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UNCITRAL Legislative Guide on Insolvency Law

Part three: Treatment of enterprise groups in insolvency

Explanatory notes on drafting issues

Note by the Secretariat

I. Introduction

1. This document sets forth explanatory notes with respect to the revision of the recommendations contained in A/CN.9/WG.V/WP.92 and Add.1 and raises a number of questions for consideration by the Working Group concerning those recommendations.

II. Domestic issues

A. Joint application for commencement — draft recommendations 199-200

2. Draft recommendation 199 provides only that the insolvency law “may” provide for joint applications for commencement, while recommendation 200 uses “The insolvency law should” with respect to specifying the parties that may make a joint application. To link the wording of the two draft recommendations, while retaining draft recommendation 199 as permissive, the Working Group may wish to consider whether the words “Where the insolvency law provides for joint applications in accordance with recommendation 199” should be added to draft recommendation 200. This is the approach adopted in the similar case of draft recommendations 220 and 221 dealing with substantive consolidation.



3. The words “satisfies the commencement standard in recommendation 16 and” have been added as requested by the Working Group at its thirty-seventh session (A/CN.9/686, para. 88).

B. Procedural coordination — draft recommendation 205

4. The wording “at the time of” has been revised to “at the same time as” for greater clarity.

C. Post-commencement finance — draft recommendation 212

5. Draft recommendation 212 has been revised in accordance with the decisions of the Working Group at its thirty-seventh session, combining former paragraphs (a) and (b) and clarifying, in paragraph (b), that the harm in question is harm suffered by the creditors of the group member providing the post-commencement finance (A/CN.9/686, para. 77).

6. The Working Group may wish to consider the alternative wording suggested in paragraph (b). Currently the insolvency representative is required to determine that the harm is offset by the benefits of the post-commencement finance at the time the insolvency representative makes its decision. Since those benefits are rarely likely to be realised at the time the decision is made, but rather to accrue over the course of the proceedings and their successful resolution, it may be more appropriate for the draft recommendation to provide that the harm will be offset by the benefits.

D. Substantive consolidation — draft recommendations 220-228

Draft recommendation 220

7. In accordance with the decisions of the Working Group at its thirty-seventh session on draft recommendation 220 (A/CN.9/686, paras. 99, 101-102):

(a) The chapeau has been revised to include the word “only”; and

(b) Paragraph (b) has been revised to include the requirement that the court should be satisfied both as to the group members’ engagement in the fraudulent activity and as to the appropriateness of the remedy.

Draft recommendation 221

8. The introductory words to draft recommendation 221 have been revised to link it to draft recommendation 220. The wording at the end of the draft recommendation referring to the conditions applicable to exclusions might more accurately refer to the circumstances in which exclusions might be warranted or permitted. As discussed in the Working Group (A/CN.9/686, paras. 103-104), the issue was not so much that conditions should attach to such exclusions, but rather that since it was not possible to identify with clarity all situations in which it might be appropriate to exclude assets and claims, some guidance should be provided on the types of circumstances that would be relevant. The use of the word conditions, however, suggests the need to identify specific requirements, for example, that the exclusion

should on balance benefit the relevant creditors; and so forth. The Working Group may wish to consider this issue further and perhaps suggest some additional wording that might provide more guidance to users of the Guide.

Draft recommendation 222

9. The proviso at the end of draft recommendation 222 has been deleted and the footnote revised as requested by the Working Group (A/CN.9/686, paras. 105-106). The words relating to the timing of the application have been revised as proposed for draft recommendation 205.

Draft recommendation 223

10. The order of the references to parties in draft recommendation 223 has been revised as requested by the Working Group (A/CN.9/686, para. 107).

Draft recommendation 224

11. With respect to draft recommendation 224, the Working Group may wish to consider whether, if assets are treated “as if they were part of the single insolvency estate” in paragraph (a), it may be appropriate to similarly provide, in paragraph (c), that claims should be “treated as if they were” claims against the single insolvency estate.

Draft recommendation 228 — calculation of the suspect period

12. The purpose of draft recommendation 228 is to have a clear rule for calculation of the suspect period in the case of substantive consolidation of a number of group members. It is currently drafted on the basis that the time of ordering substantive consolidation affects the calculation of the suspect period. The Working Group may wish to consider the following proposal.

13. In the cases covered by both paragraphs (2) and (3), there are really only two methods of calculation based, in accordance with recommendation 89, on the date of application for commencement or the date of commencement; the date of an order for substantive consolidation does not affect that calculation.

14. The relevant date will be either a different date for each member — the date of application for each member or the date of commencement for each member (currently covered by paragraph (3) (a)), or it will be a common date — the date of the earliest of all of the applications for commencement or the earliest of all of the dates of commencement (covered by paragraph (3) (b)). When all applications are made at the same time, it will be a single date and when commencement occurs at the same time, it will also be a single date, both of which fall within the scope of paragraph 3 (b).

15. Draft recommendation 228 could therefore be redrafted as follows:

- (1) The current drafting could be retained, with the addition of the words “with respect to two or more enterprise group members” at the end.
- (2) Deleted.

(3) The chapeau could be revised to provide “The specified date from which the suspect period is calculated retrospectively in accordance with recommendation 89 may be”.

(a) The current drafting could be retained, with the deletion of the words “in accordance with recommendation 89”.

(b) The current drafting could be revised along the following lines: “A common date for all enterprise group members included in the substantive consolidation, being either (i) the earliest of the dates of application for, or commencement of, insolvency proceedings with respect to those group members; or (ii) the date on which all applications for commencement were made or all proceedings commenced.”

Draft recommendation 231 — notice of substantive consolidation

16. The Working Group may wish to consider whether draft recommendation 231 (substantive consolidation) should be aligned with draft recommendation 210 (procedural coordination), as indicated by the additional words in square brackets, to require the context of the notice to be the same in both cases.

E. Participants — draft recommendation 236

17. In accordance with the decisions of the Working Group at its thirty-seventh session with respect to draft recommendation 236 (A/CN.9/686, para. 122):

(a) The heading has been revised;

(b) Additional wording has been added to paragraph (a) to align it with draft recommendation 250;

(c) The references to the division of powers between insolvency representatives and to one of them taking a leading role have been deleted from paragraph (b);

(d) A reference to intra-groups claims has been added to paragraph (c).

18. The Working Group may wish to consider the following additional issues:

(a) Revision of the chapeau to provide that cooperation “may” be implemented rather than “should” be implemented to reflect the approach taken in draft recommendation 250 and article 27 of the Model Law. The cross-reference to draft recommendations 234 and 235 has been deleted in order to align the chapeau with that of the recommendations addressing cooperation to the maximum extent possible in the international context, that is draft recommendations 241 and 250;

(b) The relocation of the references in square brackets to communication with creditors and meetings with creditors from paragraph (d) to paragraph (c) so that that communication is part of the general administration and supervision of affairs of the debtor and is not limited to the reorganization context of paragraph (d); and

(c) The alternative wording in square brackets proposed with respect to paragraph (d) to reflect the usage in draft recommendation 237 of the phrase “coordinated reorganization plans”.

III. International treatment of enterprise groups in insolvency

A. Access to courts and recognition of foreign proceedings

Purpose clause

19. A new purpose clause has been added for completeness.

B. Forms of cooperation involving courts — purpose clause and draft recommendations 240, 241, 244 and 245

Purpose clause

20. The words “involving courts” have been added at the request of the Working Group (A/CN.9/686, para. 22). The word “administer” has been added to paragraph (b) to align this draft recommendation with draft recommendation 246 and the subsequent recommendations.

21. The word “protections” has been deleted in paragraph (c) and below in the purpose clause before draft recommendation 246 and the word “safeguards” substituted to improve the drafting.

Draft recommendation 240

22. As requested by the Working Group at its thirty-seventh session (A/CN.9/686, paras. 24-25), the words “to act at the direction of” have been added to draft recommendation 240, together with a footnote referring to the definition of foreign representative to confirm that the cooperation referred to in these recommendations would also apply in the case of an interim insolvency representative.

23. It was proposed at the last session of the Working Group that adding the word “other” in the last clause to refer to “members of that enterprise group” would make the meaning clearer (A/CN.9/686, para. 23). However, adding that word may limit the proceedings commenced in other States to those with respect to other members of the group; without it the draft contemplates that the proceedings in other States can be proceedings both with respect to other group members, as well as additional proceedings with respect to the same member. An alternative approach, as proposed below with respect to draft recommendations 247 and 249, might be to substitute the word “that” with the words “the same” before enterprise group.

Draft recommendation 241

24. The words in square brackets commencing with the word “including” in paragraph (a) have been added to conform the draft recommendation to draft recommendation 250. The chapeau and paragraphs (b), (c) and (d) have been revised as requested by the Working Group (A/CN.9/686, paras. 27-28 and 30).

Draft recommendation 244

25. Draft recommendation 244 has been revised as requested by the Working Group (A/CN.9/686, paras. 42-45). The Working Group may wish to consider whether the reference to “these recommendations” is preferable to a specific reference by number to all of the recommendations above or whether the draft recommendation should simply refer to “communication involving the courts” without any cross reference.

26. It was suggested that draft recommendation 244 should be limited to communications between the courts, but since it is presumably also relevant to communications between the courts and to communications between the courts and insolvency representatives, as permitted under draft recommendations 240 and 242, the word “involving” is suggested. An alternative would be to provide that “The insolvency law should specify that communication between courts or between courts and insolvency representatives should not imply”.

Draft recommendation 245

27. The references to “joint” hearings and to independence of the court have been deleted as requested by the Working Group (A/CN.9/686, para. 46). The phrase “their availability to other courts” has been revised to “their availability to a foreign court” for greater clarity.

C. Forms of cooperation involving insolvency representatives

1. Cooperation by insolvency representatives — draft recommendations 246-250

Draft recommendations 246 and 248

28. Draft recommendations 246 (previously numbered 241) concerning cooperation between and the insolvency representative and foreign courts and draft recommendation 248 (previously numbered 244) concerning communication between the insolvency representative and foreign courts or representatives and have been relocated from the section dealing with courts to this section dealing with the insolvency representative.

Draft recommendations 247 and 249

29. Draft recommendations 247 and 249 have been revised to clarify that the foreign representatives referred to were appointed to administer insolvency proceedings commenced in other States concerning members of the same enterprise group (A/CN.9/686, para. 50). The final sentence referring to the time at which communication might take place has been deleted from draft recommendation 249 in accordance with the request of the Working Group (A/CN.9/686, para. 51).

30. The Working Group may wish to consider whether, in draft recommendations 246-249, the reference to “that” enterprise group is sufficiently clear or whether the words “the same” should be substituted.

Draft recommendation 250

31. In the chapeau of draft recommendation 250, the cross-reference to draft recommendation 248 has been deleted in order to align this recommendation with draft recommendation 241, where the cross reference was also deleted at the request of the Working Group (A/CN.9/686, para. 27). The same revision has been made to draft recommendation 236, which also addresses the issue of cooperation to the maximum extent possible.

32. In accordance with the decisions of the Working Group at its thirty-seventh session with respect to draft recommendation 250 (A/CN.9/686, paras. 52 and 55):

(a) The chapeau now provides that cooperation “may” be implemented in accordance with the examples to align the wording with that of article 27 of the Model Law and draft recommendation 241;

(b) The references in paragraph (c) to the division of the exercise of powers and to one insolvency representative taking a leading role have been deleted.

33. The Working Group may wish to consider the following proposal. The wording in square brackets at the end of paragraph (d) of draft article 250 has been added to align it with draft recommendation 236. The reference to communication with and meetings of creditors has also been added to paragraph (d) for the same reasons as given above with respect to draft recommendation 236.

2. Appointment of a single or the same insolvency representative — purpose clause, draft recommendation 251

34. As requested by the Working Group at its thirty-seventh session (A/CN.9/686, paras. 58 and 60):

(a) The purpose clause has been expanded;

(b) The reference to the court making a determination “in the best interests of the insolvency proceedings” in draft recommendation 251 has been deleted. The Working Group may wish to note that those words are still used in the equivalent domestic recommendation, draft recommendation 232.

35. The Working Group may wish to note the choice of words in square brackets in draft recommendation 251, referring either to the insolvency law or the applicable law.

D. Use of cross-border agreements — draft recommendation 253

36. The words “to the extent permitted and in the manner required by the applicable law” have been deleted as requested by the Working Group (A/CN.9/686, para. 63).

E. Possible additional recommendations

37. At its last session, the Working Group agreed to add recommendation 239 concerning access to courts and recognition of foreign proceedings that would facilitate the insolvency representative of foreign proceedings seeking cooperation

with local proceedings. These requests are sometimes referred to as “inbound requests”.

38. In addition to equipping the courts of the enacting State to deal with incoming requests for recognition, the Model Law also addresses “outbound requests”, permitting the court to seek assistance or information from foreign courts (article 25.2). The Model Law also addresses the “outward” powers of the insolvency representative of local proceedings, permitting them to seek recognition of and assistance for those proceedings in a foreign court (see the Guide to Enactment of the Model Law, paras. 26-27). Article 5 permits the insolvency representative to “act in a foreign State on behalf of the local proceedings, as permitted by the applicable foreign law”. While the draft recommendations address the outbound request with respect to the court (draft recommendation 242), they do not include the equivalent of article 5. The Working Group may wish to consider whether this issue should be addressed and if so, the appropriate solution. One approach might be to add a draft recommendation along the lines of article 5, as follows:

“The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member to act in a foreign State on behalf of those proceedings, as permitted by applicable foreign law.”

39. An alternative approach might be to follow the wording of article 25 and add the words “or to request information or assistance directly from” to draft recommendation 248, as follows:

“248. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with, or to request information or assistance directly from, foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.”