Baha Mar's Dismissal, and Everything Else New and Exciting in Chapter 15 Cases

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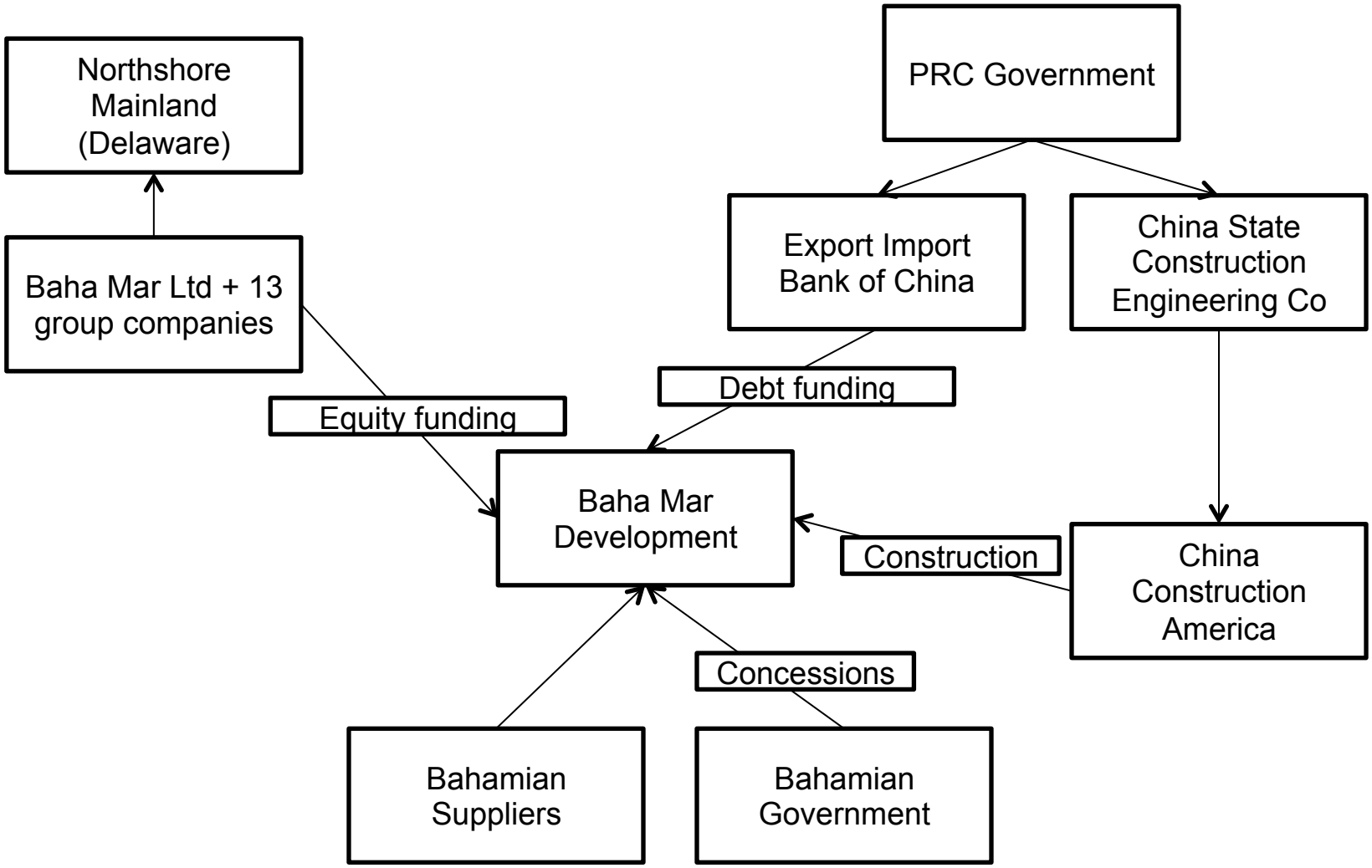
Baha Mar - Background

- Baha Mar is the largest real estate development in The Bahamas
- It is estimated that the completed development would contribute 12% of The Bahamas GDP.
- 3.3m square foot, designed to offer c.2,400 hotel rooms; homes; leisure facilities and food and beverage outlets.
- Funded by approximately $1bn of equity and $2.45bn of secured debt provided by the Export Import Bank of China, which is ultimately owned by the government of the Peoples Republic of China.
- The opening has been delayed a number of times.
- $100m contract dispute between Baha Mar and the main contractor, China Construction America, which is ultimately owned by the government of the Peoples Republic of China.
- Estimated costs to complete the development range from $300m to $600m.
- 16 debtor companies within the Baha Mar group, 15 domiciled in the Bahamas and one domiciled in Delaware.

Baha Mar – Structure



Baha Mar – Chapter 11

- Filed for Chapter 11 protection on 29 June 2015 in the District of Delaware.
- Shortly after Baha Mar sought a recognition order of Chapter 11 proceedings in the Supreme Court of the Commonwealth of The Bahamas (‘the Supreme Court’).
- 16 July 2015 the Bahamian Attorney General presented a petition to the Supreme Court seeking winding up orders for each of the debtor businesses and issued an application for the appointment of Provisional Liquidators.
- Several parties opposed the Chapter 11 recognition filing. The Supreme Court dismissed the Chapter 11 recognition application on the grounds that only insolvency proceedings in The Bahamas could give ‘true effect to the principal of modified universality’.
- The Supreme Court indicated that it made this decision because the place of incorporation; centre of main interest; residence and domicile of the majority of creditors and location of assets are in The Bahamas.
- Consequently Chapter 11 proceedings were not recognised in The Bahamas.
- Two parties then moved for the dismissal of the Chapter 11 bankruptcy arguing that Baha Mar lacks any meaningful connection to the United States.
- Chapter 11 was dismissed for all entities, other than the Delaware based entity, on 16 September 2015.

Baha Mar – Provisional Liquidators and Receivers

- 16 July 2015 the Bahamian Attorney General presented a petition to the Supreme Court seeking winding up orders for each of the debtor businesses and issued an application for the appointment of provisional liquidators.
- On 4 September 2015 the Supreme Court appointed provisional liquidators over seven debtor entities.
- The Supreme Court appointed the provisional liquidators to promote a scheme/plan of compromise between all stakeholders which could result in the reversal of Baha Mar's insolvent status.
- The provisional liquidators were appointed with minimal powers, save to promote a scheme of arrangement and/or compromise and to prevent the dissipation of assets and preserve them pending the hearing of a winding up petition.
- On 30 October 2015 the Supreme Court approved an application by the Export Import Bank of China ('the Bank') to appoint Receivers over the development.
- The Receivers have been looking at strategies to realise the Bank's debt which has looked at disposing of the development as either complete or incomplete.

AMERICAN BANKRUPTCY INSTITUTE

2016 ANNUAL SPRING MEETING

APRIL 15, 2016

NATIONAL BANKRUPTCY CONFERENCE PROPOSED REVISIONS TO CHAPTER 15

DANIEL M. GLOSBAND

GOODWIN PROCTER, LLP/CBINSOLVENCY LLC

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The National Bankruptcy Conference ("NBC") is a non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws. It has been a resource to Congress on every significant piece of bankruptcy legislation since the 1940s. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Two members, Dan Glosband and Prof. Jay Westbrook, were the primary draftsmen of chapter 15 of the Bankruptcy Code. They serve on the International Aspects Committee of the NBC chaired by Bruce Leonard. The other Committee members are Hon. Leif Clark (Ret.), Hon Allan Gropper (Ret.), Hon Ralph Mabey (Ret.), Hon. Bruce Markell (Ret.) and James Sprayregen.

Beginning in 2009, the Committee presented proposed chapter 15 revisions to the NBC for discussion and approval. In January 2015, the revisions that had been approved through the November 2014 annual meeting of the Conference were compiled into a letter to Congress drafted by Dan Glosband asking it to consider the revisions. All revisions were first reviewed by the NBC's Drafting Committee, chaired by Prof. Alan Resnick, and by the NBC's Chairman, Richard Levin and revised as suggested by them.

The January 27, 2016 letter is attached.

United Nations A/CN.9/WG.V/WP.133

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Insolvency Law

Facilitating the cross-border insolvency of multinational enterprise groups: key principles

Note by the Secretariat

Contents

V.15-06839 (E)

Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues that would extend the existing articles of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed. The Working Group considered this topic at its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2014) sessions.

2. This note sets forth a number of basic principles that might be helpful to the Working Group in structuring its discussion of the topic and considering how it should progress. These principles establish possible building blocks for a draft text with annotations explaining each principle and providing further information.

I. Key principles of regime to address insolvency in the context of enterprise groups

Background

3. In the group context, it may be desirable in order to resolve group financial difficulties to develop a coordinated insolvency solution encompassing some or all group members, the common purpose of which would be the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the members of the enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those members of the enterprise group participating in the group solution. A group solution should be a flexible concept that may be achieved in different ways, depending on the circumstances of the specific group, its structure, business model, degree and type of integration between group members, incidence of financial difficulty in the enterprise group and so forth. It may involve several different approaches for different parts of an enterprise group, such as a combination of liquidation and reorganization proceedings, but may not require proceedings to be commenced for all participating group members; there may be other ways of dealing with creditor claims (see below).

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259 (a); A/CN.9/763, paras. 13-14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

Principle 1

If required or requested to address the insolvency of an enterprise group member, insolvency proceedings may be commenced. When proceedings are not required or requested, there is no obligation to commence such proceedings.

4. This principle recognizes that in the group context, it might not always be necessary to commence proceedings for every group member, but that commencement of proceedings should not be restricted where they are required or requested. It does not address the status of those proceedings i.e. main or non-main, or the place in which such proceedings might be commenced, but those points might be further elaborated in the text.

5. As noted in the recast EC Insolvency Regulation 1346/2000 (Regulation (EU) 2015/848 of the European Parliament and of the Council)[2] (the recast EIR) non-main insolvency proceedings can serve different purposes, besides the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the commencement of proceedings to the other States where the assets are located. For that reason, the insolvency representative in the main insolvency proceedings may request the commencement of non-main insolvency proceedings where the efficient administration of the insolvency estate so requires. However, non-main insolvency proceedings may hamper the efficient administration of the insolvency estate, especially in the group context where there might be numerous non-main proceedings. Therefore, there may be situations in which the court seized of a request to commence non-main insolvency proceedings might be able, at the request of the insolvency representative in the main insolvency proceedings, to postpone or refuse the commencement of such proceedings to preserve the efficiency of the main proceedings, provided the interests of creditors and other stakeholders are protected (see for example, the recast EIR, article 36).

Principle 2

When it is proposed that an enterprise group solution be developed for some or all of the members of an enterprise group, that solution will require coordination as between group members and may be developed through a coordinating proceeding.

6. Coordination of the various proceedings may be required to achieve a group solution. There may be several ways of achieving the desired level of coordination. One approach may be to identify one of the insolvency proceedings already commenced with respect to a group member as a coordination proceeding to provide a focal point for leading the coordination and cooperation between those group members involved in negotiating and developing the group solution. Where proceedings for more than one group member are commenced in the same jurisdiction (e.g. because multiple group members have their centre of main

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[2] Adopted by the Council on 12 March 2015, available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.141.01.0019.01.ENG; Recitals 40-41 (last visited 21/09/2015).

interests (COMI) in that jurisdiction), that jurisdiction may provide a natural coordination point.

7. It might be noted that the Working Group has previously recognized, in the context of part three of the Legislative Guide, the value of one entity taking a lead role in cooperation (see A/CN.9/WG.V/WP.114, paras. 10-12). That issue was subsequently addressed in the final version of recommendation 250, which provides that the means of cooperation between insolvency representatives may include one of them taking a coordinating role.

8. Another approach might be that taken by the recast EIR, which makes provision for the commencement of group coordination proceedings. These voluntary proceedings are additional to the separate insolvency proceedings commenced for individual group members and can be requested by an insolvency representative appointed in any of the group member proceedings. The request should specify the essential elements of the coordination, in particular an outline of the coordination plan, a proposal as to who should be appointed as a coordinator and an outline of the estimated costs of the coordination (art. 61.3). Recital 57 of the recast EIR provides that group coordination proceedings should always strive to facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors. The court requested to commence such proceedings should make an assessment of those criteria prior to opening group coordination proceedings and has to be satisfied that the proceedings are appropriate and that no creditor is financially disadvantaged (art. 63). The recast EIR sets out in some detail the manner in which coordination proceedings will operate.[3]

Principle 3

Adopting the approach of recommendation 250, enterprise group members might designate one of the insolvency proceedings commenced (or to be commenced) with respect to group members participating in the group solution to function as the coordinating proceeding, the role of which would be procedural, rather than substantive. A proviso might be that the coordinating proceeding should be a proceeding taking place in a State that is the COMI of at least one of the group members that is a necessary and integral part of the enterprise group solution.

9. Issues relevant to the designation of a coordinating proceeding might include: the criteria for identifying the coordinating proceeding, by whom the identification should be made and the means of reaching agreement on identification; recognition of that agreement in all relevant States; identification of the role to be played by the coordinating proceeding; and whether coordination should be initiated and led by the court responsible for conduct of the coordinating proceeding or by the relevant insolvency representative.

[3] Recast EIR, articles 61-77.

Principle 4

1. The court located in the COMI (the COMI court) of an enterprise group member participating in a group solution can authorize the insolvency representative appointed in insolvency proceedings taking place in the COMI to seek: (i) to participate and be heard in a coordinating proceeding taking place in another jurisdiction, and (ii) recognition by the coordinating court of the proceeding in the COMI jurisdiction; and

2. The coordinating court can receive such a request for recognition.

10. Where a coordinating proceeding is taking place in one State, an insolvency representative appointed in related proceedings (i.e. concerning another group member) in a different State may need authorization to participate in the coordination proceedings and to be able to seek recognition of those proceedings, consistent with article 5 of the Model Law and recommendation 239 of part three of the Legislative Guide. The coordinating court may also need appropriate authorization to receive such applications.

Principle 5

Participation in the coordination process would be voluntary for those group members whose COMI is located in a jurisdiction different to that of the coordinating proceeding. For those group members whose COMI is located in the same jurisdiction as the coordinating proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply. Solvent members of the enterprise group may participate in a coordination process without such participation implying a submission to the jurisdiction of a domestic or foreign insolvency court or to the applicability of domestic or foreign insolvency laws.

11. The coordination process is intended to be entirely voluntary for all relevant group members. Those members not seeking to participate could be reorganized or liquidated individually. Participation of solvent group members is in keeping with the recognition in part three of the Legislative Guide that such participation may be a necessary part of a financial solution for an enterprise group and is thus based upon recommendation 238.

Principle 6

Creditors and stakeholders of each enterprise group member participating in the group solution would vote in their own jurisdiction on the treatment they are to receive under the group reorganization plan according to the applicable domestic law.

12. This principle preserves the rights of creditors and other stakeholders to vote on the specific treatment they are to be accorded under the group plan, in accordance with the relevant applicable law. A coordinated group plan may comprise a number of parts applicable to different group members and, accordingly, approval would occur member by member with respect to the part applying to each member. If, under the law applicable in each member's jurisdiction, only creditors whose rights are affected by a plan are required to vote on it, then only those creditors would vote. That law would also apply to the voting mechanism, including

use of classes, and the majorities required for approval. To approve a plan across multiple group members, a number of issues may need to be considered, including applicable majorities across group members, what is to happen to group members that do not approve the plan and so forth.

Principle 7

Following approval of the group reorganization plan by relevant creditors and stakeholders, each COMI court would have jurisdiction to deal with the group reorganization plan in accordance with domestic law.

13. In addition to the approval process, national law would apply to confirmation and implementation of the reorganization plan.

Principle 8

The insolvency representative appointed in the proceeding designated as the coordinating proceeding should have a right of access to the proceedings in each COMI court to be heard on issues related to implementation of the group reorganization plan.

14. This principle builds upon recommendation 239 and the coordination and cooperation recommendations 240-242 and 246 of part three of the Legislative Guide.

Baha Mar's Dismissal and Everything Else New in Chapter 15 Cases

By Corinne Ball

I. Introduction

More than ten years have passed since Congress passed BAPCPA, which included the addition of Chapter 15 among its amendments to title 11 of the U.S. Code (the "Bankruptcy Code"). Chapter 15 incorporated the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") into the Bankruptcy Code, with very minor adjustments. As recent cases continue to illustrate, the provisions and standards controlling access to Chapter 15 are among the most disputed. These materials review three recent bankruptcy court decisions dealing with these issues.

II. *Berau Capital*

In *Berau Capital*, Judge Glenn granted recognition of an insolvency proceeding in Singapore (the "Singapore Proceeding") as a foreign main proceeding under Chapter 15.[1] The Bankruptcy Court's analysis was focused primarily on whether the debtor in the Singapore Proceeding, Berau Capital Resources Pte Ltd ("Berau"), had property in the United States in satisfaction of section 109(a) of the Bankruptcy Code. The Second Circuit has held that a place of business or property in the U.S. was required in Chapter 15 cases in *In re Barnet*.[2] The Bankruptcy Court found that Berau satisfied section 109(a) not only because of Berau's interest in an attorney retainer held by New York counsel, but also because Berau's obligation on $450 million in U.S. dollar denominated debt pursuant to an indenture with a New York choice of forum clause to be governed by New York law. Such clauses are common in international

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1 *In re Berau Capital Res. Pte Ltd*, 540 B.R. 80 (Bankr. S.D.N.Y. 2015) (entered Oct. 28, 2015).

2 *In re Barnet*, 737 F.3d 238, 247 (2d Cir. 2013).

finance, limiting the extent to which section 109(a) under *Barnet* is an obstacle to Chapter 15 eligibility.

A. Facts

Berau's affiliates were engaged in coal mining in Indonesia.[3] Berau was incorporated in Singapore to raise funds for the group, and issued $450 million in notes under an indenture. As is common when emerging market entities access international capital markets, Berau itself was a special purpose vehicle created to raise funds, and it depended on its affiliates in Indonesia to generate revenue from coal-related activities needed to make payments on the notes. As is also common, the indenture had significant connections to New York: the indenture trustee was Bank of New York Mellon, the indenture was governed by New York substantive law, disputes were to be resolved in New York courts with venue objections waived, and other actions with respect to the indenture were to be taken exclusively in New York.

Before the notes became due on July 8, 2015, it was clear that Berau would not be able to meet its repayment obligations given the global decline in price and demand for coal. Accordingly, Berau sought protection in Singapore enjoining collection and enforcement activity against itself and its affiliates, which was granted on July 7, 2015. The Singapore court approved the appointment of a foreign representative which was also separately approved by Berau. Berau's foreign representative then sought recognition of the Singapore Proceeding under Chapter 15 in the Bankruptcy Court for the Southern District of New York.

At the hearing on the foreign representative's motion for preliminary relief pending a final hearing on recognition, the Bankruptcy Court acknowledged that the foreign representative

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[3] For additional background on Berau's business and affiliates *see generally* Preliminary Hr'g Tr. August 4, 2015, appended to Supplemental Memorandum of Law, D.I. 23, Case No. 15-11804 (Bankr. S.D.N.Y.).

Background facts [cite transcript of August 4, 2015, Appendix to D.I. 23, 15-11804]

had supported its eligibility to be a debtor with evidence of a retainer held by the foreign representative's New York counsel. However, the Bankruptcy Court requested supplemental briefing on the question of whether a contract such as a debt instrument could be property in the United States prior to the final recognition hearing.

B. Eligibility Under Section 109(a)

After considering supplemental briefing on the issue, the Bankruptcy Court determined that Berau was eligible to be recognized under Chapter 15 and section 109(a) because it owned two types of property in the United States: (i) the retainer held by New York counsel, and (ii) the indenture which included New York substantive law and forum selection clauses. Given the high likelihood that foreign debtors seeking Chapter 15 relief in New York, this holding helps to keep the courthouse doors of Chapter 15 open for foreign representatives notwithstanding *Barnet*.

Section 109(a) of the Bankruptcy Code provides that "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." In *Barnet*, the Second Circuit held that section 109(a) applied to the debtors whose foreign proceedings could be recognized under Chapter 15.[4] In other words, as the Second Circuit saw it, the debtor in a foreign insolvency proceeding for which recognition is sought in an ancillary Chapter 15 case would be a "debtor under this title" upon recognition. Therefore, the plain meaning of section 109(a) required a showing that the foreign debtor has a domicile, a place of business, or property in the United States. The foreign representative in *Barnet* had made no such showing,

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[4] *Barnet*, 737 F.3d at 247.

so the bankruptcy court's decision granting recognition was vacated and remanded for factual findings regarding whether the foreign debtor owned property in the United States.

Barnet is controversial. Collier, cited in *Barnet* in support of the application of section 109 to Chapter 15 debtors,[5] disagreed with the holding. "The Second Circuit's technical reading of the statutory language is not in step with chapter 15 or with the Model Law from which it was drawn."[6] In brief, the primary statutory counterargument to *Barnet* is that the debtor for which recognition is granted in an ancillary case under Chapter 15 is not a debtor under the Bankruptcy Code, to which section 109(a) plainly applies, but is a debtor under a foreign insolvency regime, to which it does (or, perhaps, should) not. But more broadly, *Barnet*'s close reading of the statute ignored the statute's own command that "the court *shall* consider [Chapter 15's] international origin, and the need to promote an application of this chapter that is consistent with" that of other jurisdictions.[7]

The Bankruptcy Court does not relitigate *Barnet* of course, simply noting that *Barnet* is decided and binding in the Second Circuit. The Bankruptcy Court primarily concerned itself with the application of section 109(a) to the facts before it. Many cases have held that a retainer in the possession of a U.S. law firm is sufficient property in the United States for debtor eligibility, and the Bankruptcy Court held that Berau's retainer in the possession of the foreign representative's New York counsel sufficiently qualified under section 109(a).[8]

But independent of the retainer, the Bankruptcy Court also held that Berau's indenture represented an intangible property interest located in the United States, or more specifically, in

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5 *Id.* at 247-48.

6 Collier on Bankruptcy ¶ 13.03.

7 11 U.S.C. § 1508 (emphasis added).

8 *Berau*, 540 B.R. at 82.

New York. That contracts in general create property rights is well-established, and the key issue was whether those interests were located in New York. The Bankruptcy Court saw two reasons for holding that they were. First, New York courts have held that the "situs" of a property right created by contract depends on the purpose for which it is evaluated. Berau was to discharge its obligations under the indenture in New York. Therefore, the situs of the indenture was New York.[9] Second, by NewYork statute, sufficiently large contractual obligations explicitly governed by New York law are enforceable in New York courts notwithstanding the parties' connection to the forum. Berau had given U.S. dollar denominated notes totaling $450 million accompanied by an indenture governed by New York law and selecting New York as the forum for disputes, which was far more than enough to qualify for enforcement in New York courts. As such, Berau's indenture represented a property interest in New York, and satisfied section 109(a).[10] No other issues with respect to recognition of the Singapore Proceeding as a foreign main proceeding under Chapter 15 were in dispute, the Bankruptcy Court granted recognition.

III. ***Creative Finance***

In *Creative Finance*, Judge Gerber worked through the operation of Chapter 15 in a case involving debtor bad faith.[11] The foreign debtors had engaged in "the most blatant effort to hinder, delay and defraud a creditor this Court has ever seen."[12] Ultimately, Judge Gerber denied recognition of the foreign proceeding in the British Virgin Islands ("BVI") either as a foreign

9 *Id.* at 83-84.

10 *Id.* at 84.

11 *In re Creative Fin. Ltd.*, 543 B.R. 498 (Bankr. S.D.N.Y. 2016).

12 *Id.* at 502.

main proceeding or as a foreign nonmain proceeding, precluding any need to analyze alternate remedies for bad faith. Nevertheless, Judge Gerber explored various approaches to a bad faith analysis in Chapter 15 anyway given the egregiousness of the Debtors' conduct and to avoid any implication that Chapter 15 lacks the tools to appropriately deal with cases filed in bad faith.

A. Facts

Creative Finance Ltd. and related debtor Cosmorex Ltd. (collectively, the "BVI Debtors") were organized as BVI entities for tax purposes, though they operated out of Spain and Dubai and did most of their business in the U.K. Their only non-insider creditor was Marex Financial Ltd. ("Marex"). Once it became clear that a judgment would be entered in Marex's favor against the BVI Debtors in a civil proceeding before the English High Court, the BVI Debtors transferred all of their liquid assets out of the U.K. to accounts in Gibraltar and Dubai, an amount exceeding $9.5 million. The Bankruptcy Court found that the transfer was "a blatant attempt to avoid payment of the English Judgment."[13]

The BVI Debtors' remaining assets were claims in the chapter 11 case of Refco Inc., then pending in the Southern District of New York before Judge Drain. Marex successfully domesticated its English judgment in state court in New York in an attempt to garnish future distributions from the Refco bankruptcy estate. Marex then entered into a stipulation with the Refco Plan Administrator and trustees of Refco bankruptcy trusts, agreeing that future distributions on account of the BVI Debtors' allowed claims were to be paid to Marex.

The BVI Debtors were placed into liquidation in the British Virgin Islands on December 12, 2013 by their principal, Carlos Sevilleja. Mr. Sevilleja requested a specific liquidator by name, but provided only the bare minimum in funding and records to the liquidator. The

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[13] *Id.* at 503.

apparent goal of the BVI liquidation was to obtain Chapter 15 recognition in the United States and then to block Marex's access to distributions from the Recfo chapter 11 case, without any sort of investigation or distribution of assets to the BVI Debtors' creditors who were otherwise insiders.

The Bankruptcy Court was troubled that although Marex became aware of the BVI liquidation proceedings, it did not immediately communicate their existence to Judge Drain in New York, nor did Marex tell the liquidator about the Refco stipulation until it was executed and approved. Marex also had filed but withdrawn its own petition to commence BVI insolvency proceedings for the BVI Debtors, apparently seeking to maximize its advantage to the exclusion of other creditors. But compared to (and perhaps, as a result of) the bad acts of the principal of the BVI Debtors, these points ultimately had no effect on the Bankruptcy Court's decision.

The liquidator's appointment was approved on February 10, 2014, and the liquidator filed the petitions for recognition under Chapter 15 in the Southern District of New York on February 19, 2014. The Bankruptcy Court found that the liquidator did nothing but the "minimum functions required by BVI statutes" consisting mostly of "administrative tasks" and providing required notices and reports.[14] There was no marshaling of assets, investigation, liquidation, or litigation conducted on the BVI Debtors' behalf. Save for one "hesitant" email to the BVI Debtors' principal asking about the funds transferred out of the BVI Debtors' English bank accounts, which was ignored, the liquidator made no attempt to get more information about what had happened to the Debtors.[15]

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14 *Id.* at 508-09.

15 *Id.* at 511.

B. Foreign Main Proceeding

The Bankruptcy Court concluded that it could not grant recognition of the BVI liquidation as a foreign main proceeding because the BVI Debtors' center of main interests ("COMI") was elsewhere at the time the Chapter 15 petition was filed. Though the BVI Debtors were BVI entities and maintained a registered office there, they conducted no business activities in the jurisdiction prior to liquidation, and the BVI liquidator's activities were far too insignificant to have shifted the BVI Debtors' COMI.

Section 1517 sets forth the standard for recognition of a foreign proceeding under Chapter 15 of the Bankruptcy Code:

> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
> (2) the foreign representative applying for recognition is a person or body; and
> (3) the petition meets the requirements of section 1515.
> (b) Such foreign proceeding shall be recognized—
> (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or
> (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.[16]

After discussing, and rejecting, the application of section 1506,[17] the Bankruptcy Court analyzed whether the liquidation in the BVI could be recognized as a foreign main proceeding under Chapter 15. Recognition of a foreign proceeding requires that all three elements of section 1517 are satisfied. Because the liquidator is a person and the petition satisfied the

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[16] 11 U.S.C. § 1517(a)-(b).

[17] *Creative Finance*, 543 B.R. at 515-16 (explaining that the goals of a party or the attributes of a foreign jurisdiction were relevant to whether the case was manifestly contrary to U.S. public policy, but that bad faith did not rise to that level).

requirements of section 1515, the only issue was whether the BVI liquidation qualified as either a foreign main or foreign nonmain proceeding under section 1502.

Chapter 15 defines a foreign main proceeding as "a foreign proceeding pending in the country where the debtor has the center of its main interests."[18] COMI is not defined in the Bankruptcy Code. Many courts, including the Second Circuit and the *Creative Finance* court, apply a common statement of the relevant factors:

> Various factors, singly or combined, could be relevant to such a determination: the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.[19]

The elements are not to be applied mechanically, and the key inquiry requires identification of the jurisdiction "where the debtor conducts its regular business, so that the place is ascertainable by third parties."[20] The relevant time to measure COMI for the purposes of recognition is at the time the Chapter 15 petition is filed.

"In the absence of evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interests."[21] Here, the BVI Debtors were BVI entities and maintained a registered office there, creating the rebuttable presumption that the COMI was the jurisdiction of the foreign proceeding. But given the "substantial dispute" and the contrary evidence, the Bankruptcy Court rejected the presumption.

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[18] 11 U.S.C. § 1502(4); *accord* § 1517(b).

[19] *Creative Finance*, 543 B.R. at 517 (quoting *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007)).

[20] *Id.* at 517 (quoting *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 129 (2d Cir. 2013).

[21] 11 U.S.C. § 1516(c).

Prior to the commencement of liquidation proceedings in BVI, there was no evidence that the BVI Debtors conducted any business in BVI. As noted above and as explained by the Bankruptcy Court, the BVI Debtors' operations, customers, and business were primarily in the U.K., Spain, and Dubai. The liquidation itself was the most significant activity conducted by the BVI Debtors in the British Virgin Islands.

But as the Bankruptcy Court explained, the activities of the BVI liquidator were insufficient to transfer COMI to BVI so that the BVI liquidation could be considered to be a foreign main proceeding. Such a transfer is possible and had happened in other cases, as the Bankruptcy Court noted.[22] But in this case, the Bankruptcy Court held that the minimal activities of the BVI Debtors' liquidator did not rise to that level. The liquidator failed to even attempt the types of things that could change the COMI of a foreign debtor.

C. Foreign Nonmain Proceeding

Where recognition as a foreign main proceeding is unavailable, recognition of a foreign nonmain proceeding provides certain benefits and allows the foreign representative access to certain relief in U.S. Courts. The Bankruptcy Court concluded, however, that it could not find the BVI proceeding to be a nonmain proceeding pursuant to Chapter 15.

Chapter 15 defines a foreign nonmain proceeding as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[23] "[E]stablishment means any place of operations where the debtor carries out a nontransitory economic activity . . . ."[24]

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22 *Creative Finance*, 543 B.R. at 519-20 (citing several examples).

23 11 U.S.C. § 1502(5).

24 *Id.* § 1502(2) (quotation marks removed).

> To have an establishment in a country, the debtor must conduct business in that country. The location should constitute a seat for local business activity for the debtor. The terms operations and economic activity require a showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.[25]

Citing a series of cases with similar holdings, the Bankruptcy Court held that the BVI liquidator conducted no "nontransitory economic activity" under Chapter 15. Therefore, the BVI proceeding could not be recognized as a foreign nonmain proceeding.[26]

D. Bad Faith

The Bankruptcy Court described the bad faith of the BVI Debtors throughout its opinion.[27] The tools available to a bankruptcy judge to address misconduct in a domestic bankruptcy case are flexible and diverse, including dismissal or conversion under section 1112 of the Bankruptcy Code, appointment of a trustee or examiner under section 1104, among other things.

But if a petition for recognition of a foreign main proceeding or foreign nonmain proceeding are denied, there is no longer a Chapter 15 case for which the bad faith of any actor is relevant. In fact, as the Bankruptcy Court noted, its holdings were not premised on the bad faith of the BVI Debtors or their principal at all.[28] Nevertheless, the Bankruptcy Court explained that

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[25] *Creative Finance*, 543 B.R. at 520 (footnote call numbers and quotation marks removed) (quoting *In re British Am. Ins. Co. Ltd.*, 425 B.R. 884, 915 (Bankr. S.D. Fla. 2010)).

[26] *Id.* at 521 (citing cases).

[27] *See, e.g.*, *id.* at 502 (explaining that the "scheme by the Debtors' principal [was] the most blatant effort to hinder, delay and defraud a creditor this Court has ever seen").

[28] *Id.* at 522.

the bad faith of the BVI Debtors could be relevant to the COMI analysis[29] or could be cause for relief from the automatic stay that otherwise would arise in a foreign main proceeding.[30]

IV. *Baha Mar*

In re Northshore Mainland Services, Inc.,[31] the bankruptcy case involving the incomplete Baha Mar resort, was not a Chapter 15 case, instead filing under Chapter 11. The debtors (collectively, "Baha Mar"), all but one of which are Bahamian entities, sought to gain recognition in the Bahamas of a Chapter 11 case in Delaware. The U.S. Bankruptcy Code provided additional tools and rights that the Bahamian insolvency regime did not, which could encourage restructuring and preserve the value of the enterprise, at least from the perspective of existing management. Though the Bankruptcy Court concluded that all of the Baha Mar entities qualified to be debtors under section 109(a) of the Bankruptcy Code and that the cases did not merit dismissal for lack of good faith under section 1112, the Bankruptcy Court would dismiss all of the cases involving non-U.S. entities under section 305(a)(1).

A. Facts

The Baha Mar project (the "Project") was to create a 3.3 million square foot resort complex in Nassau, Bahamas, including four hotels, a casino, and a convention center.[32] Once complete, the resort's payroll alone was estimated to be 12% of the GDP of the Bahamas. Construction was to be undertaken by CCA Bahamas Ltd. ("CCA"), one of the largest contractors in the world and an entity indirectly controlled by China State Construction

29 *Id.* at 523 (quoting *Fairfield Sentry*, 714 F.3d at 138).

30 *Id.* at 522-23 (citing 11 U.S.C. § 1520(a)(1)).

31 537 B.R. 192 (Bankr. D. Del. 2015).

32 *Id.* at 194, 96.

Engineering Corp., a Chinese SEO.[33] The Project had been funded by a $2.45 billion facility from The Export–Import Bank of China ("CEXIM") secured by an interest in substantially all of Baha Mar's assets via a debenture and a pledge of shares, along with another $1 billion in equity investment.[34]

The Project was designed to be entirely constructed before opening, a strategy with the downside that it provided no cash flow during any phase of construction to insulate against delay or cost overruns. As timelines slipped, CCA continued to provide unrealistic estimates of the Project's conclusion, insisting in December 2014 and again in January 2015 that the project would open by March 27, 2015. Baha Mar ran out of money in April, 2015, when the Project was "97% complete."[35]

Baha Mar filed voluntary petitions under Chapter 11 of the Bankruptcy Code on June 29, 2015, shortly after opening bank accounts for each of the Debtors in the United States with relatively small balances. Baha Mar sought recognition of the Chapter 11 cases in Bahamian court shortly thereafter, including a stay of proceedings against Baha Mar in the Bahamas, and it also sued CCA in England for breach of construction contracts. The strategy was clear: (i) use Chapter 11 to restructure while keeping existing management in control, gaining DIP financing, rejecting contracts and leases, and maintaining exclusivity; (ii) reject the contract with CCA, removing them from the Project altogether; (iii) recover funds from CCA in English court to fund completion of the Project, and (iv) enforce the Chapter 11 plan while shielding itself from adverse legal consequences in the Bahamas.

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33 *Id.* at 195 n.5.

34 *Id.* at 196.

35 *See id.* at 206.

Meanwhile, the Bahamian Attorney General petitioned for the appointment of provisional liquidators as to all Baha Mar entities other than Northshore Mainland Services, Inc., a Delaware corporation ("Northshore"). Several parties opposed recognition of the Chapter 11 cases in the Bahamas.

The Bahamian Supreme Court ruled against Baha Mar, explaining that there was no reason to subordinate local liquidation proceedings to proceedings in the United States, particularly where there was no legitimate expectation of creditors or contractual counterparties that their rights would be governed by the U.S. Bankruptcy Code and where Baha Mar's management remained in control.[36] Provisional liquidators were then appointed for seven of the fourteen Bahamian entities, but their powers were limited to encourage compromise and restructuring.[37]

On the motions of CCA and CEXIM, the Delaware Bankruptcy Court was faced with three arguments for dismissal: (i) the Baha Mar entities were not eligible to be debtors under section 109(a), (ii) cause existed to dismiss the Baha Mar entities under section 1112(b) as filings made in bad faith, and (iii) dismissal in the best interests of the debtors and creditors under section 305(a).

B. Eligibility to Be a Debtor

The Bankruptcy Court easily concluded that all fifteen Baha Mar entities were eligible to be debtors under the Bankruptcy Code because they owned property in the United States.

Section 109(a) of the Bankruptcy Code provides that "[O]nly a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a

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[36] *Id.* at 198.

[37] *Id.* at 199.

debtor under this title." As the Bankruptcy Court explained, ownership of property in the United States is measured as of the petition date, and courts have consistently upheld the eligibility of debtors based on relatively small amounts of cash in U.S. bank accounts.[38]

Each of the Baha Mar debtors had bank accounts in the United States, though seven of them opened their accounts only weeks prior to filing their petitions under Chapter 11 in small amounts. But this, standing alone, is enough to satisfy the requirements of section 109(a).

Even so, the Bankruptcy Court went on to list additional property owned by Baha Mar in the U.S., including a total of $11.8 million in cash, intellectual property created by U.S. law, and leasehold interests in real property. In addition to its property in the U.S., Northshore operated its business in the United States, in Florida and New Jersey. Therefore, all of the Baha Mar debtors were eligible to be debtors under the Bankruptcy Code.

C. Dismissal for Cause

The Bankruptcy Court also declined to dismiss the cases for cause under section 1112(b), finding that the Debtors had filed their petitions for a legitimate bankruptcy purpose and not as a mere litigation tactic. In other words, Baha Mar did not file its case in bad faith.

Among other things, section 1112(b) of the Bankruptcy Code provides for a court to dismiss a case under Chapter 11 for cause. Bad faith is cause for dismissal, and the burden is on a party opposing a motion to dismiss under section 1112(b) to establish good faith once the issue is called into question.[39] In the Third Circuit, good faith depends on the totality of facts and circumstances and an evaluation of "where a petition falls along the spectrum ranging from the

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[38] The *Baha Mar* case was decided prior to *Berau Capital*, discussed *supra*. Some of Baha Mar's credit agreements were governed by New York law, providing perhaps another hook for eligibility.

[39] 537 B.R. at 202.

clearly acceptable to the patently abusive."[40] A bankruptcy court should evaluate "(1) whether the petition serves a valid bankruptcy purpose, and (2) whether the petition is filed merely to obtain a tactical litigation advantage."[41]

The Bankruptcy Court held that Baha Mar's petition served a valid bankruptcy purpose and was not a mere bankruptcy tactic. The financial distress caused by the Project was genuine. And although Baha Mar admitted to its hope to make use of the provisions of the Bankruptcy Code t address its financial distress, the Bankruptcy Court held that this was not the sort of litigation tactic contemplated by § 1112(b). It was certainly not "patently abusive."

D. Abstention and Comity

Though Baha Mar survived dismissal for ineligibility or bad faith, the Bankruptcy Court nevertheless dismissed all fourteen Bahamian debtors under section 305(b), finding that abstention was in the best interests of the debtor and its creditors. The Bankruptcy Court acknowledged solid arguments on both sides of the issue, but ultimately found it decisive that the parties were most likely to expect insolvency proceedings to be conducted in the Bahamas, not in Delaware. Comity to a pending foreign insolvency proceeding that had been commenced in a procedurally fair jurisdiction further supported dismissal.

Section 305(a) grants a bankruptcy court the power to dismiss or suspend a case "if the interests of creditors and the debtor would be better served by such dismissal or suspension."[42] The Bankruptcy Court explained that dismissal under section 305(a) was "extraordinary relief"

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40 *Id.* (quoting *In re 15375 Memorial Corp. v. BEPCO, L.P.*, 589 F.3d 605, 618 (3d Cir. 2009)).

41 *Id.*

42 11 U.S.C. § 305(a)(1).

requiring consideration of the "totality of the circumstances."[43] Section 305(a) "was designed to be utilized where, for example, a few recalcitrant creditors attempted to interfere with an out-of-court restructuring that had the support of a significant percentage of the debtor's creditors."[44] It is designed to be a conjunctive, not a balancing test. Both the debtor and a large proportion of creditors should benefit from dismissal.

The Bankruptcy Court listed seven factors relevant to the abstention inquiry under section 305(a):

> (1) the economy and efficiency of administration;
> (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;
> (3) whether federal proceedings are necessary to reach a just and equitable solution;
> (4) whether there is an alternative means of achieving an equitable distribution of assets;
> (5) whether the debtor and creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
> (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and
> (7) the purpose for which bankruptcy jurisdiction has been sought.[45]

Whether under the rubric of abstention, as section **305 of the Bankruptcy Code is labeled, or comity as a matter of "international duty and convenience,"[46] courts find a significant role for deference in international insolvency proceedings.**

The movants argued for the several advantages of conducting insolvency proceedings entirely in the Bahamas, including efficiency given that the Project is

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43 537 B.R. at 203.

44 *Id.* (quoting *In re Stillwater Asset Backed Offshore Fund Ltd.*, 485 B.R. 498, 509 (Bankr. S.D.N.Y. 2013).

45 *Id.* 203-04 (quoting *In re AMC Inv'rs, LLC*, 406 B.R. 478, 488 (Bankr. D. Del. 2009)).

46 *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

there, the expectations of the parties, the lack of recognition of the Chapter 11 cases by the Bahamian courts, and the ability of Bahamian liquidators to conduct restructurings. Baha Mar responded by pointing out the international character of the proceedings, involving Chinese state-owned entities, considerable U.S. entities and ties, agreements governed by New York, Texas, British Columbian, and English law. Baha Mar also argued that abstention was not in its own best interests, given that abstention would deny it the benefits of several of the features of Chapter 11 unavailable in insolvency proceedings in the Bahamas. The unsecured creditors' committee also objected to abstention.

In general, the Bankruptcy Court acknowledged Baha Mar's points, but found the movants to have the stronger argument in favor of abstention. Acknowledging the global scope of the proceeding, the Bankruptcy Court noted that the "central focus" was on the unfinished resort Project in the Bahamas.[47] Baha Mar's choice of forum was "entitled to some weight," but the Bankruptcy Court was disappointed that consensual exit from Chapter 11 was unlikely. On the contrary, Baha Mar had proposed a plan likely to lead to additional litigation rather than an orderly or efficient resolution of contested issues. Though some documents contained venue provisions indicating a preference for a non-Bahamian forum, the Bankruptcy Court concluded that many parties expected insolvency proceedings to be conducted in the Bahamas. The Bankruptcy Court saw no need to

[47] 537 B.R. at 205.

interfere with those expectations given the dismal prospects for a consensual restructuring.

Finally, the foreign insolvency proceeding that had already been commenced in the Bahamas weighed in favor of dismissal because "the pendency of a foreign insolvency proceeding alters the balance by introducing considerations of comity into the mix."[48]

With respect to Northshore itself, however, the consideration was different. Northshore was a Delaware corporation and not subject to any sort of foreign insolvency proceeding. It was perfectly reasonable to expect Northshore to restructure in Delaware bankruptcy court. Accordingly, the Bankruptcy Court did not dismiss its case under section 305(a).

E. Aftermath of Baha Mar's Dismissal from Chapter 11

In October of 2015, the Supreme Court in the Bahamas granted CEXIM's request to appoint three partners from Deloitte and Touche as receivers of the Baha Mar resort. Liquidation proceedings have been adjourned twice in the Bahamas, most recently until May 2, 2016.[49] In the meantime, the convention center at Baha Mar is slated to host the annual meeting of the boards of governors of the Inter-American Development Bank and the Inter-American

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[48] *Id.* at 207 (quoting *In re Compania de Alimentos Fargo, S.A.*, 376 B.R. 427, 434 (Bankr. S.D.N.Y. 2007)).

[49] Travis Cartwright-Carroll, *Govt Asks for More Time on Baha Mar*, Nassau Guardian, Feb. 2, 2016, *available at* http://www.thenassauguardian.com/news/62334-govt-asks-for-more-time-on-baha-mar.

Investment Corporation in April, 2016.[50] But even if the convention center opens on time, a deal to complete and open the Baha Mar Resort had not been reached as of February, 2016.

APPENDIX: Appended to these materials is UNCITRAL Working Group V note by the Secretariat, *Facilitating the cross-border insolvency of multinational enterprise groups: key principles*, A/CN.9/WG.V/WP.133, prepared for the 48th UNCITRAL session in Vienna, December 14-18, 2015, *available at* https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/068/39/PDF/V1506839.pdf.

[50] Khrisna Virgil, *'No Concern' Over Deadlock At Baha Mar For Conference*, The Tribune, Feb. 5, 2016, *available at* http://www.tribune242.com/news/2016/feb/05/no-concern-over-deadlock-baha-mar-conference/.

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Reform of the EU Regulation on insolvent international groups of companies[1]

New Framework for Insolvent Company Groups

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Since May 31, 2002,[2] the European Council Regulation (EC) 1346/2000 of May 29, 2000[3] (the "EIR"), has been the centerpiece of cross-border insolvency law in Europe. The EIR provides guidance on procedural issues, such as in which country to file an insolvency petition, how to determine the center of main interest (COMI), when to permit secondary filings under different jurisdictions, where to file avoidance actions — and, on substantive issues, when insolvency law at the *forum concursus* collides with the laws on secured interests, real estate, set-offs, employment or procedural law of a foreign jurisdiction. The EIR itself scheduled its revision for its tenth birthday in 2012. Accordingly, on Dec. 12, 2012, the European Commission[4] presented a report and proposal for a reform of the EIR.[5]

On May 20, 2015 the European Parliament has adopted the recast of the European Insolvency Regulation ((EC) 848/2015). The reform had been initiated in late 2012 by a proposal of the European Commission and has been completed last year.[6] The revised EIR will go into effect and be applicable for any insolvency proceedings commenced after 26 June 2017. This article begins with a view on the status quo on company group insolvency law under the EIR and then discusses how the EIR intends to foster communication and cooperation on one side (Part I) and coordination on the other (Part II).

Status Quo for Company Groups

One of the goals and a real novelty of the revised EIR are its efforts to enhance coordination among insolvency proceedings relating to several debtors of the same group of companies.[7] The current EIR strictly treats each corporate entity individually and separately. Art. 3 and Recital 13

[1] This article has been published in the ABI Journal in March and April 2015 prior to the final passing of the bill in the European Parliament. This contribution has been updated according to the final version of the new EIR.
[2] Art. 47 EIR. The EIR does not apply to Denmark.
[3] Available for download in English at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/? uri=CELEX:32000R1346&from=en
[4] The European Commission is generally considered to be the executive of the EU and the "guardian of the EU treaties." It has the (almost) exclusive right to propose legislation, and it manages the daily business of the EU.
[5] *See* http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm and, in par-ticular, document 52012PC0744, *available at* http://eur-lex.europa.eu/legal-content/EN/ TXT/?uri=CELEX:52012PC0744
[6] All materials on the reform process can be accessed at: http://www.schubra.de/en/internationalaffairs/EIR_Recast_2015.php
[7] Recital 6, sentence 3

focus on the COMI of *each* debtor. Neither does the EIR currently include any rules for cooperation of insolvency proceedings relating to group companies.

Accordingly, the European Court of Justice (ECJ) has repeatedly limited the effects of the insolvency of one company group member to another group member. In the landmark *Eurofood IFSC* case,[8] Italian authorities had opened insolvency proceedings over an Irish company with a sole Italian shareholder. The ECJ referred to Art. 3 (1) EIR and decided that "in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction."[9] The ECJ's *Interedil* decision[10] confirmed this approach and underlined that any factors pointing to a COMI, other than at the statutory seat of the relevant company, must be objective and ascertainable by third parties.[11] In the *Rastelli* decision,[12] the ECJ again rejected attempts to include debtors with a COMI in one member state and insolvency proceedings pending in another member state (here, based on a concept similar to substantive consolidation).[13]

The EIR's New Approach

The new EIR keeps this approach.[14] The COMI of each debtor stays the standard for the jurisdiction of a court in a member state to commence insolvency proceedings,[15] but the rules of the new EIR move closer together separate proceedings of members of the same company group.

The new Chapter V (Art. 56-77), "Insolvency Proceedings of Members of a Group of Companies," now regulates "cooperation and communication" (section 1) and "coordination" (section 2), in particular through *group coordination proceedings*, a *coordinator* and a *coordination plan*. As is typical for EU regulations, the recitals — in particular Recitals 50-62 — explain how to apply and interpret the new provisions. Art. 2 (13) and (14) defines "group of companies" and "parent undertaking."

As a consequence of the "one company, one proceeding" principle, the reform does not provide for a concept such as substantive consolidation of bankruptcy estates under U.S. bankruptcy law. It is inadmissible in a coordination plan (Art. 72 (3)). The prevailing view appears to be that substantive consolidation alters the legal relationships involved too far and is too difficult to limit to truly exceptional cases.[16] However, substantive consolidation or similar

[8] ECJ, Judgment of May 2, 2006, C-341/04, *available at* http://curia.europa.eu/juris/liste. jsf?language=en&num=C-341/04.
[9] *Id*. at margin para 30.
[10] ECJ, Judgment of Oct. 20, 2011, C-396/09, *available at* http://curia.europa.eu/juris/liste. jsf?language=en&num=C-396/09.
[11] *Id*. at margin para 41 seqq.
[12] ECJ, Judgment of Dec. 15, 2011, C-191/10, *available at* http://curia.europa.eu/juris/liste. jsf?language=en&num=C-191/10.
[13] *Id*. at margin para 23 seqq.
[14] *Cf*. Recital 54, Sentence 2: "This coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality."
[15] The EIR is indifferent about where and at which court in a member state a proceeding can be initiated. The EIR solely determines what member state has jurisdiction.
[16] This is also the approach of the draft German Act to Facilitate Dealing with Company Group Insolvencies (*Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen*), *Deutscher Bundestag*, Doc. No. 18/407 (Jan. 30, 2014); *cf*. Dr. H. Philipp Esser, "Group Insolvency Law under Discussion in Germany and Europe," XXXII *ABI Journal* 4, 50-51, 103-04, May 2013.

concepts[17] may still be available under national insolvency laws because the new EIR rules only address insolvency proceedings for different members of the same company group initiated in more than one member state.

Definition of Company Groups

The new EIR defines "group of companies" in Art. 2 (13) as "parent undertaking" and all of its "subsidiary undertakings." "Parent undertaking" is an undertaking that "controls, either directly or indirectly, one or more subsidiary undertakings." An undertaking that prepares consolidated financial statements, according to the EU Accounting Directive (2013/34/EU of June 26, 2013), is deemed to be a parent undertaking.

The definition of the company group thus includes parent companies and subsidiaries, regardless of their legal forms; an individual as a shareholder can therefore also be a parent undertaking. The reference to the EU Accounting Directive and the non-rebuttable presumption for undertakings pre-paring consolidated financial statements is limited. The definition does not indicate that any exceptions to the duty to prepare consolidated financial statements would exempt an undertaking from belonging to the company group. Indeed, the purposes underlying insolvency law may require a broader understanding of a company group than those underlying the accounting rules.

The proposal of the European Commission had set up more specific requirements to establish control of a company, whereas the current proposal only refers to "direct or indirect control." This should allow the ECJ to understand "control" in a very broad sense including any form in which control — beyond mere economic control — may be exerted.

Cooperation and Communication (Art. 56-60)

Cooperation and Communication Between Insolvency Practitioners (Art. 56)

The purpose of the rules for insolvency proceedings of company group members is to "ensure … efficient administration" (Recital 51) and "leverage possible synergies across the group" (Recital 52). It appears logical that the proposal approaches this task first by obliging all "actors involved … cooperate and communicate with each other" (Recital 52). This duty addresses insolvency practitioners — (Art. 56) and courts (Art. 57), both separately and among each other (Art. 58).

"Insolvency practitioners" are defined in Art. 2 (5) — in short — as the persons or bodies who verify and admit claims in insolvency proceedings, represent the collective interest of the creditors, administer or liquidate the debtor's assets, or supervise the administration of the debtor's affairs. The abstract definition adds that these persons or bodies are listed in Annex B. Which element of the definition prevails? A comparison between Recital 21 and Recital 9 leaves the impression that Annex B is not exhaustive, which harmonizes with the rather broad abstract

[17] *Cf*. the French concept of "*Extension de Procédure*," in Art. L621-2 of the French *Code de Commerce* (Commercial Code), which was the subject of the above-mentioned Rastelli decision of the ECJ (*supra* fn.9).

definition in Art. 2 (5). However, the intention of the legislator was to grant legal certainty and avoid any doubt. Annex B is "closed" as well.

Under the EIR, insolvency practitioners appointed in insolvency proceedings of different members of the same company group generally have to cooperate (Art. 56 (1)). They may enter into agreements and protocols, and insolvency practitioners shall communicate any relevant information to each other, as well as consider the coordination of the administration and supervision in general, particularly in a coordinated restructuring plan. For this purpose, the insolvency practitioners may agree to delegate powers and tasks among each other (Art. 56 (2)).

Reservations

The general duty to cooperate and communicate is subject to significant reservations. It only applies "to the extent such cooperation is appropriate to facilitate the effective administration of these proceedings, is compatible with the rules applicable to such proceedings and does not entail any conflict of interests." Further, any communication of information requires "appropriate arrangements ... to protect confidential information." Each reservation is broad enough for insolvency petitioners in many controversial cases to refuse cooperation and communication at least temporarily.

For example, if two group companies potentially have claims against each other, the insolvency practitioners might not consider it appropriate for an effective administration to exchange information that could harm their own estate's economic interests. An exchange of potentially harmful information is also likely to violate the rules applicable to the respective proceeding, which in most jurisdictions include a rule that the insolvency practitioner must maximize the value of the estate and the creditors' recovery. Where an exchange of information might harm the insolvency estate, the insolvency practitioner has an evident conflicting interest against such cooperation. Lastly, in the example, the only appropriate arrangement to protect confidential information would be to not disclose it at all.

On the other hand, where cooperation creates a clear win/ win situation for the creditors of the insolvency proceedings involved, the new rules oblige the insolvency practitioners to reach out to their foreign counterparts. Thus, insolvency practitioners may not refuse to cooperate by referring simply to remote risks. Insolvency courts should in turn consider an insolvency practitioner's capability and willingness to cooperate with foreign proceedings of other group members before appointing the insolvency practitioner.

In sum, the duty to cooperate and communicate is a valuable guideline, but as Recital 52 clarifies, it must not apply against the interests of the creditors in each proceeding. Insolvency practitioners have to apply the duty to cooperate and to communicate with care — especially in the crucial beginning of an insolvency proceeding when insolvency practitioners often have limited knowledge of the facts and the legal issues of the case.

Cooperation and Communication Between Courts (Art. 57)

The duty to cooperate and communicate further applies to insolvency courts. Where one insolvency court has already opened an insolvency proceeding over a group member, such court shall cooperate with any other court before which an insolvency petition or an opened proceeding is pending. The "courts may ... appoint an independent person or body to act on [their] instructions" for the purpose of the cooperation (Art. 57 (1)). Further, the courts may communicate directly with or request information from each other without engaging the office of the executive (Art. 57 (2)). Courts may coordinate "in the appointment of insolvency practitioners," in the administration and supervision of the insolvency proceedings, in the conduct of hearings and in the approval of protocols (Art. 57 (3)).

These provisions are important and remarkable because they give courts, which normally have no authority to act beyond their state borders, the authority to reach out across their borders and to cooperate with foreign courts. For example, Art. 57 allows a German court together with a French court to jointly appoint an English valuation expert.

The duty to cooperate among the courts is subject to the same significant reservations as the one between insolvency practitioners. In many jurisdictions, courts can be liable to the creditors if they violate procedural law and if the relevant law serves to protect the creditors. Therefore, courts will have to be equally careful in disclosing sensitive, non-public information about the insolvency proceeding to courts responsible for another group member's insolvency proceeding. In any event, a court should first consult with the relevant insolvency practitioners and/or the debtor's management and analyze the local data-protection laws before engaging in any exchange of information with other courts.

Cooperation and Communication Between Insolvency Practitioners and Courts (Art. 58)

Insolvency practitioners are further obliged to cooperate and communicate with any court before which an insolvency petition or an opened insolvency proceeding is pending and may in turn request information or assistance regarding such other group members' insolvency proceedings from a court (Art. 58). Again, this cooperation and communication is subject to its appropriateness to facilitate the effective administration of these proceedings, to the compliance with the rules applicable to such proceedings, and to the lack of any conflict of interests. Pursuant to Art. 59, the costs and expenses of complying with the duties to cooperate and communicate shall be costs of the proceeding to be borne by the respective insolvency estates.

Powers of the Insolvency Practitioner in the Insolvency Proceeding of Another Group Member (Art. 60)

In addition to the general duties to cooperate and communicate, Art. 60 (1) gives the insolvency practitioner in a group company's insolvency proceeding three concrete procedural rights. To the extent appropriate to facilitate the effective administration of his proceedings, the insolvency

practitioner may (1) be heard in any of the other group members' proceedings; (2) if a restructuring plan (Art. 56 (2) lit. c) has been proposed (and subject to certain further requirements), request a stay of any measure related to the realization of the assets in any of the other group members' proceedings; and (3) apply for the opening of group coordination proceedings under Art. 61. The right to request a stay due to a proposed restructuring plan further requires that the plan cover at least some group members and has a reasonable chance of success, that the stay is necessary for proper plan implementation, that the plan would benefit the creditors of the proceeding in which the stay is requested, and that there are no coordination proceedings (Art. 61-77) pending.

The respective insolvency court shall stay the asset-realization proceedings for up to three months (extendible to up to a maximum of six months) if it is satisfied that the above conditions have been met and after hearing the insolvency practitioner appointed in its own insolvency proceeding. In order to protect the interests of the creditors in its proceeding, the insolvency court deciding about the stay may request suitable guarantees from the other insolvency practitioner while the stay is in effect.

The insolvency practitioner's right to request a stay of asset-realization matters is — besides the right to be heard and to apply for a coordination proceeding — the most powerful tool provided in section 1 on cooperation and communication. However, it is subject to strict requirements (added late to the EIR proposal), which will make it difficult for the insolvency practitioner to convince the court in a group member's proceeding to grant a stay.[18] Therefore, insolvency practitioners may face significant practical challenges in the efforts to coordinate various group members' insolvency proceedings forcefully, if the insolvency practitioners in such insolvency proceedings do not already cooperate voluntarily.

Coordination (Art. 61-77)

The second fundamental novelty in the EIR on company group insolvencies is the introduction of formalized, court-supervised proceedings led by a coordinator to coordinate the insolvency proceedings of separate (international) group members. Such coordination proceedings are voluntary,[19] but the EIR nevertheless operates under the assumption that insolvent group members will recognize the mutual gains to be achieved by coordinating a joint restructuring or liquidation of a company group or parts thereof.

Person, Tasks and Obligations of the Coordinator and the Group Coordinating Plan (Art. 70-72)

In the eyes of the EIR, the key to a successful coordination of company group insolvency proceedings is the person of the coordinator. The group coordinator is a person who is eligible in a

[18] *Cf*. the changes proposed by the Council under its "general approach," doc. no. 10284/14 ADD 1 of 3 June 2014 (http://register.consilium.europa.eu/doc/srv?l=en&f=st_10284_2014_add_1), p. 47

[19] Recital 53 and Art. 65.

member state to be an insolvency practitioner, but he/she must not be appointed as an insolvency practitioner in one of the group members' insolvency proceedings and must be free of any conflict of interest regarding the main actors in the group's insolvency proceedings.[20] This group should include — "*as appropriate*" — any professionals acting for the debtor in possession.[21]

The group coordinator has a variety of rights and tasks. As a general obligation, he/she shall "identify and outline recommendations for the coordinated conduct of the insolvency proceedings."[22] This wording implies that the coordinator's recommendations for a "coordinated conduct" can take any form, also outside a coordination plan. However, the coordinator can only recommend, not impose and enforce, his/her views on the insolvency practitioners or insolvency courts.

Group Coordinating Plan

Pursuant to Art. 72 (2), the group coordinator is further obliged to propose a "group coordination plan" that shall identify, describe and recommend "a comprehensive set of measures [that are] appropriate to an integrated approach to the resolution of the group members' insolvencies." In the proposal, the coordinator *may* address how to "re-establish the economic performance and the financial sound-ness of the group," how to settle intragroup disputes (*e.g.*, avoidance actions), and what agreements to enter into among the group members' insolvency practitioners. Thus, the group coordinator *shall* propose a coordination plan to further integrate the resolution of each group member's insolvency proceedings (*integrated approach*), but he/she also has discretion regarding the plan content.

Contrary to insolvency plans under national insolvency laws, the coordination plan is not subject to a vote and confirmation by a court. The coordinator simply proposes the plan, which thereby becomes effective. The EIR trusts that the coordinator will work out a plan for the mutual benefit of the creditors of all group members without the binding effect of a plan confirmation as it applies to insolvency plans under national laws.

Further, the coordinator may be heard and many participate in the hearings of other group members' insolvency proceedings, mediate disputes among the group members' insolvency proceedings, and present and explain the coordination plan — presumably to the persons to which any insolvency practitioner would report.[23] He/she may also request information and a stay for up to six months if the stay is necessary for the proper implementation of a plan that benefits the creditors.[24] However, the coordinator may not propose any procedural or

[20] Art. 71.
[21] Art. 76.
[22] Art. 72 (1).
[23] Here and on other occasions, the EIR wording is not very clear when it generally refers to the "national laws": Which law is meant by EIR's reference to presenting and explaining his/her "group coordination plan to the persons or bodies that he is to report to under his national law" (Art. 72 (2) (c))? Which law shall apply — the law of the court opening the coordination proceedings? What rules apply at presentations in foreign group members' proceedings?
[24] *Cf*. Art. 72 (2).

substantive consolidation, and his/her rights do not extend to any group member not participating in the coordination proceeding.[25]

All insolvency practitioners of the insolvent company group *shall consider* the recommendations and the content of the group coordination plan. An insolvency practitioner may deviate from the recommendations or the plan, but "shall give reasons" for doing so to the persons or bodies that he/she reports to under the applicable national law and to the coordinator.[26] Therefore, the recommendations and even the plan content are not compulsory. The insolvency practitioner does not need to implement the plan, but he/she needs to disclose and explain this fact in sufficient detail to the creditors, which — at the very least — increases transparency in insolvency proceedings and strengthens the autonomy of the creditors.

The group coordinator shall act impartially and with due care.[27] He/she shall be revoked by the court that appointed him/her if the coordinator acts to the detriment of the credi-tors of a participating group member or generally fails to comply with his/her statutory obligations.[28] To some extent, the coordinator is also responsible for keeping his/her own costs within the allocated budget.[29]

Request for Coordination Proceedings

Coordination proceedings are initiated by a request from one of the insolvency practitioners appointed in one of the insolvency proceedings pending over the members of the company group. The requesting insolvency practitioner may file his/her petition with any court having jurisdiction over the insolvency proceedings of a group member.[30] This court need not be the court that appointed the petitioning insolvency practitioner. However, the request shall be filed in accordance with the legal conditions governing the insolvency practitioner's insolvency proceeding.[31] Thus, the request has to fulfill the requirements of the petitioner's insolvency proceedings (*e.g.*, receive creditors' committee approval), as well as the formal requirements for the request of the court that has been asked to open the coordination proceedings.

Court's First Review and Notice

The court then begins a two-step process: First, the court has to be satisfied that

(a) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;

[25] Art. 72 (3) and (4).
[26] Art. 70.
[27] Art. 72 (5).
[28] Art. 75.
[29] Art. 72 (6).
[30] Art. 61 (1).
[31] Art. 61 (2).

(b) no creditor of any group member anticipated to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and

(c) the proposed coordinator [is eligible to be an insolvency practitioner but is not appointed as an insolvency practitioner for any group member and has no conflict of interest].[32]

The main requirements for a court to open coordinating proceedings are therefore the appropriateness of the coordination proceedings to facilitate the effective administration without disadvantaging any creditor of any participating group member, and the eligibility of the coordinator. For this reason, the request must already suggest — in detail — that the coordinator outline the proposed group consolidation and specify why the above conditions (facilitating an effective administration without disadvantaging any creditor) are met, list the insolvency practitioners and courts or authorities involved in the group insolvency, and give an estimate on the costs and their allocations.[33]

It appears that the second element of the court's review — financial disadvantage to any creditor of any group member — will often be harder to determine than the other elements of facilitation of an effective administration and the eligibility of the coordinator. In theory, the court has to prognosticate the financial position of *each* creditor of *each* group member with and without the coordination proceedings. Evidently, a court can only decide on such a petition with adequate presentation of the facts and briefing by the petitioner. The requirement further implies that the insolvency practitioners have reached a general agreement to share the benefits of the coordination fairly among all participating group members so that every-one benefits from the coordination. If the court is satisfied that these above conditions are met, it notifies the relevant insolvency practitioners of the request and its content and gives the insolvency practitioners the opportunity to be heard.

The Court's Decision to Open Coordination Proceedings

Generally, the court first requested to open coordination proceedings shall have jurisdiction and any court subsequently addressed shall defer to the court first addressed.[34] However, insolvency practitioners may decide that the court of another group member's insolvency proceeding shall have exclusive jurisdiction.[35] Such an agreement requires a two-thirds majority of all insolvency practitioners appointed in the group members' insolvency proceedings.[36] Typically, an insolvent company group has many group members with few assets and only a few

[32] Art. 63 (1) and 71.
[33] Art. 61 (3).
[34] Art. 62.
[35] Art. 66 (1).
[36] Art. 66 (2).

members with larger assets. It remains to be seen whether the latter group is now at risk of being outvoted regularly since the new majority rule counts by heads and not by the size of the insolvency estate or the economic importance of the relevant group members.

Within 30 days of being notified, any insolvency practitioner may object to the inclusion in the coordination proceeding or to the person proposed to be the coordinator.[37] If an insolvency practitioner objects to the inclusion, the insolvency proceeding of his/her group member shall not participate in the coordination proceeding and shall not be affected by the court's opening decision.[38] However, such an insolvency practitioner does have the chance to opt in at a later stage if the coordinator or all other insolvency practitioners agree to it.[39] If the insolvency practitioner has filed an objection against the person of the coordinator, the court *may* ask the objecting insolvency practitioner to submit an entirely new request, including any suggestion of another coordinator.[40]

After the expiration of the objection period, the court has to again review — now also on the basis of any objections — whether it is satisfied that the opening conditions (facilitation of effective administration, no financial disadvantage of any creditor in any group proceeding and eligible coordinator) are met. In this case, the court *may* open the coordination proceedings, appoint the coordinator, decide on the outline of the coordination and on the estimated costs, as well as on their distribution among the group members, and notify all participating insolvency practitioners and the coordinator.[41] While the insolvency practitioners only have to *consider* the coordinator's recommendations and the content of the group-coordination plan, the participating insolvency proceedings will be bound (subject to objection and challenge rights[42]) by the court's decision on the costs of the proceedings, in particular the coordinator's fees and expenses.

Why does the new provision say that the court *may* open coordination proceedings? If all requirements for such proceedings are fulfilled, the court will need absolutely compelling reasons for not opening a coordination proceeding. Nevertheless, it must be within the court's powers to question or ask for improvements of the outline for the coordination. The court-approved outline of coordination is not to be confused with the group-coordination plan, which the coordinator proposes and is not subject to court approval.[43]

The new provisions are not entirely clear[44] on whether the coordination proceedings can be limited so that not all insolvent group members participate. When is this relevant? Group-coordination plans might be proposed that are designed to benefit only certain group members while leaving others (*e.g.*, group members with high debt and few assets) out of the plan and coordination proceedings. This approach would avoid the disadvantage test[45]

[37] Art. 64.
[38] Art. 65 and 68.
[39] Art. 69. Insolvency practitioners in group-member insolvency proceedings that were opened after the court opened the coordination proceedings may also opt in under the same conditions. Art. 69 (1) b.
[40] Art. 67.
[41] Art. 68.
[42] Art. 77.
[43] Art. 72.
[44] Art. 61 (3) c.
[45] Art. 63 (1) 2.

applying for such non-participating members. Later provisions[46] refer to the "participating" group members, implying that some group members could be excluded by their own will or because the other group members never wanted them to participate. Courts will have to monitor whether this structure gives rise to any abusive practices.

Conclusion

The new EIR closes a gap in introducing rules for company group insolvencies that have not existed so far in spite of the fact that large insolvency cases today always involve company groups. The EU takes a "soft law" approach with rules that are largely subject to significant exceptions — such as a duty to communicate and cooper-ate — or voluntary in nature — such as a group-coordination proceeding and group-coordination plan. Therefore, even the group-coordination plan should not be confused with reorganization plans as they exist in many of the European member states, which should — arguably — also be admissible at the company group level. Nevertheless, for many cases, the new rules may prove to be a valuable standard of conduct to ensure effective administration through the communication, cooperation and coordination of separate insolvency proceedings over separate group members in different national jurisdictions

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[46] *See, e.g.*, Art. 63 (1) b.

EUROPEAN
COMMISSION

Brussels, 12.3.2014
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COMMISSION RECOMMENDATION

of 12.3.2014

on a new approach to business failure and insolvency

(Text with EEA relevance)

{SWD(2014) 61}
{SWD(2014) 62}

COMMISSION RECOMMENDATION

of 12.3.2014

on a new approach to business failure and insolvency

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) The objective of this Recommendation is to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximise the total value to creditors, employees, owners and the economy as a whole. The Recommendation also aims at giving honest bankrupt entrepreneurs a second chance across the Union.

(2) National insolvency rules vary greatly in respect of the range of the procedures available to debtors facing financial difficulties in order to restructure their business. Some Member States have a limited range of procedures meaning that businesses are only able to restructure at a relatively late stage, in the context of formal insolvency proceedings. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be or involve varying degrees of formality, in particular in relation to the use of out-of-court processes.

(3) Similarly, national rules giving entrepreneurs a second chance, in particular by granting them discharge from the debts they have incurred in the course of their business vary as regards the length of the discharge period and the conditions under which discharge can be granted.

(4) The discrepancies between the national restructuring frameworks, and between the national rules giving honest entrepreneurs a second chance lead to increased costs and uncertainty in assessing the risks of investing in another Member State, fragment conditions for access to credit and result in different recovery rates for creditors. They make the design and adoption of consistent restructuring plans for cross-border groups of companies more difficult. More generally, the discrepancies may serve as disincentives for businesses wishing to establish themselves in different Member States.

(5) Council Regulation (EC) No 1346/2000[1] only deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings. The Commission proposal for the amendment of that Regulation[2] should extend the scope of the Regulation to preventive procedures which

[1] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p.1).

[2] COM(2012) 744 final.

promote the rescue of an economically viable debtor and give a second chance to entrepreneurs. However, the proposed amendment does not tackle the discrepancies between those procedures in national law.

(6) On 15 November 2011, the European Parliament adopted a Resolution[3] on insolvency proceedings. It included recommendations for harmonising specific aspects of national insolvency law, including the conditions for the establishment, effects and content of restructuring plans.

(7) In the Commission Communication on The Single Market Act II[4] of 3 October 2012, the Commission undertook as a key action to modernise the Union insolvency rules in order to facilitate the survival of businesses and present a second chance to entrepreneurs. To this end, the Commission announced that it would analyse how the efficiency of national insolvency laws could be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market.

(8) The Commission Communication on A New Approach to Business Failure and Insolvency of 12 December 2012[5] highlights certain areas where differences between domestic insolvency laws may hamper the establishment of an efficient internal market. It noted that the creation of a level playing field in these areas would lead to greater confidence in the systems of other Member States for companies, entrepreneurs and private individuals, and improve access to credit and encourage investment.

(9) On 9 January 2013 the Commission adopted the Entrepreneurship 2020 Action Plan[6] where the Member States are invited, among other things, to reduce when possible, the discharge time and debt settlement for honest entrepreneurs after bankruptcy to a maximum of three years by 2013 and to offer support services to businesses for early restructuring, advice to prevent bankruptcies and support for small and medium enterprises to restructure and re-launch.

(10) Several Member States are currently undertaking reviews of their national insolvency laws with a view to improving the corporate rescue framework and the second chance for entrepreneurs. Therefore it is opportune to encourage coherence in these and any future such national initiatives in order to strengthen the functioning of the internal market.

(11) It is necessary to encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby to lower the cost of restructuring for both debtors and creditors. Greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence would also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union.

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3 European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law, P7_TA (2011) 0484.

4 COM(2012) 573 final.

5 COM(2012) 742 final.

6 COM(2012) 795 final.

(12) Furthermore, removing the barriers to effective restructuring of viable companies in financial difficulties contributes to saving jobs and also benefits the wider economy. Making it easier for entrepreneurs to have a second chance would also lead to higher self-employment rates in the Member States. Moreover, efficient insolvency frameworks would provide a better assessment of the risks involved in lending and borrowing decisions and smooth the adjustment for over-indebted firms, minimizing the economic and social costs involved in their deleveraging process.

(13) Small and medium sized enterprises would benefit from a more coherent approach at Union level, since they do not have the necessary resources to cope with high restructuring costs and take advantage of the more efficient restructuring procedures in some Member States.

(14) Tax authorities also have an interest in an efficient restructuring framework for viable enterprises. In implementing this Recommendation, Member States should be able to take appropriate measures to ensure the collection and recovery of tax revenues respecting the general principles of tax fairness and to take efficient measures in cases of fraud, evasion or abuse.

(15) It is appropriate to exclude from the scope of this Recommendation insurance undertakings, credit institutions, investment firms and collective investment undertakings, central counter parties, central securities depositories and other financial institutions which are subject to special recovery and resolution frameworks where national supervisory authorities have wide-ranging powers of intervention. Although consumer over-indebtedness and consumer bankruptcy are also not covered by the scope of this Recommendation, Member States are invited to explore the possibility of applying these recommendations also to consumers, since some of the principles followed in this Recommendation may also be relevant for them.

(16) A restructuring framework should enable debtors to address their financial difficulties at an early stage, when their insolvency could be prevented and the continuation of their business assured. However, in order to avoid any potential risks of the procedure being misused, the financial difficulties of the debtor must be likely to lead to its insolvency and the restructuring plan must be capable of preventing the insolvency of the debtor and ensuring the viability of the business.

(17) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting court formalities to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. For example, to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the appointment of a mediator or a supervisor should not be compulsory, but made on a case-by-case basis.

(18) A debtor should be able to request the court for a stay of individual enforcement actions and suspension of insolvency proceedings whose opening has been requested by creditors where such actions may adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business. However, in order to provide for a fair balance between the rights of the debtor and of creditors, and taking into account the experience of recent reforms in the Member States, the stay should be initially granted for a period of no more than four months.

(19) Court confirmation of a restructuring plan is necessary to ensure that the reduction of the rights of creditors is proportionate to the benefits of the restructuring and that

creditors have access to an effective remedy, in full compliance with the freedom to conduct a business and the right to property as enshrined in the Charter of Fundamental Rights of the European Union. The court should therefore reject a plan where it is likely that the attempted restructuring reduces the rights of dissenting creditors below what they could reasonably expect to receive in the absence of a restructuring of the debtor's business.

(20) The effects of bankruptcy, in particular the social stigma, legal consequences and the on-going inability to pay off debts constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even if evidence shows that entrepreneurs who have gone bankrupt have more chance to be successful the second time. Steps should therefore be taken to reduce the negative effects of bankruptcy on entrepreneurs, by making provisions for a full discharge of debts after a maximum period of time,

HAS ADOPTED THIS RECOMMENDATION:

I. Objective and subject matter

1. The objective of this Recommendation is to encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance, thereby promoting entrepreneurship, investment and employment and contributing to reducing the obstacles to the smooth functioning of the internal market.

2. By reducing those obstacles, the Recommendation aims in particular to:

   (a) lower the costs of assessing the risks of investing in another Member State,

   (b) increase recovery rates for creditors, and

   (c) remove the difficulties in restructuring cross-border groups of companies.

3. This Recommendation provides for minimum standards on:

   (a) preventive restructuring frameworks; and

   (b) discharge of debts of bankrupt entrepreneurs.

4. When implementing this Recommendation, Member States should be able to take appropriate and efficient measures to ensure the enforcement of taxes, in particular in cases of fraud, evasion or abuse.

II. Definitions

5. For the purposes of this Recommendation:

   (a) 'debtor' means any natural or legal person in financial difficulties when there is a likelihood of insolvency;

   (b) 'restructuring' means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the

objective of enabling the continuation, in whole or in part, of the debtors' activity;

(c) 'stay of individual enforcement actions' means a court ordered suspension of the right to enforce a claim by a creditor against a debtor;

(d) 'courts' includes any other body with competence in matters relating to preventive procedures to which the Member States have entrusted the role of the courts, and whose decisions may be subject to an appeal or review by a judicial authority.

III. Preventive restructuring framework

A. AVAILABILITY OF A PREVENTIVE RESTRUCTURING FRAMEWORK

6. Debtors should have access to a framework which allows them to restructure their business with the objective of preventing insolvency. The framework should contain the following elements:

(a) the debtor should be able to restructure at an early stage, as soon as it is apparent that there is a likelihood of insolvency;

(b) the debtor should keep control over the day-to-day operation of its business;

(c) the debtor should be able to request a temporary stay of individual enforcement actions;

(d) a restructuring plan adopted by the majority prescribed by national law should be binding on all creditors provided that the plan is confirmed by a court;

(e) new financing which is necessary for the implementation of a restructuring plan should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.

7. The restructuring procedure should not be lengthy and costly and it should be flexible so that more steps can be taken out-of-court. The involvement of the court should be limited to where it is necessary and proportionate with a view to safeguarding the rights of creditors and other interested parties affected by the restructuring plan.

B. FACILITATING NEGOTIATIONS ON RESTRUCTURING PLANS

Appointment of a mediator or a supervisor

8. Debtors should be able to enter a process for restructuring their business without the need to formally open court proceedings.

9. The appointment of a mediator or a supervisor by the court should not be compulsory, but rather be made on a case by case basis where it considers such appointment necessary:

(a) in the case of a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan;

(b) in the case of a supervisor, in order to oversee the activity of the debtor and creditors and take the necessary measures to safeguard the legitimate interests of one or more creditors or another interested party.

Stay of individual enforcement actions and suspension of insolvency proceedings

10. The debtors should have the right to request a court to grant a temporary stay of individual enforcement actions (hereafter "stay") lodged by creditors, including secured and preferential creditors, who may otherwise hamper the prospects of a restructuring plan. The stay should not interfere with the performance of on-going contracts.

11. In Member States which make the granting of the stay subject to certain conditions, debtors should be able to be granted a stay in all circumstances where:

(a) creditors representing a significant amount of the claims likely to be affected by the restructuring plan support the negotiations on the adoption of a restructuring plan; and

(b) a restructuring plan has a reasonable prospect of being implemented and preventing the insolvency of the debtor.

12. Where provided for in the laws of the Member States, the obligation of the debtor to file for insolvency, as well as applications by creditors requesting the opening of insolvency proceedings against the debtor lodged after the stay has been granted should also be suspended for the duration of the stay.

13. The duration of the stay should strike a fair balance between the interests of the debtor and of creditors, and in particular secured creditors. The duration of the stay should therefore be determined on the basis of the complexity of the anticipated restructuring, and should not exceed four months. Member States may provide that the period can be renewed upon evidence of progress in the negotiations on a restructuring plan. The total duration of the stay should not exceed 12 months.

14. When the stay is no longer necessary with a view to facilitating the adoption of a restructuring plan, the stay should be lifted.

C. RESTRUCTURING PLANS

Contents of restructuring plans

15. Member States should ensure that courts can confirm plans with expediency and in principle in written procedure. They should lay down clear and specific provisions on the content of restructuring plans. Restructuring plans should contain a detailed description of the following elements:

(a) clear and complete identification of the creditors who would be affected by the plan;

(b) the effects of the proposed restructuring on individual debts or categories of debts;

(c) the position taken by affected creditors on the restructuring plan;

(d) where applicable, the conditions for new financing; and

(e) the potential of the plan to prevent the insolvency of the debtor and ensure the viability of the business.

Adoption of restructuring plans by creditors

16. To increase the prospects of restructuring and therefore the number of viable businesses being rescued, it should be possible to adopt a restructuring plan by the affected creditors, including secured and unsecured creditors.

17. Creditors with different interests should be treated in separate classes which reflect those interests. As a minimum, there should be separate classes for secured and unsecured creditors.

18. A restructuring plan should be adopted by the majority in the amount of creditors' claims in each class, as prescribed by national law. Where there are more than two classes of creditors, Member States should be able to maintain or introduce provisions which empower courts to confirm restructuring plans which are supported by a majority of those classes of creditors, taking into account in particular the weight of the claims of the respective classes of creditors.

19. Creditors should enjoy a level playing field irrespective of where they are located. Therefore, where the laws of the Member States require a formal voting process, creditors should in principle be allowed to vote by distance means of communication such as registered letter or secure electronic technologies.

20. To make the adoption of restructuring plans more effective, Member States should also ensure that it is possible for restructuring plans to be adopted by certain creditors or certain types or classes of creditors only, provided that other creditors are not affected.

Court confirmation of the restructuring plan

21. To ensure that the rights of creditors are not unduly affected by a restructuring plan and in the interest of legal certainty, restructuring plans which affect the interests of dissenting creditors or make provision for new financing should be confirmed by a court in order to become binding.

22. The conditions under which a restructuring plan can be confirmed by a court should be clearly specified in the laws of the Member States and should include at least the following:

(a) the restructuring plan has been adopted in conditions which ensure the protection of the legitimate interests of creditors;

(b) the restructuring plan has been notified to all creditors likely to be affected by it;

(c) the restructuring plan does not reduce the rights of dissenting creditors below what they would reasonably be expected to receive in the absence of the restructuring, if the debtor's business was liquidated or sold as a going concern, as the case may be;

(d) any new financing foreseen in the restructuring plan is necessary to implement the plan and does not unfairly prejudice the interests of dissenting creditors.

23. Member States should ensure that courts can reject restructuring plans which clearly do not have any prospect of preventing the insolvency of the debtor and ensuring the

viability of the business, for example because new financing needed to continue its activity is not foreseen.

Rights of creditors

24. All creditors likely to be affected by the restructuring plan should be notified of the content of the plan and given the right to formulate objections and to appeal against the restructuring plan. Nevertheless, in the interest of the creditors supporting the plan, the appeal should not in principle suspend the implementation of the restructuring plan.

Effects of a restructuring plan

25. The restructuring plans which are adopted by the unanimity of affected creditors should be binding on all those affected creditors.

26. The restructuring plans which are confirmed by a court should be binding upon each creditor affected by and identified in the plan.

D. PROTECTION FOR NEW FINANCING

27. New financing, including new loans, selling of certain assets by the debtor and debt-equity swaps, agreed upon in the restructuring plan and confirmed by a court should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.

28. Providers of new financing as part of a restructuring plan which is confirmed by a court should be exempted from civil and criminal liability relating to the restructuring process.

29. Exceptions to the rules on protection of new financing should be made where fraud is subsequently established in relation to the new financing.

IV. Second chance for entrepreneurs

Discharge periods

30. The negative effects of bankruptcy on entrepreneurs should be limited in order to give them a second chance. Entrepreneurs should be fully discharged of their debts which were subject of a bankruptcy after no later than three years starting from:

(a) in the case of a procedure ending with the liquidation of the debtor's assets, the date on which the court decided on the application to open bankruptcy proceedings;

(b) in the case of a procedure which includes a repayment plan, the date on which implementation of the repayment plan started.

31. On expiry of the discharge period, entrepreneurs should be discharged of their debts without the need in principle to re-apply to a court.

32. A full discharge after a short period of time is not appropriate in all circumstances. Member States should therefore be able to maintain or introduce more stringent provisions which are necessary to:

(a) discourage entrepreneurs who have acted dishonestly or in bad faith, either before or after the bankruptcy proceedings were opened;

(b) discourage entrepreneurs who do not adhere to a repayment plan or to any other legal obligation aimed at safeguarding the interests of creditors; or

(c) safeguard the livelihood of the entrepreneur and his family by allowing the entrepreneur to keep certain assets.

33. Member States may exclude specific categories of debt, such as those rising out of tortious liability, from the rule of full discharge.

V. Supervision and reporting

34. The Member States are invited to implement the principles set out in this Recommendation by [ADD date 12 months from the publication of the Recommendation].

35. The Member States are invited to collect reliable annual statistics on the number of preventive restructuring procedures opened, the length of procedures and information about the size of the debtors involved and the outcome of the procedures opened, and to communicate that information to the Commission on an annual basis and for the first time by [ADD date: 12 months from the publication of the Recommendation].

36. The Commission will assess the implementation of this Recommendation in the Member States by [ADD date: 18 months from the publication of the Recommendation]. In this context, the Commission will evaluate its impact on rescuing companies in financial difficulties and giving honest entrepreneurs a second chance, its interplay with other insolvency procedures in other areas such as discharge periods for natural persons not exercising a trade, business, craft or professional activity, its impact on the functioning of the internal market and on small and medium enterprises and the competitiveness of the economy of the Union. The Commission will assess also whether additional measures to consolidate and strengthen the approach reflected in this Recommendation should be proposed.

Done at Brussels, 12.3.2014

For the Commission
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Insolvency Law

Directors' obligations in the period approaching insolvency: enterprise groups

Note by the Secretariat

Contents

V.16-01157 (E)

Introduction

1. Part three of the UNCITRAL Legislative Guide on Insolvency Law deals with the treatment of enterprise groups in insolvency and provides background on the nature of enterprise groups; reasons for conducting business through enterprise groups; what constitutes an enterprise group by reference to concepts such as ownership and control; and regulation of enterprise groups. Part four of the Legislative Guide addresses the obligations of directors in the period approaching insolvency, discussing issues associated with directors' obligations in that period and, in particular, the rationale for imposing obligations specific to that period by way of the operation of insolvency, rather than corporate, law. Neither part addresses the specific issues that might affect the obligations of directors who perform that function for one or more enterprise group members.

2. At its forty-fourth session (December 2013), the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the Working Group noted that possible solutions needed to be considered carefully so that they did not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's obligations to its own company and the interests of the group) would be helpful.

3. Deliberations on this topic commenced at the Working Group's forty-sixth session (December 2014) on the basis of a draft prepared by the Secretariat following consultation with an informal expert group as requested by the Working Group (A/CN.9/WG.V/WP.125) and continued at its forty-seventh session (May 2015) on the basis of a revised draft (A/CN.9/WG.V/WP.129).

4. This note has been prepared by the Secretariat on the basis of the deliberations and conclusions of the Working Group at its forty-seventh session (A/CN.9/835, paras. 13-21). Set out below are revisions to draft recommendations 267 to 270 and the accompanying commentary. Proposed additions and revisions to the commentary are included in square brackets, with explanations as appropriate included in the footnotes.

UNCITRAL Legislative Guide on Insolvency Law, part four: Directors' obligations in the period approaching insolvency — enterprise groups

Introduction and purpose of this section

1. This second section of part four builds upon recommendations 255 to 266 of the first section, which address the obligations of directors of an individual company in the period approaching insolvency. Focusing on the nature of the obligations and the steps that might be taken to discharge those obligations (as established in recommendations 255 and 256), this section proposes how those recommendations could be revised for application in the context of enterprise groups. Recommendations 257 to 266 of the first section of part four continue to apply in the enterprise group context as drafted, however cross-references in those recommendations to recommendations 255 and 256 should be read for the purposes of this additional section as references to recommendations 267 and 268.

2. Additional recommendations (recommendations 269 and 270) have been added to this section to address the situation where a director is appointed to, or holds a managerial or executive position in, more than one group member and conflicts arise in discharging the obligations owed to the different members.

3. This section uses the same terminology as other parts of the Legislative Guide. To provide orientation to the reader, this section should be read in conjunction with part three and the first section of part four.

I. Background

4. The first section of part four of the Legislative Guide considers the obligations of directors of individual companies in the period approaching insolvency, providing information on how those obligations are treated under current laws. While some jurisdictions have developed provisions to impose obligations on directors in the period approaching insolvency, the relative advantages and disadvantages of such regimes remain the subject of debate.[1] The first section of part four underlines the need for early action to be taken when businesses face financial difficulty in order to avoid rapid decline and to facilitate rescue and reorganization. It also notes that while there has been an appropriate refocusing of insolvency laws in many countries towards increasing the options for that early action to be taken, there has been little corresponding attention paid to creating appropriate incentives for directors to use those options.[2] The first section encourages the development of appropriate incentives by identifying, for incorporation in the law relating to insolvency, the basic obligations a director of an enterprise may have in the period approaching insolvency and the steps that might be taken to discharge those obligations. Those obligations would become enforceable only when insolvency proceedings have commenced.

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[1] Legislative Guide, part four, chap. I, paras. 8-10.

[2] Ibid., para. 6.

5. In the enterprise group context, the issue of directors' obligations in the period approaching insolvency does not appear to be clearly or widely addressed by national legislation. While the concept of enterprise groups has been considered and developed in many jurisdictions, the question of the obligations of directors of one or more members of those enterprise groups remains somewhat uncertain.[3]

6. Part three of the Legislative Guide, which addresses the insolvency treatment of enterprise groups, notes that enterprise groups are often characterized by varying degrees of economic integration (from highly centralized to relatively independent) and types of organizational structure (vertical or horizontal) that create complex relationships between group members and may involve different levels of ownership and control. Those factors, together with adherence to the single entity principle and the widespread lack of any explicit acknowledgement of the group reality in the legislation applicable to individual group members, raise a number of issues for directors of enterprise group members. Adherence to the single entity principle typically requires directors to promote the success and pursue the interests of the company they direct, respecting the limited liability of that company and ensuring that its interests are not sacrificed to those of the enterprise group, irrespective of the interests of the group as a whole, the position of the director's company in the group structure, the degree of independence or integration among group members and the incidence of ownership and control. But where that company's business is part of an enterprise group and reliant, at least to some extent, on other group members for the provision of vital functions (e.g. financing, accounting, legal services, suppliers, markets, management direction and decision-making or intellectual property), addressing the financial difficulties of that company in isolation is likely to be difficult, if not, in some cases, impossible. [Indeed, adhering to a strictly narrow interpretation of the director's obligations may bring about the failure that it is hoped to avoid.] Part three discusses in some detail the current economic reality of enterprise groups and, in the context of insolvency, the impact of treating enterprise group members as unrelated entities on resolving the financial difficulties of some group members or of the group more widely.[4]

7. The requirement to act in the interests of the directed company may be further complicated in the group context when a director of one group member performs that function or holds a managerial or executive position in other group members. In such a situation, it may be difficult for the director to separately identify the interests of each of those group members and treat them in isolation. [Moreover, the interests of those group members may be affected by the possibly competing economic goals or needs of other group members and those of the enterprise group collectively. The short and long term implications for the interests of the different group members may need to be assessed, which may involve accepting, even if only in the short term, some detriment to the interests of individual group members in order to achieve a longer term benefit for the enterprise group to which those individual members belong. Where a group insolvency solution is pursued, it is reasonable that some safeguards would apply.][5]

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[3] A/CN.9/WG.V/WP.115, para. 40, which outlines the manner in which a number of different jurisdictions address this issue.

[4] Legislative Guide, part three, chap. I.

[5] The changes to this paragraph address some of the concerns expressed at the forty-seventh session, A/CN.9/835, para. 17.

8. Some examples of situations in which the interests of individual group members may be affected by those of the group more widely may include where one group member is a key supplier, or provides finance to another group member or acts as a guarantor for finance provided by an external lender to another group member, in an attempt to keep the group as a whole afloat, including its own business; where one group member agrees to transfer its business or assets or surrender a business opportunity to another group member or to contract with that member on terms that could not be considered commercially viable, but where to do so may ultimately benefit the business of group member agreeing to the transfer; or where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations.

9. Such considerations might be relevant in the period approaching insolvency, when greater control and coordination of the groups' activities may be required to maximize efficiency and design solutions to resolve the financial difficulties of the group as a whole or for some of its parts. At that time, there may also be more opportunities for advantage to be taken of more vulnerable and dependent group members in order to benefit other members, such as through transfers of assets, diversion of business opportunities and use of those group members to conduct more risky transactions or activities or to absorb losses and bad assets.

10. To address the best interests of the directed group member, a director may require a degree of flexibility to weigh the various competing interests and act for the benefit of other group members or the group as a whole where that action coincides with the best interests of the directed member. To the extent that the course of action a director chooses to follow in such circumstances is reasonable and directed to avoiding insolvency or minimizing its impact on the directed group member, they should not be liable for breach of their obligations. [Where having weighed the competing interests of the directed group members, the course of action chosen gives rise to a conflict between the obligations the director owes to those different group members, that conflict should be disclosed to the affected group members. Resolving such a conflict might require mediation or negotiation of the opposing interests.]

11. While, as noted above, few laws address directors' obligations in the enterprise group context, courts in different jurisdictions have accorded differing degrees of recognition to the practical reality of the manner in which enterprise groups operate. While the focus is still upon directors exercising their powers for the benefit of their own group member or members, some jurisdictions may permit directors to have regard, for example, to the direct or derivative commercial benefits accruing to that group member from pursuing a particular course of action with other group members and to the extent to which their group member's prosperity or continued existence depends on the well-being of the group as a whole. Typically, however, collective benefit is not a sufficient justification by itself [for acts judged to be prejudicial to creditors.] Moreover, directors might also be required to take into account any reasonably foreseeable detriments that might flow to their group member as a result of the course of action taken and to consider the position of their group member's unsecured creditors, particularly where that member's solvency might be affected. The latter consideration is of particular importance where the transaction is a guarantee or security for a loan to another group member,

[especially where the survival of that other group member is not critical to the solvency of the group member giving the guarantee or security].

12. Other jurisdictions have allowed directors of group companies to act in the interests of the overall group when certain conditions are met, such as that the group has a [structure that affords group members some influence in the overall decisions]; that the group member took part in the long-term and coherent group policy; and that the directors in good faith reasonably assumed that any detriment suffered by their group member would in due course be made good by other advantages. Another approach permits a director of a group member to act in the interests of the parent provided it does not prejudice the group member's ability to pay its own creditors and the directors are authorized, either by the constitution of the group member or by shareholders. Under those laws, for the director to avoid liability, the group member should not be insolvent at the time the director acts, nor should it become insolvent by virtue of that action.

13. This section identifies the extent to which a director of an enterprise group member may take account of considerations beyond the group member they direct in fulfilling their obligations in the period approaching insolvency and the safeguards that should apply. Those considerations will, to a greater or lesser extent, reflect aspects of the economic reality of the enterprise group. This section proposes principles for inclusion in the law concerning the obligations of directors of enterprise group companies in the period approaching insolvency. These principles may serve as a reference point and can be used by policymakers as they examine and develop appropriate legal and regulatory frameworks. Whilst recognizing the desirability of achieving the goals of insolvency law (outlined in part one, chapter I, paragraphs 1-14 and recommendation 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls for entrepreneurs that may result from overly draconian rules.

14. This section does not deal with the liability of directors under criminal law, company law or tort law. It focusses only on those obligations that may be included in the law relating to insolvency and become enforceable once insolvency proceedings commence.

II. Elements of the obligations of directors of enterprise group companies in the period approaching insolvency

A. The nature of the obligations

15. The underlying rationale of imposing obligations on directors in the proximity of insolvency is addressed in the first section of part four, paragraphs 1 to 7, and remains equally applicable in the enterprise group context. The obligations of directors of a group member continue to be the same basic obligations as established in recommendation 255, but provision might be made to permit the broader context of the economic reality of the enterprise group to be taken into account in determining the steps that should be taken by a director to avoid liability for breach of those obligations. Relevant factors to be considered might include the position of the enterprise group member in the enterprise group, the degree of integration between enterprise group members (as mentioned in recommendation 217 of

part three) and the possibility of maximizing value in the group by designing a solution to the group's financial difficulties that includes the whole group or some of its parts. Such solutions may require a director of a group member in financial difficulty to take steps that may appear, at first glance, to be detrimental to that group member, but that will ultimately achieve a better result for it and ensure the continuation of its business and maximization of its value. Taking those same steps in circumstances where they are not likely to benefit the group member in financial difficulty may expose directors to liability for failure to discharge their obligations reasonably.

16. One consideration for directors evaluating the steps to be taken to address the group member's financial difficulties is the impact of those steps on creditors of that group member, especially when wider group interests are to be accommodated. Recommendation 255 requires directors to have due regard to the interests of creditors, as well as of other stakeholders of the group member. The interests of creditors may be safeguarded by establishing a "no worse off" standard — i.e. that creditors will be no worse off under the steps that are taken than they would have been had those steps not been taken.[6]

17. The first section of part four discusses the types of steps that a director might reasonably be expected to take in order to address financial difficulty, avoid the onset of insolvency and, where it is unavoidable, to minimize its impact (see part four, chap. II, para. 5). Those steps would continue to be relevant in the group context and might be supplemented by additional steps, depending on the factual situation, that might effectively require some degree of mutual assistance and cooperation with other group members. Those additional steps might be affected by the position of the group member in the enterprise group and require consideration of whether more value might be preserved or created by assisting the implementation of a solution for the enterprise group as a whole or some of its parts, than by taking steps that relate only to the individual group member. Consideration might be given to assessing the directed member's obligations, both financial and legal, to other group members; the transactions that should (or should not) be entered into with other group members; possible sources and availability of finance [(both in the period approaching insolvency and once formal proceedings commence)],[7] including its provision by the directed group member to other group members; and the impact of possible solutions, whether limited to the directed group member or involving the group more widely, on creditors and other stakeholders of the directed group member. A director might also consider taking steps to organize informal negotiations with creditors, such as voluntary

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[6] The Working Group may wish to consider whether there is a need for the safeguards provided in this draft text and the draft being developed on cross-border insolvency of enterprise groups to be consistent. See for e.g., draft art. 8, A/CN.9/WG.V/WP.137/Add.1, which refers to adequate protection of creditors in the context of developing a group insolvency solution. See also the purpose clause for recommendations 267-268 and recommendation 267 below.

[7] The language in parentheses has been added to broaden the issues to be considered beyond the period after proceedings commence (reflected by the current drafting and use of the phrase "post-commencement finance") to include finance that might be required in the period approaching insolvency before the group member commences formal proceedings, as well as once formal proceedings have been applied for and subsequently commenced. This would include both post-application and post-commencement finance, as discussed in the Legislative Guide, part three. The same change is reflected in rec. 268, para. 1(b).

restructuring negotiations, with a view to devising a solution for the enterprise group as a whole or some of its parts where that will benefit the directed group member.

18. Where insolvency is unavoidable and formal proceedings are to be commenced, a director might consider the court in which those proceedings should commence, particularly when there is a possibility of making a joint application with other group members and procedurally coordinating those proceedings, as discussed in part three.[8]

Recommendations 267-268

Purpose of legislative provisions

The purpose of these provisions addressing the obligations of those responsible for making decisions concerning the management of an enterprise group member that arise when insolvency is imminent or unavoidable is:

(a) To protect the legitimate interests of creditors and other stakeholders of the enterprise group member;

(b) To ensure that those responsible for making decisions concerning the management of an enterprise group member are informed of their roles and responsibilities in those circumstances;

(c) To recognize the impact of the enterprise group member's position in the enterprise group upon the manner in which the group member should be managed to address its imminent or unavoidable insolvency and the obligations of those responsible for making decisions concerning the management of that group member, including in situations where they are also responsible for making decisions concerning the management of other group members; and

(d) To permit an enterprise group member to be managed, where appropriate, in a manner that will maximize value in the enterprise group by promoting approaches to resolve insolvency for the enterprise group as a whole or for some of its parts, whilst taking reasonable steps to ensure that the creditors of that group member and its other stakeholders are no worse off than if that group member had not been managed so as to promote such approaches to resolution.

Paragraphs (a)-(d) should be implemented in a way that does not:

(a) Unnecessarily adversely affect successful business reorganization of the enterprise group member, taking into account the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole or some of its parts, the position of the group member in the enterprise group and the degree of integration between group members;

(b) Discourage participation in the management of companies, particularly those experiencing financial difficulty; or

(c) Prevent the exercise of reasonable business judgement or the taking of reasonable commercial risk.

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[8] Legislative Guide, part three, recs. 202-210.

Contents of legislative provisions

The obligations

267. (a) The law relating to insolvency should specify that the obligations established in recommendation 255 will apply to a director of a company that is a member of an enterprise group.

(b) Insofar as not inconsistent with those obligations, the director of an enterprise group member may take reasonable steps to promote a solution that addresses the insolvency of the enterprise group as a whole or some of its parts. In so doing, the director may take into account the possible benefits of maximizing the value of the enterprise group as a whole, whilst taking reasonable steps to ensure that the creditors of the group member and its other stakeholders are no worse off than if that group member had not been managed so as to promote such a solution.

Reasonable steps for the purposes of recommendation 267

268. For the purposes of recommendation[s] 255 and 267, and to the extent not inconsistent with the obligations of the director to the group member of which they are director reasonable steps in the enterprise group context might include, in addition to the steps outlined in recommendation 256:

(a) Evaluating the current financial situation of the enterprise group member and of the enterprise group to consider whether more value might be preserved or created by considering a solution for the enterprise group as a whole or some of its parts;

(b) Considering the financial and other obligations of the group member to other enterprise group members, whether transactions should be entered into with other enterprise group members, and possible sources and availability of finance, [including when formal proceedings are to be commenced];[9]

(c) Evaluating whether the enterprise group member's creditors and other stakeholders would be better off under an insolvency solution for the enterprise group as a whole or some of its parts;

(d) Assisting the implementation of an insolvency solution for the group as a whole or some of its parts;

(e) Holding and participating in informal negotiations with creditors, such as voluntary restructuring negotiations,[10] where organized for the enterprise group as a whole or some of its parts; and

(f) Where formal insolvency proceedings are to be commenced, considering the court in which they should be commenced, whether a joint application[11] with other relevant enterprise group members is possible or appropriate and whether proceedings should be procedurally coordinated.[12]

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[9] See footnote 7 for an explanation of this revision.

[10] Legislative Guide, part one, chap. II, paras. 2-18.

[11] Ibid., part three, recs. 199-201.

[12] Ibid., part three, recs. 202-210.

B. Identifying the parties who owe the obligations

19. In the enterprise group context, identifying those responsible for management decisions may be more complex than in the case of a single company. Various layers of management and influence can affect the affairs of any single group member and the manner in which it conducts its business, particularly in the vicinity of insolvency. Such influence may undermine the ability of the directors of a group member to take appropriate steps to address the financial difficulties of the directed member or involve that member in the financial difficulties of other group members, to the detriment of the creditors of the directed group member. This may occur in numerous circumstances, such as where the boards of two or more members consist of substantially the same persons; where the majority of the board of one group member is nominated by another group member, which is in a position of control; where one group member controls the management and financial decision-making of the group; or where one group member interferes in a sustained and pervasive manner in the management of another group member, typically in the situation of a parent and controlled group member.

20. There may also be some enterprise groups in which it is difficult to identify the precise boundaries between group members because management responsibilities across different boards are blurred. In addition, relevant executives and decision makers may be employed by group members several steps removed from the group member in question and the separate identity and liability of that group member may be generally disregarded in the daily business of the group. In such situations, serious issues may arise as to the obligations of such persons with respect both to the actual business conducted by the group member in question and to the group member by which they are employed.

21. Persons that might be considered to be a director in the group context could include another group member or the director of another group member, including a shadow director[13] of that other group member. While some laws do not permit a group member to be formally appointed as a director of another group member, such a group member might nevertheless be regarded as a shadow director of that other member when it exercises influence over or directs its activities.

22. Paragraphs 13 to 16 of the first section of part four discuss the parties who owe the obligations discussed above. Recommendation 258 adopts a broad formulation, providing that it should include any person formally appointed as a director or exercising factual control and performing the functions of a director. Paragraph 15 of the commentary notes the types of function that may be expected to be performed by such a person. Those considerations would also be applicable in the enterprise group context discussed in this part.

C. Conflict of obligations

23. It may often be the case in enterprise groups that a director performs that function or holds a management or executive position in more than one group member, whether as a result of the ownership and control structure of the group, the

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[13] Ibid., part four, footnote 11 to para. 13.

alliances between group members, family ties across the group or some other aspect of the manner in which the business or businesses of the group are organized.[14] Whatever the reason, a director who sits on the boards of, [or has managerial responsibility for,] a number of different group members may face, in the period approaching insolvency, potential conflicts between the obligations owed to those different group members as they attempt to identify the course of action most likely to preserve value and provide the best solution to the financial difficulties of each group member. The nature and complexity of the conflict may relate to the position of the directed entities in the group hierarchy, the related degree of integration between group members, and the incidence of control and ownership. Where a director sits on the boards of the parent and controlled group members, for example, that director needs to be able to demonstrate that any transaction involving the parent took into account, and was fair and reasonable to, the controlled group member.

24. In addition, the interests of the directed group members may be closely intertwined with the enterprise group more widely, requiring the economic reality of the group as a whole to be considered. In such circumstances, steps that may be regarded as detrimental to a company operating as a stand-alone entity may be reasonable when considered in that broader context. The business of a subsidiary, for example, may be generally dependent on the business of the group more widely and it may be appropriate for that subsidiary to provide funding in the short term for other members in order to keep that wider business operating and ultimately save the business of the subsidiary itself.

25. Directors facing such a conflict might be expected to act reasonably and take adequate and appropriate steps to address the situation. That might require a director, depending on the factual situation, to identify the nature and extent of the conflict in accordance with applicable law and determine how it might be addressed. It may be sufficient in some circumstances for the director to disclose relevant information regarding the conflict, including its nature and extent, to the affected boards of directors, while in other circumstances wider disclosure to creditors and other stakeholders, including the boards of directors of other group members, may be reasonable. Such disclosure may be sufficient to support the director's continuing integrity and any lack of the impartiality or independence required can be assessed against the circumstances disclosed.

26. It may be appropriate in some circumstances for the director to refrain from participating in any decisions relating to the conflict that are to be taken by the affected boards or attending meetings at which related issues are to be discussed [and for this to be recorded as a deliberate approach agreed with fellow directors, as opposed to an act of omission.] Appointment of additional or substitute board members may be possible in some cases and, if the conflict cannot be resolved, the director may consider, as a last resort, resigning from one or other of the affected boards. That might potentially include resignation from the board of an insolvent or a solvent group member. While that option of resignation may free the director of the dilemma, it simultaneously neglects the larger problem and may exacerbate the situation, especially in the period approaching insolvency, if it leaves the affected group member or members without the expertise necessary to address their financial

[14] See Legislative Guide, part three, chap. I, paras. 6-15.

difficulties. As noted in the first section of part four, resignation from the board will not render a director immune from liability, as under some laws they may leave themselves open to the suggestion that the resignation was connected to the insolvency or that they had failed to take reasonable steps to minimize losses to creditors in the face of impending insolvency.[15]

27. [Good corporate governance that supports analyses of the situations of the respective group members giving rise to the conflict and records the reasons for the action taken may be critical to the director in discharging obligations with respect to the conflict. A policy on corporate governance does not, however, replace or limit obligations owed by directors to the group member or members. It offers indicia as to what steps are considered reasonable to manage the conflict. Different corporate governance policies and standards between the members of an enterprise group can also lead to conflicting solutions and outcomes, which need to be carefully reviewed and assessed by directors.][16]

Recommendations 269-270

Purpose of legislative provisions

The purpose of provisions on conflict of obligations is to address the situation where a director of one enterprise group member holds that position or a management or executive position in another or other enterprise group members, whether the parent or a controlled group member. That situation may give rise, in the period approaching insolvency, to a conflict between the obligations owed to the different group members, which may have an impact upon the steps to be taken to discharge those obligations.

Contents of legislative provisions

Conflict of obligations

269. The law relating to insolvency should address the situation where, in the period approaching insolvency, a director of an enterprise group member who holds that position or a management or executive position in another or in other enterprise group members has a conflict between the obligations owed in relation to the creditors and other stakeholders of those different group members.

Reasonable steps for the purposes of recommendation 269

270. The insolvency law may specify that a director faced with such conflicting obligations should take reasonable steps to manage those conflicts. Reasonable steps may include:

(a) Obtaining advice to establish the nature and extent of the different obligations;

(b) Identifying the parties to whom the conflict of obligations must be disclosed and disclosing relevant information, including, in particular, the nature and extent of the conflict;

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[15] Legislative Guide, part four, chap. II, para. 27.

[16] Revisions to this paragraph seek to address concerns expressed at the forty-seventh session (A/CN.9/835, para. 18) and include some additional suggested text.

(c) Identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant group members on the matters giving rise to such conflicts, or (ii) be present at any board meeting at which such issues are to be considered;

(d) Seeking the appointment of an additional director when the conflicting obligations cannot be reconciled; and

(e) As a last resort, where there is no alternative course of action available, resigning from the relevant board(s) of directors.

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Insolvency Law

Facilitating the cross-border insolvency of multinational enterprise groups: compilation of principles and draft articles

Note by the Secretariat

Contents

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I. Introduction

1. The provisions set out below are arranged in accordance with the structure agreed at the forty-eighth session (A/CN.9/864, para. 18). There is some overlap between the content of the three texts that are merged below, but the original numbering of each article or principle is retained to indicate the origin of each provision; renumbering can be undertaken at a later stage. Where more than one article addresses the same issue they have been merged, while principles that are reflected in the content of articles appear in footnotes to those articles. Principles that address issues not covered by the articles are included in the text; the Working Group may wish to consider whether the substance of those principles should be reflected in draft legislative provisions. The drafting of the principles and the numbered articles has been revised to ensure consistent use of terminology such as “planning proceeding”, rather than “coordinating proceeding”.

II. Draft legislative provisions on facilitating the cross-border insolvency of multinational enterprise groups

Chapter 1. General provisions

Article 1. Scope [*to be drafted*][1]

Principle 1 bis[2]

The principles that follow are each subject to two fundamental underpinning principles:

(a) The jurisdiction of the courts in the State in which the centre of main interests (COMI) of an enterprise group member is located remains unaffected; and

(b) The principles do not replace or interfere with any process or procedure (including any permission, consent or approval) required by the jurisdiction in which the COMI of an enterprise group member is located, in respect of that enterprise group member’s participation [to any extent] in a group insolvency solution.

Principle 1

If required or requested to address the insolvency of an enterprise group member, insolvency proceedings may be commenced. When proceedings are not required or requested, there is no obligation to commence such proceedings.

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[1] The material contained in the paragraphs 3 and 4 of the Introduction in A/CN.9/WG.V/WP.137 could be included in the scope provision.

[2] Principle 1bis is taken from A/CN.9/864, para. 14.

Article 2. Definitions[3]

For the purposes of these provisions:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;[4]

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;[5]

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;[6]

(d) "Enterprise group member" means

Variant 1: [an enterprise referred to in subparagraph (a)];[7]

Variant 2: [an enterprise that has a separate legal identity and that is interconnected, by control or significant ownership, with one or more other enterprises];[8]

(e) "Group Representative" means

Variant 1: a person or body, [including one appointed on an interim basis], authorized to act as a representative of a proceeding commenced in this State in respect of an enterprise group member whose centre of main interests is located in this State and in which other group members are participating for the purpose of developing a group insolvency solution;[9]

Variant 2: [a person or body who is appointed pursuant to article B, paragraph 3 and who is responsible for seeking to develop a group insolvency solution];[10]

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[3] The variants set forth below are suggested as a means of simplifying and clarifying the drafting of the various proposals that have been made. They are not intended to introduce new material for consideration.

[4] Use of this definition from the Legislative Guide, part three was agreed by the Working Group at its forty-fifth session (A/CN.9/803, para. 16). This definition and the definitions of "enterprise group" and "control" are included for the information of the Working Group; if not required in this text, they can be deleted at a later stage.

[5] Use of this definition from the Legislative Guide, part three was agreed by the Working Group at its forty-fifth session (A/CN.9/803, para. 16).

[6] This definition is found in the Legislative Guide, part three, glossary, para. 4(c).

[7] Variant 1 of subpara. (d) is taken from A/CN.9/WG.V/WP.128.

[8] Variant 2 of subpara. (d) is taken from Art. A, para. 1 as set forth in A/CN.9/864, para. 39. This variant repeats elements of the definitions of "enterprise" and "enterprise group" as those terms appear in part three of the Legislative Guide, which are included at subparas. (a) and (b). This definition might thus be revised in accordance with variant 1 or as "an enterprise that is a member of an enterprise group".

[9] Variant 1 of subpara. (e) is taken from A/CN.9/WG.V/WP.134.

[10] Variant 2 of subpara. (e) is taken from Art. A, para. 2 as set forth in A/CN.9/864, para. 39. This person need not necessarily be authorized to administer the assets etc. of the debtors with their COMI in the commencing State and an insolvency representative (IR) may be appointed in those proceedings.

(f) "Group insolvency solution" means

Variant 1: [a set of proposals adopted in a planning proceeding:

(a) For the reorganization, sale, or liquidation of some or all of the operations or assets of more than one group member;

(b) That would be likely to add to the overall combined value of the group members involved; and

(c) That must be approved, insofar as the proposals relate to a particular group member, in the jurisdiction in which that group member has its centre of main interests];[11]

Variant 2: [a proposal or set of proposals developed in a planning proceeding to enhance the overall combined value of two or more enterprise group members through the reorganization, sale, or liquidation of some or all of the operations or assets of those group members.][12]

(g) "Planning proceeding" means

Variant 1: a proceeding:

(a) That is a main proceeding for an enterprise group member that would be a necessary and integral part of a group insolvency solution;

(b) In which a group representative has been appointed;

(c) In which there is a reasonable prospect of developing a group insolvency solution; and

(d) In which one or more additional group members are participating for the purpose of attempting to develop a group insolvency solution.[13]

Variant 2: [a main proceeding commenced in respect of an enterprise group member that is[14] a necessary and integral part of a group insolvency solution, in which one or more additional group members are participating[15] for the purpose of developing a group insolvency solution and in which a group representative has been appointed.]

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[11] Variant 1 of subpara. (f) is taken from art. A, para. 3; subparagraph (c) is a substantive requirement covered by article E and thus may not need to be part of the definition.

[12] Variant 2 of subpara. (f) is a drafting proposal by the Secretariat.

[13] Variant 1 of subpara. (g) is taken from art. A, para. 4 as set forth in A/CN.9/864, para. 39.

[14] Variant 2 of subpara. (g) is a drafting proposal by the Secretariat. This variant provides that the group member "is" a "necessary and integral part" of the group insolvency solution, rather than using the phrase "would be" a necessary and integral part, which suggests an indeterminate time in the future.

[15] Although it may be more flexible to provide for future participation by group members by addition of the words "or are likely to participate", art. B, para. 3 currently requires that one or more additional group members be participating in the main proceeding before the group representative can be appointed.

Chapter 2. Cooperation and coordination[16]

Article 9. Cooperation and direct communication between a court of this State and foreign courts or group representatives

1. [In the matters referred to in article 1,] the court shall cooperate to the maximum extent possible with foreign courts or group representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court to facilitate the development and implementation of a group insolvency solution.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or group representatives concerning members of the same enterprise group [participating in a [planning proceeding] [group insolvency solution]] and in particular with respect to implementation of a group insolvency solution and the roles of the respective courts when such a solution is to be implemented.

Article 10. Cooperation to the maximum extent possible under article 9

Cooperation to the maximum extent possible for the purposes of article 9 may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with the foreign court or group representative;

(c) Coordination of the administration and supervision of the affairs of the enterprise group members participating in a [planning proceeding] [group insolvency solution];

(d) Coordination of concurrent foreign proceedings commenced with respect to enterprise group members participating in a [planning proceeding] [group insolvency solution];

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval of the treatment of the claims of creditors of the enacting State in a foreign proceeding;[17]

(g) Approval of agreements concerning the coordination of proceedings to facilitate the implementation of a group insolvency solution;

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[16] These articles of chapter 2 have been revised to take account of some elements of the regime proposed in chapters 3-4; further revisions may be required as those chapters are further developed to include, for example, foreign representatives of enterprise group members participating in a group insolvency solution in addition to the group representative. Such an addition might be relevant, in the context of the fact situation given above in para. 7 of A/CN.9/WG.V/WP.137 to include any insolvency representatives appointed to administer the liquidation or reorganization of debtors 3 and 4 in States B and C.

[17] This subparagraph will need to be aligned with whatever decision is taken with respect to draft art. F, in particular the application of that article in circumstances where there is no planning proceeding.

(g) bis Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication;[18] and

(h) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 11. *Deleted*

Article 12. Effect of communication under article 9[19]

Participation by a court in communication pursuant to article 9, paragraph 2 does not imply:

(a) A compromise or waiver by the court of any powers, responsibilities or authority;

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts. Each court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

Article 13. Coordination of hearings

1. The court may conduct a hearing in coordination with a foreign court.

2. The substantive and procedural rights of parties and the jurisdiction of each court may be safeguarded by reaching agreement on the conditions to govern the coordinated hearings.

3. Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

Article 14. Cooperation and direct communication between [group representatives] and foreign courts

1. [In the matters referred to in article 1,] the [group representative] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives [of enterprise group members] to facilitate the development and implementation of a group insolvency solution.

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[18] Subparagraph (g) bis has been added as suggested at the forty-eighth session: A/CN.9/864, para. 21(b).

[19] Support was expressed at the forty-eighth session (A/CN.9/864, para. 23) in favour of both deleting and retaining draft art. 12, but it was ultimately agreed that it should be retained in the text for further consideration.

2. The [group representative] is entitled, 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 and foreign representatives.

Article 15. Cooperation to the maximum extent possible under article 14

For the purposes of article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members participating in a [planning proceeding] [group insolvency solution], provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of proceedings to facilitate the implementation of a group insolvency solution;

(c) Allocation of responsibilities between the group representative and foreign representatives;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members participating in a [planning proceeding] [group insolvency solution]; and

(e) Coordination with respect to the proposal and negotiation of [reorganization plans] [a group insolvency solution].

Article 17. Authority to enter into agreements concerning the coordination of proceedings

An agreement concerning the coordination of proceedings may be entered into to facilitate the implementation of a group insolvency solution.

Article 18. Appointment of a single [or the same] insolvency representative[20]

1. The court may coordinate with foreign courts with respect to the [appointment] [recognition] of a single [or the same] insolvency representative to [administer] [coordinate] insolvency proceedings concerning members of the same

[20] The intent of this article as originally drafted was to facilitate cooperation and coordination by appointing the same person as insolvency representative to all relevant group members in different States (provided that person was appropriately qualified) (see Legislative Guide, part three, chap. II, paras. 142-144). In the context of the regime proposed in chapters 3-4, however, this article might need to be revised or omitted, as a different approach is contemplated. Chapter 3 provides for appointment in the State of the COMI of one or more group members (in the fact situation provided in para. 7 of A/CN.9/WG.V/WP.137, debtors 1 and 2 in State A) of a group representative that can represent the State A proceedings in other States as required for the purposes of developing a group insolvency solution. It is not contemplated that foreign courts would cooperate with the court of State A in making that appointment, as the group representative represents only the proceedings in State A. That person, or another person, may be appointed to administer the reorganization or liquidation of debtors 1 and 2 in State A; that issue is not addressed by the provisions in chapter 3. For the purposes of developing a group insolvency solution, the group representative appointed in State A may not need to be appointed in other States provided the substance of chapters 3-4 is available, i.e. recognition, participation, standing, relief and so forth. Cooperation and coordination between the courts, other insolvency representatives and the group representative is addressed in the other articles of this chapter.

enterprise group in different States [where a group insolvency solution is being developed], provided that the insolvency representative is qualified for appointment in each of the relevant States.

2. To the extent required by applicable law, the insolvency representative is subject to the supervision of each appointing court.

Chapter 3. Facilitating the development and recognition of a group insolvency solution

A. Provisions relevant to a State in which a planning proceeding commences (i.e. State A concerning debtors 1 and 2)

Article B. Participation by enterprise group members in an insolvency proceeding in this State; appointment of a group representative[21]

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State for an enterprise group member whose centre of main interests is located in this State, any other group member (whether solvent or insolvent)[22] may participate in that proceeding for the purpose of attempting to develop a group insolvency solution.

2. An insolvent enterprise group member whose centre of main interests is in another State may not participate in a proceeding under paragraph 1 if a court in that other State precludes it from so doing.[23]

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[21] Art. B, para. 1 gives effect to Principles 2, 3 and 5. Principle 2: "When it is proposed that a group insolvency solution be developed for some or all of the members of an enterprise group, that solution will require coordination as between group members and may be developed through a planning proceeding.";
Principle 3: "Adopting the approach of recommendation 250, enterprise group members might designate one of the insolvency proceedings commenced (or to be commenced) with respect to group members participating in the group solution to function as a coordinating proceeding, the role of which would be exclusively procedural, rather than substantive. A proviso might be that a coordinating proceeding should be a proceeding taking place in a State that is the COMI of at least one of the enterprise group members that is a necessary and integral part of the enterprise group solution."; and
Principle 5, sentences 1 and 3: "1. Participation in the coordination process would be voluntary for those group members whose COMI is located in a jurisdiction different to that of the planning proceeding.
3. Solvent members of the enterprise group may participate in a coordination process without such participation implying a submission to the jurisdiction of a domestic or foreign insolvency court or to the applicability of domestic or foreign insolvency laws." (see art. 10 of the Model Law).

[22] The use of the word "insolvent" should be understood as distinguishing those group members that may be subject to insolvency proceedings in accordance with recommendations 15 and 16 of the Legislative Guide, from those group members not so subject that may be described as "solvent". See footnote 4 of A/CN.9/WG.V/WP.137. See also Legislative Guide, part three, rec. 238, which stresses the voluntary nature of participation by solvent group members.

[23] Para. 2 is taken from art. B, para. 2 as set forth in A/CN.9/864, para. 41. See footnote 15 of A/CN.9/WG.V/WP.137 on possibility of using permissive language in this draft para.

3. *Variant 1*: If one or more enterprise group members participate in a proceeding under paragraph 1, the court may appoint a group representative, who may then seek recognition from foreign courts and may seek to participate in any foreign proceeding related to a participating group member.[24]

Variant 2: If one or more enterprise group members participate in a proceeding referred to in paragraph 1 of this article, the court may appoint a group representative. The group representative is authorized to act in a foreign State on behalf of that proceeding and to participate in any foreign proceeding relating to the enterprise group members participating in the [group insolvency solution] [planning proceeding], as permitted by the applicable foreign law.[25]

Principle 4, paragraph 2

The court can receive a request for recognition of the type referred to in paragraph 1 of this principle.[26]

Principle 5, sentence 2

For those group members whose COMI is located in the same jurisdiction as the planning proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply.

Article D. Relief available to a planning proceeding in this State

2. To the extent needed to preserve the possibility of developing a group insolvency solution, the court may, at the request of the group representative, grant the following relief with respect to the assets or operations of any insolvent enterprise group member that is participating in the planning proceeding in this State:[27]

(a) Staying execution against the enterprise group member's assets;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Suspending the proceedings[28] temporarily to allow for the development of a group insolvency solution;

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[24] Variant 1 of para. 3 is taken from art. B, para. 3 as set forth in A/CN.9/864, para. 41.

[25] Variant 2 of para. 3 is a drafting proposal by the Secretariat that seeks to clarify the different elements of variant 1, drawing upon art. 5 of the Model Law.

[26] See principle 4, para. 1 below.

[27] See footnote 19 of A/CN.9/WG.V/WP.137. As currently drafted, the scope of this draft article is unclear. The chapeau appears to refer to the State in which the planning proceeding is taking place and it has thus been included in the category A provisions. It may also be relevant to the category B provisions. In that case, revision of the drafting might clarify that point and arts. D, 6 and 7 will need to be rationalized to avoid repetition and overlap.

[28] It may be desirable to add further language to clarify which proceeding subpara. 2(c) refers to — the planning proceeding or other proceedings that might be taking place in the State with respect to participating foreign debtors (e.g. for debtors 3 and 4 in State A).

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the enterprise group member's assets, rights, obligations, or liabilities;

(e) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the enterprise group member's assets, affairs, rights, obligations, or liabilities; and

(g) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

B. Provisions relevant to a State in which recognition of a planning proceeding is sought

Article 3. Recognition of a planning proceeding

1. A group representative appointed in a planning proceeding may apply for recognition of that proceeding [in this State].[29]

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the planning proceeding and appointing the group representative; or

(b) A certificate from the foreign court affirming the existence of the planning proceeding and of the appointment of the group representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the group representative.

3. An application for recognition shall also be accompanied by:[30]

(a) *Variant 1*: Evidence that [each group member sought to be represented in [a foreign proceeding] [a group insolvency solution]] has agreed to participate in that [proceeding] [solution]. Where such a group member is subject to

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[29] Para. 1 of art. 3 incorporates art. C as set forth in A/CN.9/864, para. 43.

[30] Variant 1 of subpara. 3 (a) reflects drafting suggestions made at the forty-eighth session (A/CN.9/864, para. 33(a)). Variant 2 of subpara. 3 (a) has been prepared by the Secretariat. Subpara. 3 (a) may not be required on the basis that a group representative cannot be appointed in a planning proceeding unless group members have been permitted to participate in that proceeding in accordance with art. B, para. 2. In other words, the court appointing the group representative has already considered the question of permission. Thus, all that may be required for recognition is that the group representative satisfies the other requirements of art. 3, paras. 2, 3 and 4.

insolvency proceedings[31] in the court of its centre of main interests, evidence shall be procured that any approval which may be required under the domestic law of the State of the commencement of proceedings for the participation in the [foreign proceeding] [proposed enterprise group insolvency solution] has been obtained;

(a) *Variant 2*: Evidence that an insolvent enterprise group member participating in the [planning proceeding] [foreign proceeding] whose centre of main interests is not in the State in which the planning proceeding commenced has [obtained permission to participate] [not been precluded from participating] in that proceeding in accordance with article B, paragraph 2;

[(b) A statement identifying all members of the enterprise group and all proceedings commenced in respect of enterprise group members participating in the [group insolvency solution] [planning proceeding] that are known to the group representative.][32]

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Principle 4, paragraph 1

The court located in the COMI (the COMI court) of an enterprise group member participating in a group insolvency solution can authorize the insolvency representative appointed in insolvency proceedings taking place in the COMI to seek:

(i) To participate and be heard in a planning proceeding taking place in another jurisdiction; and

(ii) Recognition by the court of the proceeding in the COMI jurisdiction.

Article 6. Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the group representative, where relief is urgently needed to protect the assets of the enterprise group member subject to a [foreign proceeding] [planning proceeding] or the interests of the creditors, grant appropriate relief of a provisional nature, including:

(a) Staying execution against the enterprise group member's assets;

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Entrusting the administration of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets that, by

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[31] The words "subject to insolvency proceedings" are used throughout the Legislative Guide, part three to refer to those group members for which insolvency proceedings have commenced.

[32] Subpara. 3 (b) includes drafting suggestions made at the forty-eighth session (A/CN.9/864, para. 33(d)).

their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

[(c) bis Entrusting the realization of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy];

(d) Recognizing existing arrangements concerning the funding of enterprise group members participating in the [group insolvency solution] [planning proceeding] where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements[, subject to any appropriate safeguards the court may apply].[33]

(e) Deleted.[34]

2. [*Insert provisions of the enacting State relating to notice*.]

3. Unless extended under article 7, subparagraph 1 (g), the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [group insolvency solution] [planning proceeding] [proceeding located in the COMI of an enterprise group member participating in the group insolvency solution].[35]

Article 5. Decision to recognize a planning proceeding

1. [Subject to any applicable public policy exception,] a planning proceeding shall be recognized if:

(a) and (b) Deleted;

(c) The application meets the requirements of [article 3, paragraphs ...] [is a planning proceeding within the meaning of article 2, paragraph (g)];[36]

(d) The application has been submitted to the court referred to in article ...;

(e) Deleted;

[(f) The foreign proceeding was commenced on the basis of the centre of main interests or establishment of the foreign group member or (if permissible under the laws of the enacting State) any other basis, including the presence of

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[33] The additional text at the end of subpara. 1(d) was suggested at the forty-eighth session (A/CN.9/864, para. 36(c)). If the Working Group decides to retain art. 8 as drafted, para. 2 of that article would obviate the need to include those additional words in art. 6, subpara. 1(d). In principle support for including a provision of this nature on post commencement finance was expressed at the forty-fifth and forth-sixth sessions (A/CN.9/803, para. 30 and A/CN.9/829, para. 49 respectively). As drafted, subpara. 1(d) would apply both to post-application and post-commencement finance. This provision might need to be aligned with draft art. 7, para. (h).

[34] Subpara. 1(e) has been deleted following agreement at the forty-eighth session (A/CN.9/864, para. 36(d)).

[35] The additional text at the end of art. 6, para. 4 was suggested at the forth-eighth session (A/CN.9/864, para. 36(e)).

[36] Art. 5, para. 1 (c) incorporates art. C.

assets of the foreign group member or voluntary submission by the foreign group member to the jurisdiction of the court of the foreign State].[37]

(g), (h) and (i) Deleted.[38]

2. An application for recognition of a [foreign proceeding] [planning proceeding] shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of changes in the status of the [group insolvency solution] [planning proceeding] or in the status of their own appointment occurring after the application for recognition is made.

Article 7. Relief that may be granted upon recognition of a planning proceeding

1. Upon recognition of a planning proceeding, where necessary to protect the assets of the enterprise group member[39] or the interests of creditors and to facilitate the development of a group insolvency solution, the court may, at the request of the group representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member;[40]

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Staying execution against the assets of the enterprise group member;

(d) Suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group member, except where authorized by the court;

(e) Entrusting the administration of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court;

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[37] It was acknowledged at the forty-eighth session that the drafting of subpara. 1(f) gave rise to numerous concerns (A/CN.9/864, para. 35) and thus required further consideration. It has been retained in the revised draft text only to remind the Working Group of the need to discuss the issue of whether to depart in this draft text from the Model Law approach of recognizing proceedings only on the basis of COMI or establishment.

[38] Although there was agreement at the forty-eighth session to retain subparas. 1(g) and (h), they have been deleted from the revised draft text, as they repeated elements of the definition of "planning proceeding". Para. (i) has been deleted following a suggestion at the forty-eighth session (A/CN.9/864, para. 34(b)).

[39] The drafting of some elements of art. 7 might need to specify which group members are being referred to — those in respect of which the planning proceeding commenced (i.e. that have their COMI in the State in which the planning proceeding commenced) or those participating in the planning proceeding that might have their COMI in the receiving State or both in some circumstances. Cf. art. 7, para. 2 and use of the words "in this State", also see footnote 27 above and footnote 19 of A/CN.9/WG.V/WP.137 relating to art. D, para. 2.

[40] It might be noted that art.7, subparas. 1 (a) and (b) overlap with draft art. H, para. 1.

[(e) bis Entrusting the realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court;]

(f) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of the enterprise group member;

(g) Extending any provisional relief granted;

(h) [When a group member located in this State is providing funding to other group members and is participating in the [group insolvency solution] [planning proceeding]], and [where permitted by relevant laws [of the receiving State]], recognizing existing arrangements concerning the funding of enterprise group members participating in the [group insolvency solution] [planning proceeding] and authorizing the continued provision of finance under those funding arrangements;[41]

(i) Subject to article 8, approving treatment in the foreign proceeding of the claims of creditors located in this State;[42] or

(j) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Upon recognition of a planning proceeding the court may, at the request of the group representative, entrust the distribution of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

Article D. Participation of a group representative in a proceeding in this State

1. Upon recognition of a planning proceeding, the group representative may participate in any proceedings[43] in this State concerning enterprise group members that are participating in the planning proceeding.

Article 8. Protection of creditors and other interested persons[44]

1. In granting or denying relief under article 6 or 7, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 6 or 7 to conditions it considers appropriate.

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[41] Additional language in art. 7, subpara. 1 (h) was agreed at the forty-eighth session (A/CN.9/864, para. 37(b)). This subpara. and art. 6, subpara. 1 (d) might need to be aligned.

[42] Art. 7, subpara. 1 (i) may need to be aligned to art. F, para. 1 and art. G, para. 1 noting that those articles are intended to apply irrespective of whether or not there is a planning proceeding.

[43] Are the proceedings referred to in this para. only insolvency proceedings? If so, the words "[*identify the laws of the enacting State relating to insolvency*]" might be added.

[44] There was general support at the forty-eighth session for inclusion of an article along the lines of art. 8 as drafted. The Working Group may wish to note that art. 8 may overlap with other articles, including art. H, para. 2.

3. The court may, at the request of the group representative or a person affected by relief granted under article 6 or 7, or at its own motion, modify or terminate such relief.

Article E. Approval of local elements of a group insolvency solution[45]

1. If a proposed group insolvency solution is developed in the planning proceeding, and the group representative submits to the court in this State[46]

Variant 1: the portion of the group insolvency solution affecting an insolvent group member whose centre of main interests [or establishment][47] is in this State, the court shall submit the relevant portion of the group insolvency solution to the approval process in [*refer to the relevant provisions in domestic insolvency law*].[48]

Variant 2: that group insolvency solution, the court shall submit the relevant portion of the group insolvency solution affecting an insolvent group member whose centre of main interests [or establishment] is in this State to the approval process in [*refer to the relevant provisions in domestic insolvency law*].[49]

2. If the approval process [pursuant to] [referred to in] paragraph 1 results in approval of the portion of the group insolvency solution affecting the enterprise group member, the court shall confirm and implement those elements relating to assets or operations in this State.

Principle 8

The insolvency representative appointed in the proceeding designated as the planning proceeding is entitled to apply directly to a court in this State to be heard on issues related to implementation of the group insolvency solution.

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[45] Art. E, para. 1 gives effect to principle 6: "Creditors and stakeholders of each enterprise group member participating in the group solution would vote in their own jurisdiction on the treatment they are to receive under the group reorganization plan according to the applicable domestic law." Art. E, para. 2 gives effect to principle 7: "Following approval of the group reorganization plan by relevant creditors and stakeholders, each COMI court would have jurisdiction to deal with the group reorganization plan in accordance with domestic law."

[46] The Working Group may wish to consider whether this article should clarify whether recognition of the planning proceeding is required for submission of the group insolvency solution to the foreign court.

[47] The reference to "establishment" is included in art. E (paras. 1 and 2) in accordance with a suggestion made at the forty-eighth session (A/CN.9/864, para. 48(b)).

[48] Variant 1 reflects art. E as proposed at the forty-eighth session (A/CN.9/864, para. 47).

[49] Variant 2 gives effect to the proposal at the forty-eighth session (A/CN.9/864, para. 48(a)) that the whole of the group insolvency solution should be submitted to the court, with the approval process applying only to the relevant local elements.

Chapter 4. Treatment of foreign claims in accordance with applicable law[50]

Article F. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

1. To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a non-main proceeding in that other State.

2. A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under paragraph 1.

Chapter 5. Supplemental provisions[51]

Article G. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

1. To facilitate the treatment of claims that would otherwise be brought by creditors in a proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a proceeding in that other State.

2. A court in this State may stay or decline to open a main proceeding if a foreign representative or group representative from another State in which a proceeding is pending has made a commitment under paragraph 1.

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[50] The provisions as set out in arts. F and G are not limited to cases where a group solution is being developed through a planning proceeding. Article F is part of the core provisions; article G is part of the supplemental provisions. They are presented as originally proposed at the forty-eighth session (A/CN.9/864, para. 49). However, a proposal made at the forty-eighth session to redraft the provisions (A/CN.9/864, para. 50) would result in the following, with art. F being based on the first paras. of arts. F and G. Whether the two paras. of art. G, as revised, should be considered to be core or supplemental provisions may, as noted, require further consideration:

"*Article F*.

"A foreign representative or group representative appointed [in this State] may commit to, and the court [in this State] may approve, providing creditors with claims that could otherwise be brought in a proceeding in another State with the treatment in this State that they would have received had a proceeding commenced in that other State."

"*Article G*.

"1. A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under article F.

"2. A court in this State may stay or decline to open a main proceeding if a foreign representative or group representative from another State in which a proceeding is pending has made a commitment under article F."

[51] As noted above in the introduction to A/CN.9/WG.V/WP.137, articles G and H are supplemental components, which would be additional options for a State to enact, and would go a step further than the core provisions.

Article H. Additional relief

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of creditors of affected enterprise group members would be adequately protected in the planning proceeding, the court, in addition to granting any relief described in article D, may stay or decline to open insolvency proceedings in this State relating to enterprise group members participating in the planning proceeding.[52]

2. Notwithstanding article E, paragraph 1, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of creditors of the affected enterprise group member are adequately protected in the planning proceeding, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article D that is necessary for implementation of the group insolvency solution.

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[52] The type of additional relief referred to in art. H, para. 1 is potentially covered by art. 7, subparas. 1 (a) and (b), albeit available at a different time of the proceedings. The two articles may need to be aligned. Relief to support the group insolvency solution may come too late to be meaningful if it is only available following submission of that group solution for approval.

United Nations A/CN.9/WG.V/WP.137

General Assembly

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Insolvency Law

Facilitating the cross-border insolvency of multinational enterprise groups: summary

Note by the Secretariat

Contents

V.16-01062 (E)

I. Introduction

1. This note provides a summary of how the three sets of provisions contained in the following documents work in combination: (a) the key principles for facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.133); (b) the draft legislative provisions on the cross-border insolvency of enterprise groups (arts. 8-18 from A/CN.9/WG.V/WP.128 and arts. 2-7 from A/CN.9/WG.V/WP.134); and (c) the joint proposal made at the forty-eighth session of Working Group V (A/CN.9/864, paras. 38-53). The combined provisions are organized into chapters according to the structure agreed by the Working Group at its forty-eighth session.[1]

2. Accordingly, chapters 1 to 4 are the core provisions, which address scope and definitions; coordination and cooperation; facilitating the development, recognition and implementation of a group insolvency solution; and the treatment of foreign claims in main proceedings in accordance with the law applicable to those claims (so-called “synthetic proceedings”).[2]

3. Chapter 5 contains supplemental provisions, which address the effect of the treatment of creditor claims in a foreign insolvency proceeding referred to in paragraph 2 on the relief that may be ordered in a creditor’s home State, as well as an approach to approval of a group insolvency solution based on adequate protection of creditors. The proposal notes (A/CN.9/864, para. 49, footnote 1) that those provisions, which would be optional for a State to enact, would go a step further than the core provisions. They would permit a court in one jurisdiction to use so-called “synthetic proceedings” for a group member whose centre of main interests (COMI) is located in a different jurisdiction. They would also allow a court to provide additional relief — staying or declining to commence insolvency proceedings, as well as approving the relevant portion of a group insolvency solution without submitting it to the applicable approval procedures under local law — if the court determined that creditors would be adequately protected.

4. The proposal further notes that the use of the supplemental provisions might result in a group member’s insolvency being handled in a manner that was not consistent with the prior expectations of creditors and other third parties, i.e. that the group member would be subject to normal insolvency proceedings in its COMI jurisdiction. As a consequence, departing from that basic principle of proceedings commenced on the basis of COMI should be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency largely outweigh any negative effect on creditors’ expectations in particular and legal certainty in general. That would only appear to be justified:

(a) In jurisdictions where courts traditionally hold a large degree of discretion and flexibility in conducting insolvency proceedings;

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[1] See A/CN.9/864, para. 18.

[2] The term “synthetic proceedings” is not used in the draft articles set forth in A/CN.9/WG.V/WP.137/Add.1. What is referred to is the substance of what transpires when that approach is used, for example, commitment to and approval of the treatment of foreign claims in proceedings in this State in accordance with the law applicable to those claims.

(b) Where the enterprise group in question was closely integrated and therefore the benefit of so-called "synthetic proceedings" in lieu of main proceedings (conducted at the COMI) was obvious; and

(c) Where the use of the proceedings under articles A to G (if available), could not achieve a similar result.

5. Within chapters 3 to 5, the provisions have been divided into two categories. Category A provisions would be required in the State in which the main or planning proceeding commences in order to facilitate the development of a group insolvency solution through that proceeding (this might be referred to as the originating State). These provisions are of the kind that might be added to the national insolvency law of that State and reflect some of the elements of part three, chapter II of the Legislative Guide. Category B provisions would be required to facilitate cross-border recognition of that planning proceeding and implementation of a group insolvency solution in another State (this might be referred to as the receiving State). These are provisions that might be added to a cross-border recognition regime, such as provided by the Model Law. The provisions in chapter 2 on cooperation and coordination are largely based upon the provisions of the Model Law and part three, chapter III of the Legislative Guide. As such, the enacting State could be both an originating and a receiving State, depending on the circumstances.

6. Document A/CN.9/WG.V/WP.137/Add.1 contains the substantive provisions referred to in the summary, organized in accordance with the agreed structure.

7. The summary refers to the following fact scenario:

> Debtors 1 to 4 are all members of an enterprise group. Debtors 1 and 2 have their COMIs in State A. Insolvency proceedings commence in State A for debtors 1 and 2. Debtor 3 has its COMI in State B and debtor 4 has its COMI in State C.

II. Summary of the combined draft provisions on facilitating the cross-border insolvency of multinational enterprise groups

Chapter 1. General provisions

1. Principles 1 bis and 1.

2. Article 1. Scope.

3. Definitions.

Chapter 2. Coordination and cooperation

Articles 9-18 (A/CN.9/WG.V/WP.128)

4. The courts can coordinate and cooperate with each other, with a group representative (GR) and any foreign representative[3] of a group member participating

[3] As defined in UNCITRAL Model Law on Cross-Border Insolvency, art. 2(d).

in a planning proceeding (for the purpose of developing the group insolvency solution); the GR and foreign representatives can also cooperate and coordinate between themselves and with the courts.

Chapter 3. Facilitating the development and implementation of a group insolvency solution

A. Provisions relevant to the State in which a planning proceeding commences (i.e. State A concerning debtors 1 and 2)

5. Debtors 3 and 4 can "participate"[4] in a planning proceeding[5] commenced in State A for debtors 1 and 2 in order to develop a group insolvency solution,[6] provided the courts in States B and C [permit] [do not preclude] that "participation",[7] see below paragraph 10.

6. When debtors 3 and 4 are participating in the planning proceeding in State A, the court in State A can appoint a GR to represent that proceeding[8] and authorize the GR:

(a) To seek recognition of the planning proceeding commenced in State A in a foreign State (e.g. States B and C);[9] and

(b) To participate in any proceedings relating to debtors 3 and 4 taking place in a foreign State (e.g. States B and C),[10] including where those proceedings relate to approval of the group insolvency solution.[11]

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[4] The notion of "participation" may need to be explained, since much of substance in the draft text arises from participation in the proceedings in State A. Two distinctions may need to be made between the type of group member participating (i.e. solvent or insolvent) and what they are actually participating in — the planning proceeding or the negotiation of the group insolvency solution. Participation by a solvent group member should be voluntary (see Legislative Guide, part three, paras. 11-14 and 152, rec. 238) and in many cases that member may only need to participate in the negotiation of the group insolvency solution (rather than the planning proceeding in State A), to which they would be contractually bound. Where participation relates to the planning proceeding, it raises issues of the approvals that are required in each case, as well as the concerns previously raised (A/CN.9/835, para. 27) with respect to the standing of solvent and insolvent group members to appear and be heard in the proceedings in State A, as well as submission to the jurisdiction of the courts of State A and the relevance of art. 10 of the Model Law. The issue of participation, particularly where it arises in the period approaching insolvency of a group member has implications for the duties of directors of insolvent group members that might need to be considered in the text being developed on that issue.

[5] As defined in art. 2, para. (g) in A/CN.9/WG.V/WP.137/Add.1.

[6] Art. B, para. 1; principles 2, 3 and 5.

[7] Principle 1 bis (b); principle 4, para. 1(i); art. B, para. 2.

[8] Art. B, para. 3.

[9] Art. B, para. 3.

[10] Art. B, para. 3; since the GR appears to have no legal relationship to debtors 3 and 4, participation in the proceedings in States C and/or D, could be based upon recognition of the planning proceeding in State A (see art. D, para. 1 and art. 12 of the Model Law).

[11] Principle 8.

7. In the planning proceeding in State A relating to debtors 1 and 2, the recommendations of part three of the Legislative Guide on joint application (rec. 199) and procedural coordination (recs. 202-210) might apply.[12]

8. The court in State A can order relief affecting the assets of debtors participating in the planning proceeding in State A (i.e. debtors 3 and 4) to support the development of the group insolvency solution through that proceeding.[13]

9. The court in State A can receive a request for recognition of any proceedings taking place in a foreign State (e.g. States B and C) concerning debtors participating in the planning proceeding in State A (e.g. these could be non-main proceedings with respect to debtors 1 and 2, and main or non-main proceedings with respect to debtors 3 and 4).[14]

B. Provisions relevant to the State in which recognition of a planning proceeding is sought (i.e. States B and C)

10. Courts in States B and C can [permit] [not preclude] "participation" of debtors 3 and 4 in a planning proceeding in State A where a group insolvency solution is to be developed.[15]

11. Courts in States B and C can authorize an insolvency representative appointed in proceedings relating to participating debtors (e.g. debtors 3 and/or 4) to seek recognition of those proceedings in State A.[16]

12. A GR can apply for recognition in States B and C (and other States as relevant) of the planning proceeding in State A.[17] Recognition shall be granted if the specified requirements are met.

13. After an application for recognition has been made in States B and C, interim relief relating to the assets (located in States B and C) of debtors 1 and 2 is available

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[12] Principle 5.

[13] Art. D, para. 2; this relief appears to relate only to the assets etc. of foreign debtors that are located in or subject to the jurisdiction of State A (see comment in respect of art. D, para. 2 in A/CN.9/WG.V/WP.137/Add.1).

[14] Principle 4, para. 2 — this relief might be covered by provisions of the Model Law, if enacted in State A.

[15] Principle 4, para. 1(i); art. B, para. 2. It may be preferable to draft this provision as permissive, rather than preclusive. If the enacting legislation does not authorize such participation, following an approach similar to art. 5 of the Model Law, the court may be requested to provide that permission (it may be noted that some States, in enacting art. 5 of the Model Law, have adopted that approach and require the court to approve a representative seeking assistance in a foreign State).

[16] Principle 4, para. 1(ii) — this is probably covered by the Model Law, as would be acceptance of that request for recognition in State A (see para. 9 above and principle 4, para. 2 in A/CN.9/WG.V/WP.137/Add.1).

[17] Art. C; art. 3.

to assist that proceeding[18] and, following recognition, additional relief can be granted.[19]

14. In granting, modifying or terminating the relief referred to in paragraph 13, the interests of creditors and other interested persons are to be adequately protected.[20]

15. Upon recognition of the planning proceeding, the GR can participate in any proceeding taking place in States B and C relating to debtors 3 and 4 on the basis that they are participating in the proceedings in State A.[21]

16. Once a group insolvency solution is developed in State A, the GR submits the solution to the courts of States B and C, which are then responsible for submitting the parts affecting debtors 3 and 4 to the relevant approval process and implementation.[22]

17. The GR has a right of access to the proceedings in States B and C to be heard on issues related to implementation of the group insolvency solution.[23]

Chapter 4. Treatment of foreign claims in accordance with applicable law[24]

18. A foreign representative or GR may commit to, and the court may approve, treatment of any foreign claims in proceedings in this State in accordance with the treatment[25] they would receive in any foreign non-main proceeding under the applicable foreign law.[26]

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[18] Art. 6.

[19] Art. 7. Arts. 6 and 7 currently appear to be limited to protecting the assets etc. of the group member that is "subject to a foreign proceeding"; in the scenario above that would be the assets of debtors 1 and 2 that are located in States B and C; it does not appear to relate to the assets of participating debtors 3 or 4. The relief provided by art. D, para. 2 (see para. 8 above) appears to relate to relief that might be granted by the court of State A with respect to assets of participating debtors 3 and 4 that might be located in State A where the planning proceeding is taking place. As currently drafted, it appears not to apply to the relief that might be available to the GR with respect to the assets located in States B and C of debtors 3 or 4 that might be required to assist the development of the group insolvency solution. Art. H, paras. 1 and 2 seem to refer to such relief being available at the time of approval of the group insolvency solution in States B and C. If art. D is to apply in States A, B and C with respect to the assets of debtors 1-4, some revision of the drafting might be required to clarify that point.

[20] Art. 8.

[21] Art. D, para. 1; Participation by the GR in any insolvency proceedings relating to debtors 1 and 2 taking place elsewhere might be covered, following recognition, by art. 12 of the Model Law.

[22] Art. E; principles 6 and 7.

[23] Principle 8.

[24] The ch. 4 provisions are not limited to cases where a group insolvency solution is being developed through a planning proceeding.

[25] The standard for that treatment, which focuses on the priority accorded under the applicable foreign law, might be that the creditors should be no worse off under that treatment than they would have been if non-main proceedings had commenced. This issue was previously discussed in the Working Group, see A/CN.9/803, paras. 17 and 21(b), and A/CN.9/829, para. 41.

[26] Art. F, para. 1 as proposed (see A/CN.9/864, para. 48).

19. The court in this State may stay or decline to commence a non-main proceeding in this State where a commitment in accordance with paragraph 18 has been made by a foreign representative or a GR in the relevant foreign proceeding.[27]

Chapter 5. Supplemental provisions[28]

20. The commitment in paragraph 18 may also be made with respect to the treatment a claim would receive in a foreign main proceeding.[29]

21. The court in this State may stay or decline to commence a main proceeding where a commitment in accordance with paragraph 18 has been made by a foreign representative or a GR in the relevant foreign proceeding.[30]

22. As a variation upon the approval process in paragraph 16, the courts in States B and C can approve the relevant portion of the group insolvency solution relating to debtors 3 and 4 and grant appropriate relief of the type referred to in article D, paragraph 2, if satisfied that the interests of creditors of the affected group members (i.e. debtors 3 and 4) are adequately protected in the planning proceeding.[31]

23. After recognizing the planning proceeding in State A, the courts in States B and C can, provided the interests of creditors of affected group members (i.e. debtor 3 and 4) are protected in the planning proceeding, order relief of the kind referred to in article D, paragraph 2 and stay or decline to commence any proceedings in States B and C concerning debtors 3 and 4 respectively.[32]

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[27] Art. F, para. 2 as proposed (see A/CN.9/864, para. 48). It might be noted, however, that a proposal made at the forty-eighth session (A/CN.9/864, para. 50(d)) suggested that art. F. para. (2) should be considered a supplemental rather than a core provision. Accordingly, arts. F, para. 1 and G, para. 1 could be combined as a core provision, while arts. F, para. 2 and G, para. 2 should be supplemental provisions. This proposal is reflected as a variant in A/CN.9/WG.V/WP.137/Add.1, footnote 50.

[28] A separate scope provision for chapter 5 could be drafted and include the material currently reproduced in paras. 3 and 4 of the introduction to this note.

[29] Art. G, para. 1 as proposed (see A/CN.9/864, para. 48).

[30] Art. G, para. 2 as proposed (see A/CN.9/864, para. 48); principle 1. Previous discussion in the Working Group referred to the court taking such action on the basis of certain considerations, e.g. after balancing the interests of the global group against protecting the interests of local creditors (see A/CN.9/803, para. 28).

[31] Art. H, para. 2.

[32] Art. H, para. 1; principle 1.

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Report of Working Group V (Insolvency Law) on the work of its forty-eighth session (Vienna, 14-18 December 2015)

Contents

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I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), Working Group V (Insolvency Law) agreed to continue its work on cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part three of the UNCITRAL Legislative Guide on insolvency law (the Legislative Guide) and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16). Discussion of those issues commenced at the forty-fifth session of Working Group V (April 2014) (A/CN.9/803), and continued at the forty-sixth (December 2014) (A/CN.9/829) and forty-seventh sessions (May 2015) (A/CN.9/835).

B. Directors' obligations in the period approaching insolvency: enterprise groups

2. At its forty-fourth session, the Working Group had also agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group, whose task would be to examine how part four of the Legislative Guide could be applied in the enterprise group context and to identify any additional issues (such as conflicts between a director's duty to its own company and the interests of the group, as well as issues of governing law) that might need to be addressed. The informal expert group reported back in the second half of 2014 with a draft text for consideration by the Working Group at its forty-sixth session (A/CN9/WG.V/WP.125). That draft text was considered at the forty-sixth (A/CN.9/829, paras. 12 to 32) and forty-seventh (A/CN.9/835, paras. 13 to 22) sessions.

3. The report of the forty-seventh session of the Working Group indicated that a new draft of the text addressing the obligations of directors of enterprise group companies in the period approaching insolvency would be prepared for consideration at its forty-eighth session (A/CN.9/835, para. 13). That draft has not yet been prepared on the basis that more progress needed to be made on the work on facilitating the cross-border insolvency of multinational enterprise groups before it was possible to identify how the draft text on directors' obligations might need to be adjusted to ensure consistency. Depending on the progress made during the

forty-eighth session of the Working Group, it was noted that it might be possible to provide that new draft text for its forty-ninth session.

C. Recognition and enforcement of insolvency-derived judgements

4. At its forty-fourth session (December 2013), Working Group V had further agreed (A/CN.9/798, para. 30) that it should seek at an appropriate time a mandate from the Commission to commence work on the recognition and enforcement of insolvency-derived judgements, which had been discussed at the colloquium held in conjunction with the forty-fourth session in December 2013 (A/CN.9/815). At its forty-fifth session, the Working Group agreed (A/CN.9/803, para. 39(b)) that it should seek that mandate from the Commission at its forty-seventh session (2014). At that session, the Commission agreed that, in addition to the two topics concerning treatment of enterprise groups in insolvency, Working Group V's other priority should be to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements, which was said to be an important area for which no explicit guidance was contained in the UNCITRAL Model Law on Cross-Border Insolvency. The Commission approved a mandate in accordance with those terms (A/69/17, para. 155). The Working Group commenced its deliberations on the topic at its forty-sixth session (December 2014) (A/CN.9/829) and continued them at its forty-seventh session (May 2015) (A/CN.9/835).

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its forty-eighth session in Vienna from 14-18 December 2015. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Armenia, Austria, Brazil, Canada, China, Colombia, Croatia, Czech Republic, Denmark, El Salvador, France, Germany, Greece, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Namibia, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Bolivia (Plurinational State of), Chile, Cyprus, Dominican Republic, Lebanon, Luxembourg, Netherlands, Peru, Republic of Moldova, Slovakia, Sudan, Tunisia and United Arab Emirates.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: World Bank;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students Association (ELSA), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, International Bar Association (IBA), International Insolvency Institute (III), International Women's

Insolvency and Restructuring Confederation (IWIRC), Islamic Development Bank (ISDB), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), New York City Bar Association (NYCBAR), and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Carlos SÁNCHEZ MEJORADA Y VELASCO (Mexico)

Rapporteur: Ms. Michal ELBAZ (Israel)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.132);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: key principles (A/CN.9/WG.V/WP.133);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: revised draft legislative provisions (A/CN.9/WG.V/WP.134); and

(d) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.135).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) facilitating the cross-border insolvency of multinational enterprise groups; and (b) the recognition and enforcement of insolvency-derived judgements.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group commenced its deliberations on the cross-border insolvency of multinational enterprise groups on the basis of documents A/CN.9/WG.V/WP.128 (recalling that articles 8 to 18 had not been considered at the forty-seventh session), A/CN.9/WG.V/WP.133 and A/CN.9/WG.V/WP.134, followed by the recognition and enforcement of insolvency-derived judgements on the basis of document A/CN.9/WG.V/WP.135. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Facilitating the cross-border insolvency of multinational enterprise groups

A. Key principles of a regime to address insolvency in the context of enterprise groups

13. The Working Group commenced its discussion of this topic on the basis of the principles contained in document A/CN.9/WG.V/WP.133.

14. A new principle was proposed for insertion before principle 1 along the following lines:

> "The principles that follow are each subject to two fundamental underpinning principles:
>
> "(a) The jurisdiction of the courts in the State in which the centre of main interests (COMI) of an enterprise group member is located is [and remains] unaffected; and
>
> "(b) The principles do not replace or interfere with any process or procedure (including any permission, consent or approval) required by the jurisdiction in which the COMI of an enterprise group member is located, in respect of that enterprise group member's participation [to any extent] in a group solution."

15. The Working Group approved the additional principle as proposed. It was observed that the new principle would cover some issues raised in connection with other principles, for example, the requirements for participation in the coordination process as contemplated in principle 5.

16. The Working Group approved principles 1 to 8 with the following observations. It was noted that the reference to refusing the commencement of proceedings in paragraph 5 might not be possible in all jurisdictions, as it would be dependent upon domestic law. Use of the words "rather than substantive" in principle 3 should be deleted and the word "exclusively" should be added before the word "procedural".

17. Noting that substantive consolidation had been discussed in part three of the Legislative Guide, it was suggested that it should also be discussed in the cross-border context and any reasons for not including it in this draft text as a possible tool in resolving cross-border insolvency should be explained.

18. Having approved the principles, the Working Group considered how to approach the draft text on enterprise groups contained in documents A/CN.9/WG.V/WP.128 (articles 8 to 18) and WP.134. A proposal was made that the various topics contained in those documents could be divided into five main areas, the first three of which would form a set of basic provisions with the fourth and fifth being supplemental for those States wishing to go beyond the first three. The first topic, for example, could address coordination and cooperation as set out in draft articles 9 to 18 of A/CN.9/WG.V/WP.128. The second topic could include the elements needed for the development of a group solution involving multiple entities and approval of that solution, as well as voluntary participation in the solution, and obtaining relief to support that solution. The third topic could cover the use of

synthetic proceedings in lieu of commencing non-main proceedings. The fourth and fifth supplemental topics could address the use of synthetic proceedings in lieu of commencing main proceedings and approval of the group solution on a more streamlined basis that assessed whether the interests of creditors of the affected group member were adequately protected by that solution.

19. Endorsing that general approach, the Working Group agreed to first consider articles 9 to 18 of A/CN.9/WG.V/WP.128.

B. Draft legislative provisions on the cross-border insolvency of enterprise groups (A/CN.9/WG.V/WP.128)

1. Cooperation with foreign courts and foreign representatives

Article 9. Cooperation and direct communication between a court of this State and foreign courts or foreign group member representatives

20. There was general support in the Working Group for article 9 as drafted.

Article 10. Cooperation to the maximum extent possible under article 9

21. There was general support in the Working Group for article 10 as drafted, with the following comments:

(a) Some preference was expressed in favour of deleting the square brackets in paragraph (c) and retaining the text "participating in a group insolvency solution", although it was noted that consistency with the definition of that phrase needed to be maintained;

(b) An additional paragraph might be added to the draft article to address cooperation among courts on how to allocate and provide for the costs associated with cross-border cooperation; and

(c) A cross-reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation might be added to the draft article.

Article 11. Conditions applicable to cross-border communication involving courts

22. There was support in the Working Group for the deletion of draft article 11 on the basis that it was already contained in part three of the Legislative Guide and was more appropriate to that text than a model law.

Article 12. Effect of communication under article 9

23. There was some support for deleting draft article 12 as covering issues not addressed in the Model Law; however, there was also support for retaining it on the basis that it facilitated common understanding about the effect of communication. In that regard, it was noted that in jurisdictions less familiar with cross-border cooperation, there was uncertainty as to the effect of this type of communication, and that retaining draft article 12 could facilitate effective implementation of this text. It was agreed that the draft article would be retained for further consideration.

Article 13. Coordination of hearings and Article 14. Cooperation and direct communication between the […] and foreign courts and foreign group member representatives

24. There was general support in the Working Group for articles 13 and 14 as drafted.

Article 15. Cooperation to the maximum extent possible under article 14

25. There was general support in the Working Group for article 15 as drafted, with the following comments:

(a) Some preference was expressed in favour of deleting the square brackets in paragraph (d) and retaining the text "participating in a group insolvency solution"; and

(b) The language of article 27(d) of the Model Law, i.e. "agreements concerning the coordination of proceedings" should be used in paragraph (b) in place of "cross-border insolvency agreement".

26. It was noted that the draft text did not contain a draft article 16.

Article 17. Authority to enter into cross-border insolvency agreements

27. There was general support in the Working Group for article 17 as drafted, but it was suggested that the title and the substance of draft article 17 should incorporate the language of article 27(d) of the Model Law, i.e. "agreements concerning the coordination of proceedings" in place of "cross-border insolvency agreement".

Article 18. Appointment of a single or the same insolvency representative

28. Subject to giving some consideration in the next draft of the text to the use of the phrase "a single or the same insolvency representative" to provide greater clarity, there was general support in the Working Group for article 18 as drafted.

Article 8. Protection of creditors and other interested persons

29. The Working Group recalled that it had not considered draft article 8 at its previous session (as noted above in para. 12). There was general support for article 8 as drafted.

2. Coordination of concurrent proceedings (A/CN.9/WG.V/WP.128, section D)

30. There was some agreement that the draft model law may need to incorporate provisions addressing issues covered by articles 28 to 32 of the Model Law. At this stage, however, the Working Group was not clear what might be required and noted that this matter should be reverted to in future discussions.

C. Draft legislative provisions on the cross-border insolvency of enterprise groups (A/CN.9/WG.V/WP.134)

31. The Working Group next considered the revisions made to articles 1 to 7 of the draft text based on the conclusions reached at its forty-seventh session (A/CN.9/835, paras. 23-46).

Article 2. Definitions

32. Some support was expressed in favour of retaining Variant 2 of paragraphs (h) "foreign group proceeding" and (i) "enterprise group insolvency solution". It was felt that those variants better reflected the desire to focus on recognition of the coordinating proceeding.

Article 3. Recognition of a foreign group proceeding

33. The following proposals were made in respect of draft article 3:

(a) There was support for the proposal that the words in subparagraph 3(a) "that court has not prohibited participation of that group member in the" should be deleted and that the second sentence should end as follows: "any approval which may be required under the domestic law of the State of the opening of proceedings for the participation in the [foreign group proceeding] [enterprise group insolvency solution] has been obtained";

(b) That in the same subparagraph, the word "proposed" be added before the phrase "enterprise group insolvency solution";

(c) That in the same subparagraph, it might be clarified whether the words "subject to insolvency proceedings" referred to insolvency proceedings that had already commenced and it was proposed that some consideration might need to be given as to whether this subparagraph was consistent with principle 4 of A/CN.9/WG.V/WP.133; and

(d) That subparagraph 3(b) should also require a statement identifying all members of the enterprise group.

Article 5. Decision to recognize a foreign group proceeding

34. The following proposals and observations were made in respect of draft article 5:

(a) It was questioned whether the phrase "subject to any applicable public policy exception" in paragraph 1 was necessary; it was noted that the answer to that question might be resolved by the form that the draft text ultimately took;

(b) That subparagraph 1(i) could be deleted on the basis that it repeated elements of the definition of "foreign group proceeding";

(c) That since subparagraphs 1(g) and (h) were generally supported, the square brackets around them could be deleted and the text retained, with attention to consistency with the discussion at subparagraph 40(d) below; and

(d) That paragraph 1 bis should be deleted on the basis that it overlapped with the definition of "foreign group proceeding".

35. In respect of subparagraph 1(f), some concern was expressed that it revealed an overall problem with the drafting, given the definition that had been agreed for "foreign group proceeding" in draft article 2. Because of that change, the meaning of draft article 5 had been altered and, in particular, subparagraph 1(f) was somewhat circular in that it repeated elements of that definition. In addition, subparagraph 1(f) referred to other types of proceeding, for example, those commenced on the basis of the presence of assets in the jurisdiction, which would not be recognizable under the Model Law, but which may nevertheless be a necessary part of a group solution. An issue to be considered was therefore whether there should be a departure in the group context from the Model Law approach of recognizing proceedings on the basis of COMI or establishment. In considering those other types of proceedings, and the manner in which they might be involved in the group solution, it was suggested that it would be important to resolve the function of a group proceeding in achieving that group solution. For example, if the group proceeding was to simply coordinate negotiation of that solution, it would not supplant the COMI as a basis for commencement of proceedings in respect of a group member.

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding

36. There was general support in the Working Group for article 6 as drafted, with the following comments:

(a) It was agreed that the word "appropriate" should be added to the chapeau before the words "relief of a provisional nature";

(b) In respect of subparagraphs 1(a) and (b), some support was expressed in favour of retaining the words in square brackets, and also in favour of deleting those words. Those who preferred to retain the text in square brackets agreed that the word "procedural" was not necessary and could be deleted. After discussion, it was agreed that the square bracketed text should be deleted as being inappropriate for inclusion in a text to be enacted as domestic law. It was observed that the relief that might be granted under draft article 6 was discretionary and that, in any event, the court could only order relief that it was permitted to order under domestic law. It was also observed that that idea should be expressed clearly in any commentary or guide to enactment prepared for the draft text;

(c) In respect of subparagraph 1(d), support was also expressed in favour of its deletion on the basis of its potential to conflict with subparagraph 1(b), and on the basis of the potential for loss of value through the continuation of funding, which was contrary to the focus on preservation measures in draft article 6(1) and might create problems if recognition was subsequently denied. It was observed, however, that continuation of funding could be critical to achieving a successful reorganization and the provision should thus be retained. After discussion, it was agreed that subparagraph 1(d) should be retained, with the addition of the words "subject to any appropriate safeguards the receiving court may apply";

(d) It was agreed that subparagraph 1(e) should be deleted as being too broad and not consistent with the urgency required for provisional relief; and

(e) Some support was expressed in favour of retaining the text in both sets of square brackets in paragraph 4. Another suggestion was to replace that text with the

words “a proceeding in the court located at the COMI of a group member participating in the group solution”.

Article 7. Recognition of a foreign group proceeding

37. There was general support in the Working Group for article 7 as drafted, with the following comments:

(a) As noted in respect of draft article 6 above (see subpara. 36(b)), the square bracketed text in subparagraphs 1(a) and (b) should be deleted; and

(b) It was agreed that the phrase “Where the funding group member is participating in the group coordination plan, and where permitted by relevant laws [of the receiving court]” should be inserted in subparagraph 1(h).

D. Proposal in respect of the cross-border insolvency of enterprise groups

38. In keeping with the general approach endorsed in paragraphs 18 and 19 above, the Working Group considered the detail of a proposal by Switzerland, the United Kingdom, the United States and INSOL Europe. Having considered the topic of coordination and cooperation as contained in articles 9 to 18 of A/CN.9/WG.V/WP.128, there was general agreement that the proposal provided a viable way forward, separating the more contentious issues from those which were more amenable to broad agreement. It was noted that the proposal should not be considered as complete, since it included policy statements and legislative texts, and might generally require further elaboration and refinement. The Working Group discussed the specific elements of the proposal as set out below.

39. The first article considered was as follows:

“**Article A — Definitions**

“(1) ‘Group Member’ means an enterprise that has a separate legal identity and that is interconnected, by control or significant ownership, with one or more other enterprises.

“(2) ‘Group Representative’ means a person or body who is appointed pursuant to Article B(3) and who is responsible for seeking to develop a Group Solution.

“(3) ‘Group Solution’ means a set of proposals adopted in a Planning Proceeding:

“(a) For the reorganization, sale, or liquidation of all or some of the operations or assets of more than one Group Member;

“(b) That would be likely to add to the overall combined value of the Group Members involved; and

“(c) That must be approved, insofar as the proposals relate to a particular Group Member, in the jurisdiction in which that Group Member has its centre of main interests.

"(4) 'Planning Proceeding' means a proceeding:

"(a) That is a main proceeding for a Group Member that would be a necessary and integral part of a Group Solution;

"(b) In which a Group Representative has been appointed;

"(c) In which there is a reasonable prospect of developing a Group Solution; and

"(d) In which one or more additional Group Members are participating for the purpose of attempting to develop a Group Solution."

40. The following suggestions were made with respect to the drafting of the definitions:

(a) To the extent that the definitions reflected those included in other UNCITRAL insolvency texts, including part three of the Legislative Guide, care should be taken to ensure consistency;

(b) With respect to paragraph 1, since the word "enterprise" could refer to a single entity or something broader, the definition should be along the lines of "a separate legal entity that is a member of an enterprise group";

(c) The chapeau of paragraph 3 should include the text "a proposal or set of proposals…"; and

(d) With respect to subparagraphs 3(b) and 4(c), a more objective test should be used along the lines of "the purpose of which would be to enhance the overall combined value of the group members involved" and "the purpose of which would be to develop a group solution" respectively.

41. The next article considered was:

"**Article B — Participation by Group Members in an Insolvency Proceeding in this State; Appointment of a Group Representative**

"(1) Subject to paragraph (2), if an insolvency proceeding has been commenced in this State for a Group Member whose centre of main interests is located in this State, any other Group Member (whether solvent or insolvent) may participate in that proceeding for the purpose of attempting to develop a Group Solution.

"(2) An insolvent Group Member whose centre of main interests is in another State may not participate in a proceeding under paragraph (1) if a court in that other State precludes it from so doing.

"(3) If one or more Group Members participate in a proceeding under paragraph (1), the court may appoint a Group Representative, who may then seek recognition from foreign courts and may seek to participate in any foreign proceeding related to a participating Group Member."

42. The following suggestions were made with respect to the drafting of the article:

(a) Paragraph 1 should distinguish between solvent and insolvent group members because they were governed by different legislative frameworks; the interests of creditors of solvent entities were different to those of an insolvent

entity; different considerations would apply as between liquidation and reorganization as to the participation in a group solution of solvent and insolvent entities; and

(b) Paragraph 3 should clarify on whose behalf the group representative was acting in seeking recognition.

43. The next article considered was:

"**Article C — Recognition of a Proceeding Occurring in Another State as a Planning Proceeding**

"A Group Representative appointed in a foreign proceeding may seek to have that proceeding recognized in this State as a Planning Proceeding. Recognition shall be granted by the court if the criteria in Article A(4) are met."

44. It was suggested that it should be clarified that the State referred to in article C was the receiving State and not the originating State in which the group representative had been appointed.

45. The next article considered was:

"**Article D — Participation by Group Representative and Available Relief**

"(1) Upon recognition of a foreign proceeding as a Planning Proceeding under Article C, the Group Representative may participate in any proceedings in this State related to Group Members that are participating in the Planning Proceeding.

"(2) To the extent needed to preserve the possibility of developing a Group Solution, the court may, at the request of the Group Representative, grant the following relief with respect to the assets or operations of any insolvent Group Member that is participating in the Planning Proceeding in this State:

"(a) Staying execution against the Group Member's assets;

"(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the Group Member;

"(c) Suspending the proceedings temporarily to allow for the development of a Group Solution;

"(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the Group Member's assets, rights, obligations, or liabilities;

"(e) Entrusting the administration or realization of all or part of the Group Member's assets located in this State to the Group Representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

"(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the Group Member's assets, affairs, rights, obligations, or liabilities; and

"(g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State."

46. The following suggestions were made with respect to the drafting of the article:

(a) There needed to be consistency between the proceedings being recognized and the debtors in respect of whose assets relief might be granted, and further consideration of whether the relief should be automatic or discretionary upon recognition, bearing in mind the distinction between articles 20 and 21 of the Model Law;

(b) Appropriate safeguards for creditors should be considered;

(c) In respect of article D(1), thought might need to be given to the situation where a group member from the receiving State was participating in the planning proceeding, but no local proceeding had been commenced in the receiving State;

(d) Consideration should be given to adding, where relevant, the words "in this State" if the relief in article D(2) was intended to have merely territorial rather than universal effect;

(e) Identification or specification of the receiving and originating jurisdictions in respect to the COMI of relevant debtors needed to be clearer; and

(f) In respect of article D(2)(e), the restriction of relief to perishable and other assets in jeopardy was thought to be too narrow.

47. The next article considered was:

"**Article E — Approval of Local Elements of a Group Solution**

"(1) If a proposed Group Solution is developed in the Planning Proceeding, and the Group Representative submits to the court in this State the portion of the Group Solution affecting an insolvent Group Member whose centre of main interests is in this State, the court shall submit the relevant portion of the Group Solution to the approval process in [*cross-reference to relevant provisions in domestic insolvency law*].

"(2) If the approval process pursuant to paragraph (1) results in approval of the portion of the Group Solution affecting the Group Member, the court shall confirm and implement those elements relating to assets or operations in this State."

48. The following suggestions were made with respect to the drafting of the article:

(a) In respect of article E(1), the group representative should submit the entire group solution to the court in the receiving State and the approval process could then be limited to the relevant local elements of that solution; and

(b) A reference to establishment should also be included in article E(1) to cover the situation where a group solution affected creditors in a jurisdiction in which the group member participating in that solution only had an establishment.

49. The next articles considered were:

"**Article F — Use of Synthetic Non-Main Proceedings**

"(1) To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or Group Representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a non-main proceeding in that other State.

"(2) A court in this stage may stay or decline to open a non-main proceeding if a foreign representative or Group Representative from another State in which a main proceeding is pending has made a commitment under paragraph (1)."

"**Article G — Use of Synthetic Main Proceedings**[1]

"(1) To facilitate the treatment of claims that would otherwise be brought by creditors in a proceeding in another State, a foreign representative or Group Representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a proceeding in that other State.

"(2) A court in this stage may stay or decline to open a main proceeding if a foreign representative or Group Representative from another State in which a proceeding is pending has made a commitment under paragraph (1)."

50. The following suggestions were made with respect to the drafting of the articles, noting that article F formed part of the basic provisions and article G was a supplemental provision:

(a) The word "synthetic" should be deleted from the heading of article F and a more appropriate term identified;

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[1] Articles G and H were proposed as supplemental components described by the following text:

"The supplemental components, which would be additional options, would go a step further. They would permit a court to use synthetic proceedings for a group member whose COMI was in a different jurisdiction. They would also allow a court to provide additional relief — staying or declining to open proceedings, as well as approving the relevant portion of a group solution without submitting it to the applicable approval procedures under local law — if the court determined that creditors would be adequately protected.

"Use of the optional provisions might result in a group member's insolvency being handled in a manner that was not consistent with the prior expectations of creditors and other third parties that the legal entity would be subject to normal proceedings in its COMI jurisdiction. As a consequence, departing from that basic principle (COMI) should be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency largely outweighed the negative effect on creditors' expectations in particular and legal certainty in general. This would only appear to be justified:

- In jurisdictions where courts traditionally held a large degree of discretion and flexibility in the handling of insolvency proceedings,
- Where the group in question was closely integrated and therefore the benefit of synthetic proceedings in lieu of main proceedings (at the COMI) was obvious, and
- Where the use of the proceedings under Articles A to G (if available) could not achieve a similar result."

(b) Article F should be supplemented by appropriate provisions on the protection of creditors such as draft article 8 above (see para. 29) (and article 22 of the Model Law);

(c) The meaning of the term "treatment" in both articles should be clarified, i.e. whether it referred to the ranking of claims or to some other matter; and

(d) That article F should be regarded as a supplemental rather than a basic provision. To address that concern, it was proposed that articles F(1) and G(1) should be considered to be basic provisions, as they simply addressed the type of treatment that creditors might be offered, and that the reference in article F(1) to "non-main proceeding" be adjusted to "proceeding"; article G(1) as currently drafted could then be deleted. Articles F(2) and G(2) would then address the more controversial issue of the power of the court to decline to commence main or non-main proceedings; whether that should be considered to be a basic or supplemental provision would require further consideration.

51. The next article considered was:

"Article H — Additional Relief

"(1) If, upon recognition of a Planning Proceeding pursuant to Article C, the court is satisfied that the interests of creditors of affected Group Members would be adequately protected in the Group Coordination Proceeding, the court, in addition to granting any relief described in Article D, may stay or decline to open insolvency proceedings in this State relating to Group Members participating in the Planning Proceeding.

"(2) Notwithstanding Article E(1), if, upon submission of a proposed Group Solution by the Group Representative, the court is satisfied that the interests of creditors of the affected Group Member are adequately protected in the Planning Proceeding, the court may approve the relevant portion of the Group Solution and grant any relief described in Article D that is necessary for its implementation."

52. The following suggestions were made with respect to the drafting of the article:

(a) There should be consideration of the extent to which the ability to recognize and enforce a group solution might go beyond what was possible pursuant to the relief provisions of the Model Law and the manner in which article H(2) might raise issues related to the model law being developed on recognition and enforcement of insolvency-related judgements; and

(b) It was clarified that articles F and G were intended to operate independently of a group solution and thus in a situation where there was no agreement on a planning proceeding.

53. At the end of the discussion, given the support expressed by the Working Group for the group solution discussed during the deliberations, the Secretariat was requested to prepare a draft text for consideration at a future session based upon the principles contained in A/CN.9/WG.V/WP.133, and the text in A/CN.9/WG.V/WP.128 and WP.134, as well as the articles and structure of the proposal outlined above in paragraphs 18 and 38 to 52. That draft should take into

account the conclusions and agreements reached at the current session of the Working Group.

V. Cross-border recognition and enforcement of insolvency-related judgements

54. The Working Group commenced its discussion of this topic on the basis of the draft model law on the recognition and enforcement of insolvency-related judgements contained in document A/CN.9/WG.V/WP.135 (draft model law).

Article 1. Scope of application

55. The Working Group recalled its agreement concerning the need to take into consideration existing international and regional instruments, as well as those under development, in order to avoid overlap and to ensure that there were no gaps in terms of the scope of application of the draft model law. It was noted that that view was also reflected by the Commission at its forty-eighth session (A/70/17, para. 236). The Working Group agreed that those considerations should continue to be borne in mind in its ongoing deliberations.

56. In pursuit of that objective, it was proposed that the following text should be inserted in draft article 1:

> "x. This [law] shall not apply to a judgement where there is a Treaty [in force] concerning the recognition or enforcement of civil and commercial judgements (whether concluded before or after [this law] comes into force), and that Treaty applies to the judgement.
>
> "y. A judgement is to be treated for the purposes of paragraph x as falling within the class of judgements to which a Treaty applies:
>
> "(i) even where the particular judgement is not enforceable under the Treaty because of the particular circumstances of the case; and
>
> "(ii) whether or not the State has adopted the Treaty."

57. While the proposal received some support, a number of reservations were also expressed, particularly in respect of the content of paragraph (y). Some were of the view that it was unusual for an UNCITRAL instrument to state that its provisions would apply in a State other than the enacting State. Others did not agree with that interpretation of the proposed text.

58. After discussion, there was support in the Working Group for Variant 1 of draft article 1, for retaining paragraph 2 of the draft article, and with respect to the proposal outlined above, to provide a revised text based on the issues discussed in the Working Group and exploring other possible drafting options to reflect the intent of that proposal. Support was also expressed in favour of retaining Variant 3.

Additional text to address concerns about article 1, Variant 1

59. After further discussion and recalling that the Working Group had expressed a preference for the retention of Variant 1, a concern was expressed that subparagraph 1(1)(b) might lead to a conflict of laws, as it seemed to suggest that

recognition and enforcement of insolvency-related judgements in a foreign State could be governed by the law of the originating State. The following text for a new article was proposed: “In the event of a conflict between the application of this law and the law of the State where the judgement was rendered, the provisions of this law prevail.”

60. There was some acknowledgement of the difficulty that was identified. It was explained, however, that the purpose of subparagraph 1(1)(b) was simply to authorize the recognition and enforcement of an insolvency-related judgement in a foreign State in much the same way as article 1(1)(b) of the Model Law authorized assistance to be sought in a foreign State in connection with a proceeding under the law of the enacting State. On that basis, Variant 1 of draft subparagraph 1(1)(b) would not give rise to a conflict of law situation. Reference was also made to article 5 of the Model Law (which is repeated in this draft text — see para. 71 below) and it was suggested that, for greater clarity, the text of the heading of that article might be used to replace subparagraph 1(1)(b). A further proposal to remedy the perceived difficulty was to add the words “in this State” to the chapeau of Variant 1 of article 1. After discussion, it was agreed that if the intent was analogous to article 1 of the Model Law, the suggestion to use the heading of draft article 5 of the current text as a substitute for draft subparagraph 1(1)(b) might provide a solution. In that case, however, it was suggested that draft subparagraph 1(1)(b) would not be needed because article 5 of the draft text would be sufficient. The Working Group agreed that the issue would require further consideration.

Article 2. Definitions

(a) “Foreign proceeding”

61. The Working Group was generally in agreement with paragraph (a) as drafted. Support was specifically expressed in favour of retaining the text “including an interim proceeding,” and deleting the brackets around it.

(c) “Judgement”

62. The three issues raised with respect to the definition were the inclusion of the word “final”, the reference to administrative decisions, and the inclusion of provisional measures. A number of concerns were expressed with respect to the use of the word “final”, and the manner in which it might be interpreted under domestic law in different States. There was support both in favour of and against the use of the term. A proposal to resolve that issue that focussed on the enforceability of the judgement in the originating jurisdiction received some support. It was noted that the concept of enforceability was used in other international instruments.

63. Concerns expressed with respect to administrative decisions included the nature of the bodies that might issue decisions and whether the parties to the dispute had been given an opportunity to be heard before the decision was made. A proposal was made to limit administrative decisions that were enforceable under this text to those that would have the same effect as court judgements under the law of the originating State. That proposal received some support. A different proposal was to delete any reference to administrative decisions.

64. As to the inclusion of provisional measures, a number of delegations expressed concern on their inclusion on the basis that they were merely interim orders and

might be changed by the originating court. Another concern related to differences between the types of relief that might be ordered by an originating court and those that might be available as relief in the receiving State; where the former were much broader than the latter, the receiving court might be unable to recognize and enforce the order. In that regard, it was noted that relief granted under the Model Law was subject to the provisions of local law, e.g. articles 20 (2) and 22 (2). A different view was that provisional measures might be of particular importance in insolvency, particularly where they were of a protective or conservatory nature. It was suggested that some of the concerns expressed might better be addressed under draft article 10, or by qualifying provisional measures by reference to those enforceable under the laws of the originating State.

65. After discussion, it was agreed that in respect of each of the issues outlined above, since the Working Group could not reach agreement on how to reconcile the different views, the existing text should remain in square brackets. The Secretariat was requested to explore possible solutions including approaches adopted by the Hague Conference, such as that of equivalent effect, as included in article 13 of the text emanating from the fifth session of the Hague Conference working group on the judgements project (October 2015).

(d) "Insolvency-related judgement"

66. The prevailing view was that Variant 1 of the chapeau was preferred over Variant 2, noting that the reference to "insolvency estate" could be defined by reference to paragraph 12 (t) of the glossary of the Legislative Guide. No comments were expressed with respect to subparagraphs (i), (iii), and (iv).

67. With respect to subparagraph (ii), it was suggested that the words "and assets" should be added after the word "sums". That proposal received some support. A second proposal was to limit the subparagraph to those cases where the obligations arose after the commencement of insolvency proceedings. It was agreed that that proposal would need further consideration.

68. Support was expressed in favour of Variant 1 of subparagraph (v). In respect of subparagraph (vi), one view expressed was that it raised the same concerns as noted above with respect to provisional measures. It was suggested in respect of subparagraph (vii) that UNCITRAL's work on secured transactions should be cross-referenced. Further suggestions concerned subparagraphs (viii) and (xiii), which were said to be currently drafted too broadly and should be limited to judgements that would otherwise be enforceable under this instrument. In terms of subparagraph (ix), support was expressed for retention of the subparagraph with the addition of the words "that could be pursued by or on behalf of the insolvency estate". In relation to subparagraphs (x) to (xii), although it was proposed that those provisions should be deleted on the basis that they were covered by the Model Law, it was noted that there might be situations where that was not the case (such as where the foreign proceeding was no longer pending), and they should be retained in the text. There was support for the latter view on the additional basis that it was not entirely clear whether such provisions were covered by the Model Law.

69. After discussion, a preference was expressed in favour of Variant 1 of the chapeau and of Variant 1 of subparagraph (v). It was agreed that subparagraphs (ii), (vi) to (ix) and (xiii) required some revision as discussed above, and that

subparagraphs (x) to (xii) should be retained. There was broad support for deleting subparagraph (xiv).

Possible additions to draft article 2

70. After discussion, the Working Group agreed to retain Variant 3 of paragraph (f), to retain paragraph (e) and to delete paragraphs (g) and (h).

Articles 3 to 7

71. Although some reservations were expressed with respect to the need for article 5, support was nonetheless expressed in favour of retaining draft articles 3 to 7.

Article 8. Recognition and enforcement of an insolvency-related judgement

72. Support was expressed in favour of retaining Variant 2, with the following adjustment to paragraph 1: a comma should be inserted at the end of the first sentence, followed by insertion of "including by way of defence." The second sentence could then be deleted. In subparagraph 1 (b), the reference to finality should be aligned with the revised definition of "judgement". Some support was expressed in favour of deleting paragraph 3.

73. The view was expressed that subparagraph 2 (c) was not needed because only notice of the application for recognition and enforcement was required to support that application. Notice relating to the originating proceeding could be requested by the judge if proper notification of that proceeding was contested.

74. It was suggested that the words "as required by the law of the State of recognition" be added after the word "evidence" in subparagraph 2 (d).

75. Reference was made to paragraph 3 of the notes section following draft article 8, which quoted from paragraph 4 of the preliminary draft text emanating from the Hague Conference working group on the judgements project dealing with the question of postponement. Support was expressed in favour of including that concept in the draft text.

Article 9. Decision to recognize and enforce an insolvency-related judgement

76. Concerns were raised as to the intent of paragraph (f). A view was expressed that the purpose was not to provide for review of the foreign judgement itself, but rather of the proceedings in which the judgement was issued, and in particular, whether those proceedings would be manifestly contrary to the public policy of the receiving State. Concerns were also expressed, however, that that could be read as contradictory to the purpose of the draft instrument. A related concern was that refusal of recognition under the Model Law on technical grounds should not be a ground for refusing recognition of a judgement emanating from those proceedings. It was proposed that the chapeau of article 9 be simplified to read "An insolvency-related judgement shall be recognized and enforced provided:".

77. It was proposed that public policy concerns might best be addressed by incorporating an article along the lines of article 6 of the Model Law. That article would replace paragraph (f) and article 10 paragraph (d) and resolve any question of the party with the burden of proving that recognition of the judgement would be

manifestly contrary to public policy. That proposal received some support, and a proposal for text was made later in the session (see para. 81 below).

Article 10. Grounds to refuse recognition of an insolvency-related judgement

78. The Working Group supported revision of the chapeau of article 10 to read: "Recognition and enforcement of an insolvency-related judgement may be refused if:".

Paragraph (a)

79. Some support was expressed in favour of retaining the first part of the provision dealing with the possible review of the judgement and deleting the second part relating to lack of enforceability in the originating State because of such a review. An alternative view was also expressed that the later phrase of the provision in respect of lack of enforceability was the more important aspect of the provision and should be retained. That view received some support. In addition, some support was also expressed in favour of adding some provision for the protection of creditors and other stakeholders along the lines of article 22 of the Model Law, although it was noted that such a proposal had relevance to the text as a whole rather than simply with respect to paragraph (a). It was also noted that the draft text emanating from the Hague Conference working group on the judgements project provided for postponement or refusal of recognition in the event that the judgement was subject to review. It was suggested that that approach might be followed in the current text (see para. 75). After discussion, it was agreed to retain paragraph (a) for further consideration.

Paragraph (b)

80. One proposal was that paragraph (b) should be deleted because it required the receiving court to pass judgement on certain aspects of the proceedings in the originating State. A concern expressed related to the meaning of the word "notice" but in response, it was observed that not only was this provision commonly found in similar international instruments, but that the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (articles 15 and 16) might assist in interpreting this provision. After discussion, paragraph (b) was retained for further consideration.

Paragraphs (c), (d) and (e)

81. It was noted that if an article dealing with a general public policy exception were included in the text, paragraphs (d) and (e) could be deleted. After further consideration, it was proposed that the following provision based upon article 6 of the Model Law and paragraph (e) could be added: "Nothing in this law prevents this court from refusing to take an action governed by this law if the action would be manifestly contrary to public policy [or] [including] the fundamental principles of procedural fairness of the State." That proposal was supported as a basis for further consideration. A suggestion that the word "and" should be used instead of the words in square brackets was not supported on the basis that public policy included both procedural and substantive fairness. Paragraph (c) was retained for further consideration.

Paragraphs (f) and (g)

82. It was observed that since all judgements were "binding", that word could be deleted from the text. It was noted that an article along the lines of article 22 of the Model Law may also have some application to paragraphs (f) and (g). There was some support for also deleting the word "final" on the basis that the decision on enforcement should not be delayed in order to wait for the prior or earlier judgement to become final. After discussion, paragraphs (f) and (g) were retained for further consideration.

Paragraph (h)

83. There was support in the Working Group for the retention of Variant 1 of paragraph (h).

Paragraph (i)

84. Various concerns were expressed with respect to different elements of Variants 1, 2 and 3, although some preference was expressed for Variant 3. Concerns expressed included the use of the terms "unreasonable or unfair" in Variants 1 and 2, and introduction of the use of the term "centre of main interests" in Variant 3. It was pointed out that the use of that term might be problematic for States that had not enacted the Model Law. Several revisions were proposed, but after discussion, there was agreement that those three variants should be deleted. It was noted that the list of factors recently proposed in the context of the Hague Conference working group on the judgements project was not required in this text.[2]

85. Two proposals for a new paragraph (i) were made; the Working Group agreed to retain them in square brackets for future consideration. The first proposal was: "(i) The judgement was not rendered by a court in the State of the debtor's centre of main interests or by a court which would have had jurisdiction in accordance with the law of the requested State concerning recognition and enforcement of the foreign judgement." The second proposal was: "(i) The judgement was not rendered by a court that: (a) [for Model Law enacting States: was supervising a main proceeding regarding the insolvency of the party against whom the judgement was issued;] (b) exercised jurisdiction based on the consent of the party against whom the judgement was issued; (c) exercised jurisdiction on a basis on which the receiving court could have exercised jurisdiction under its own law; or (d) exercised jurisdiction on a basis that was not inconsistent with the law of the receiving court." Although there was stronger support for the second proposal, the Working Group agreed to retain both for further consideration. The view was expressed that future discussion on the matter should be linked to the discussion on scope as set out in draft articles 1 and 2.

86. A further proposal was made to include an additional paragraph in draft article 10 as follows: "The judgement adversely affects the interests of creditors and other interested parties in this State who did not, directly or through an appropriate representative, participate in the foreign proceedings, and who could not reasonably be expected to have participated in such proceedings." Support was expressed for that proposal, although it was noted that if it was limited to local creditors only, the

[2] See the text emanating from the 5th meeting, October 2015.

provision would be too narrow; the Working Group's attention was drawn to article 22 of the Model Law and paragraph 198 of the Guide to Enactment and Interpretation.

Paragraph (j)

87. It was observed that paragraph (j) could be deleted as having already been addressed by article 8.

VI. Other business

88. The Working Group was advised that a meeting of the open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues and to study adoption of the Model Law (A/CN.9/798, para. 19) had taken place. Several papers were presented for consideration and comment, and the work to be undertaken was further discussed. A further meeting of the informal group will be convened during the forty-ninth session of the Working Group in New York (2 to 6 May 2016).

By Daniel M. Glosband and Prof. Jay Lawrence Westbrook[1]

Opinion: No Debtor "Presence" Is Required for Chapter 15 Recognition

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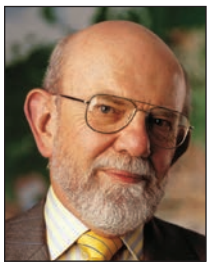

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The UNCITRAL Model Law on Cross-Border Insolvency[2] and chapter 15 of the Bankruptcy Code[3] provide assistance to foreign courts or foreign representatives in connection with foreign insolvency proceedings.[4] The history and commentary underlying the Model Law are especially important and must be considered in interpreting chapter 15.[5] To obtain judicial assistance in a Model Law country, a foreign representative must obtain an order granting *recognition* of a foreign proceeding.[6] The nature and attributes of the debtor — whether the debtor has a domicile, place of business or property in the ancillary country — are extraneous to the eligibility of a foreign proceeding for recognition:

> In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of article 2, subparagraph *(a), independently of the nature of the debtor* or its particular status under national law.[7]

The reader searches the Model Law and the Guide in vain to find any provision granting relief to *debtors*. The Model Law was designed to help trustees and administrators better cooperate in international insolvency cases. Debtors' rights were (and in most countries remain) of little interest to most of the UNCITRAL delegates.[8]

Nonetheless, in *In re Barnet*,[9] the Second Circuit Court of Appeals recently ruled that § 109(a) of the Bankruptcy Code[10] requires that a debtor in a foreign insolvency proceeding have a presence in the U.S. — "resides or has a domicile, a place of business, or property" — as a precondition to recognition. The court professed to use a plain-meaning rule to reach and defend its conclusion, but the plain-meaning approach is inappropriate for several reasons:

- while it is plain that § 103(a) applies chapter 1 to chapter 15, the way in which § 109(a) functions in relation to chapter 15 is not plain and requires a structural analysis that the court sidestepped;
- the term "debtor" as used in § 109(a) cannot plainly include "debtor" as used in chapter 15; and
- the mandate in § 1508 that, in interpreting chapter 15, courts shall consider its international origin, and the need to promote an application that is consistent with the needs of international insolvency practice requires flexibility, not literal rigidity.[11]

The correct answer to how § 109(a) meshes with chapter 15 is found in the structure of the Code, including the very specialized function of chapter 15, the nature of the relief it grants, the facially different definitions of "debtor," and its origin in a Model Law that disregards the nature of the debtor.[12] The *Barnet* decision may create serious barriers to relief for foreign debtors — a result wholly inconsistent with the congressional purpose in enacting chapter 15.

An Australian court appointed Barnet and Fletcher as liquidators of Octaviar Administration Pty. Ltd.[13] They filed a verified petition seeking recognition of the Australian liquidation proceeding as a foreign main proceeding.[14] A lender and defendant in an Australian litigation commenced by the liquidators, Drawbridge Special Opportunities Fund LP, opposed recognition, asserting that § 109(a) applied and posited that Octaviar did not satisfy the requirements of § 109(a).[15] The bankruptcy court granted recognition pursuant to § 1517(a).[16] The Second Circuit granted a direct appeal and held that the foreign proceeding could not be recognized because the liquidators failed to prove that the debtor satisfied § 109(a),[17] which applied by the plain-meaning rule of statutory interpretation.[18]

1 The authors led a delegation to the United Nations Commission on International Trade Law (UNCITRAL) that produced the Model Law on Cross-Border Insolvency, which became chapter 15 of the Bankruptcy Code, and worked closely with congressional staffs on the version adopted. This article is an abbreviated version of a much longer article forthcoming in the *International Insolvency Review*, *available at* onlinelibrary.wiley.com/doi/10.1002/iir.1230/full (last visited March 26, 2015; link active through May 24, 2015).

2 UNCITRAL is the United Nations Commission on International Trade Law. The Model Law and Guide to Enactment ("Model Law," "Guide") can be found at www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited on March 24, 2015). The Guide was updated in 2013, but nearly all of the original text remains, albeit with different paragraph numbering. Unless otherwise noted, citations in this article are to the updated Guide.

3 Chapter 15: Ancillary and Other Cross-Border Cases, 11 U.S.C. §§ 1501-1532 .

4 Model Law, Article 1(a); 11 U.S.C. § 1501(b)(1).

5 House Report 109-31, pt. 1, 109th Cong., 1st Sess. (2005), at 106, fn.101.

6 Model Law, Article 15; 11 U.S.C. § 1515.

7 Guide at ¶ 55 (emphasis added).

8 *See Barclays Bank PLC v. Kemsley*, 992 N.Y.S. 2d 602, 606 (N.Y. Sup. Ct. 2014) (relying on comments of Hon. **James M. Peck** (ret.) at a hearing following denial of a petition for recognition by the foreign representatives of Paul Kemsley's U.K. bankruptcy).

9 *In re Katherine Elizabeth Barnet*, 737 F.3d 238 (2d Cir. 2013). Barnet and William John Fletcher are the liquidators of Octaviar Administration Pty. Ltd. and its foreign representatives. *Id.* at 241.

10 11 U.S.C. § 101, *et seq.*

11 Section 1508 provides that "[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

12 11 U.S.C. § 101(13) (defining "debtor," with terms repeated in § 109(a), as a person "concerning which a case under this title has been commenced"); 11 U.S.C. § 1502(1) (defining "debtor" for purposes of chapter 15 as "an entity that is the subject of a foreign proceeding"); Guide at ¶ 55.

13 *In re Octaviar Administration Pty. Ltd.*, Case No. 12-13443 (Bankr. S.D.N.Y. 2010) (the "Chapter 15 Case"), Docket No. 47.

14 Verified Petition under Chapter 15 for Recognition of a Foreign Main Proceeding, *In re Katherine Elizabeth Barnet*, Chapter 15 Case (the "Chapter 15 Case"), Docket No. 2.

15 *Barnet*, 737 F.3d at *241; Chapter 15 Case, Docket No. 13, p. 2.

16 Chapter 15 Case, Docket No. 18 (the "Recognition Order").

17 *Barnet*, 737 F.3d at 247.

18 *Id.* at 246.

As the late Hon. **Burton R. Lifland** recognized in *In re Bear Stearns*,[19] the Model Law and chapter 15 created a very simple and definite structure.[20] A foreign proceeding *shall* be recognized if the foreign proceeding is within the meaning of Article 2(a), the foreign representative is a person or body within the meaning of Article 2(d), and the foreign proceeding is either a foreign main proceeding or a foreign nonmain proceeding.[21]

The chapter 15 commencement procedure is wholly contained within chapter 15;[22] the provisions for commencement of cases under other chapters of title 11 do not apply to chapter 15.[23] Sections 301, 302 and 303 all state that petitions to commence a case under chapters 7, 11, 9, 12 and 13 can be filed by (or, under § 303, against) entities that "may be a debtor under such chapter."[24] Section 109(b)-(f) specifies the persons or entities who may be debtors under those chapters.[25] The structure of § 109, which is an umbrella debtor-eligibility requirement for each of the chapter-specific subsections of § 109 that follow, weighs against application to chapter 15. Chapter 15 is notably absent from the series of chapters specifically addressed by the rest of § 109, leading naturally and "plainly" to the conclusion that § 109(a) does not apply to the commencement of a chapter 15 case. Section 109 does not specify the persons who may be debtors under chapter 15 because, "for the purposes of [chapter 15,] the term 'debtor' means an entity that is the subject of a foreign proceeding" (*i.e.*, not a debtor in a case under title 11).[26]

Barnet erroneously concluded that the "plain-meaning" rule provided a relatively simple resolution of the case.[27] It disregarded the implications of the discrete definitions of "debtor" in §§ 101(13) and 1502(1), essentially conjoining those incompatible definitions, and consequently misunderstood a structural issue as a definitional one. Section 1502 contains a definition of "debtor" that begins "[f]or the purposes of this chapter, the term — (1) debtor means an entity that is the subject of a foreign proceeding." "'Debtor' *is given a special definition for this chapter*. This definition does not come from the Model Law, but is necessary to eliminate the need to refer repeatedly to 'the same debtor as in the foreign proceeding.'"[28] In contrast, § 101(13) states that a "'debtor' means person or municipality concerning which a case under this title has been commenced." The filing of a petition for recognition of a foreign proceeding will not commence a case that will convert the debtor subject to the foreign proceeding into a debtor concerning which a case under title 11 has been commenced.

The existence of two distinct definitions of "debtor" should signal the unlikelihood that a plain-meaning approach will be efficacious.[29] The central issue is how § 109(a) applies to chapter 15 — obviously a structural issue. Since chapter 1 of the Code, including § 109(a), does not fit the commencement process for chapter 15 cases in a literal application, the plain-meaning approach loses its usefulness, and attention must turn to the structure and purpose of chapter 15. That striking structural exception — that commencement of cases under all other chapters is governed by § 109 while commencement of cases under chapter 15 is governed by § 1515 — compels a different understanding of the application *vel non* of § 109(a) to that chapter notwithstanding the language in § 103 applying chapter 1 to chapter 15.

Section 109(a) does apply to a foreign debtor in a full bankruptcy proceeding under chapter 7 or 11 when, for example, the debtor files a U.S. bankruptcy proceeding to seek enforcement of a foreign discharge. Section 109(a) also applies in a chapter 15 case when, after recognition, § 1511 authorizes the foreign representative to commence a "full" case under § 301, 302 or 303. In that instance, the debtor in the foreign proceeding that has been recognized must also be eligible to become a debtor under title 11. Conversely, the reason that § 109(a) does not apply to recognition is that the debtor in the foreign proceeding will not, by virtue of chapter 15 recognition of the foreign proceeding, become "a debtor under this title."

The court's statement that "[s]ection 1502's scope is expressly limited to "this chapter"[30] is wrong and fails to provide a basis for the plain meaning of § 109(a) to trump the plain meaning of § 1502. The definition sections of chapters 7 and 11 begin with the phrase, "In this subchapter —," which limits the definitions to use within the chapter. The unique introductory language of § 1502, "For the purposes of this chapter," is expressly expansive and does not permit the application of dual definitions.[31]

The Second Circuit concluded that the "plain meaning" of §§ 103 and 109(a) pre-emptively established that a foreign proceeding cannot be recognized under chapter 15 unless the debtor that is the subject of the foreign proceeding meets the requirements of § 109(a). We have seen that the meaning, on its face, cannot have been "plain" and that in any case, § 1508 rejects a purely textual reading of chapter 15. House Report 109-31 (Part 1) (2005) accompanied S.256, the legislation embodying the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA); title VIII of BAPCPA comprises chapter 15.[32] The House Report recurringly refers to the Model Law and the Guide to explain chapter 15.[33] Section 1508 of the Code promotes uniform application of chapter 15 with the Model Law as adopted in other countries: "Interpretation of this Chapter on a uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well."[34]

19 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007); *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008).

20 *Bear Stearns*, 374 B.R. at 127.

21 Model Law, Article 17.

22 11 U.S.C. §§ 1504 and 1515.

23 11 U.S.C. § 103(a) states that "chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15."

24 11 U.S.C. §§ 301, 302 and 303.

25 11 U.S.C. § 109(b)-(f).

26 11 U.S.C. § 1502(1).

27 *Barnet*, 737 F. 3d at 247 ("Section 103(a) of Title 11 provides that, other than for an exception not relevant here, Chapter 1 'of this title ... appl[ies] in a case under chapter 15.' *Section 109*, of course, is within Chapter 1 of Title 11 and so, by the plain terms of the statute, it applies 'in a case under chapter 15.'").

28 H.R. Rep. 109-31 (Part 1) (2005) at 107 (emphasis supplied).

29 *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."). Of course, the threshold question is the determination that the meaning is "plain."

30 *Barnet*, 737 F.3d at 249.

31 H.R. Rep. 109-31 at 107 states that "'[d]ebtor' is given a special definition … to eliminate the need to refer repeatedly to 'the same debtor as in the foreign proceeding.'"

32 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-08, 119 Stat. 23, title VIII, enacted April 20, 2005. H.R. Rep. 1, *et seq.*

33 H.R. Rep. 109-31 at 105-19.

34 H.R. Rep. 109-31 at 109.

continued on page 63

from page 25

The Second Circuit never mentioned § 1508 in *Barnet*, although § 1508 dictates that "[i]n interpreting this chapter, the court shall consider its international origin, and the need to promote an application … that is consistent with the application of similar statutes adopted by foreign jurisdictions," negating a rigid, literal plain-meaning interpretation. The *Barnet* decision reads as if § 1508 were absent from the Bankruptcy Code. When a court is interpreting a statute, how can it fail to mention or apply a section of that statute entitled "Interpretation"?

The foreign representatives subsequently filed a new petition for recognition of a foreign main proceeding[35] and identified two types of property in the U.S. — claims and causes of action, and an undrawn retainer held by their counsel.[36] The bankruptcy court held that such causes of action satisfied § 109(a) and found that retainers also comprised "property" within § 109(a).[37] Whether foreign representatives are safe in relying on this sort of tactic is not at all clear since application of § 109(a) invites a subjective, "bad-faith" attack that could be an impediment to recognition, permitting substitution of the high hurdle "manifestly contrary to public policy" (§ 1506) with the lower bar of lack of good faith.[38]

The *Barnet* decision represents an ostensibly stubborn adherence to literal statutory interpretation when the statutory provisions at issue *prima facie* were not susceptible to literal interpretation and when Congress instructed courts to look beyond the statute for guidance in harmonizing chapter 15 to the Model Law. We hope courts in other circuits will apply § 1508 and not impose requirements for recognition beyond those set forth in § 1517.[39] To eliminate the risk of misapplication of § 109(a), Congress could modify § 103(a) to make it unavoidably clear that § 109(a) does not apply to eligibility of a foreign proceeding for recognition. abi

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35 *In re Octaviar Administration Pty. Ltd. (Debtor in a Foreign Proceeding)*, 511 B.R. 361 (Bankr. S.D.N.Y. June 19, 2014) ("*Octaviar II*").

36 *Octaviar II* at 369 and 372.

37 *Id.* at 372-73, *citing In re Cenargo Int'l PLC*, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003); *In re Yukos Oil Co.*, 321 B.R. 396, 401-03 (Bankr. S.D. Tex. 2005); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000). *See also In re Suntech Power Holdings Co. Ltd.*, 2104 WL 6152761 (Bankr. S.D.N.Y. Nov. 17, 2014).

38 *Cf., e.g. Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071-72 (5th Cir. 1986) ("Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings.").

39 Subsequent to the *Barnet* decision, the U.S. Bankruptcy Court for the District of Delaware disagreed with *Barnet*, refused to apply § 109(a) to the recognition of a foreign proceeding and predicted that the Third Circuit would agree. *In re Bemarmara Consulting A.S.*, Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013).