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UNCITRAL Model Law

By the International Insolvency Institute

Evan J. Zucker, Moderator
Blank Rome, LLP; New York, USA

Kathlene M. Burke
Skadden, Arps, Slate, Meagher & Flom LLP; London, UK

Hon. Christopher M. Klein
U.S. Bankruptcy Court (E.D. Cal.); Sacramento, USA

Prof. Avv Antonio Tullio
Tullio & Partners Studio Legale; Modena, Italy

Robert van Galen
NautaDutilh N.V.; Amsterdam, The Netherlands

2019

Developments on UNCITRAL Working Group V

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NautaDutilh N.V.; Amsterdam, The Netherlands

Kathlene M. Burke
Skadden, Arps, Slate, Meagher & Flom LLP; London, U.K.

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Agenda

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III. Model Law on Enterprise Group Insolvency

IV. Obligations of Directors in Period Approaching Insolvency

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Recognition and Enforcement of Insolvency-Related Judgments

Need for Model Law	UNCITRAL's Model Law on Cross-Border Insolvency ("CBI") does not specifically address the enforcement of judgments. Consequently, some jurisdictions have questioned whether a foreign judgment can be enforced under the CBI Model Law (*e.g.*, *Rubin v. Eurofinance SA*).
Goal	Provide an efficient and expeditious framework for recognizing and enforcing insolvency-related judgments that complements the CBI Model Law.
Key Provisions	• Art. 2(d): Definition of "insolvency-related judgment" • Art. 11: Streamlined procedure • Art. 13: Standard for recognition • Art. 14: Grounds for refusal to recognize a judgment
Outstanding Issues	Art. 14(h) allows for recognition to be refused if insolvency proceeding is not or would not be recognizable under CBI Model Law. Does this limit the effectiveness and streamlined process of the Model Law on IRJ? For example, COMI has been interpreted differently under EIR Recast and Chapter 15.
Did the Model Law Achieve Its Objectives?	If *Rubin* was reheard in the UK applying the Model Law on IRJ, there is still some question as to whether an English court would have discretion not to enforce the judgment.
Path Towards Adoption	Can be adopted as a stand-alone law or as an addition to law enacting CBI Model Law. There is a question as to whether adoption is necessary in jurisdictions that recognized foreign judgments under the CBI Model Law (*e.g.*, United States). And, in other jurisdictions, would the enactment of Article X be sufficient to accomplish the same objectives?

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Enterprise Group Insolvency

Need for Model Law	To address a gap in the original Model Law on Cross-Border Insolvency, which had not foreseen the need to address the management and coordination of multiple insolvency proceedings of affiliated companies belonging to a single enterprise group.
Goals	• Provide a legislative framework to address the insolvency of an enterprise group, including both domestic and cross-border aspects of that insolvency. • Provide a framework for cross-border cooperation and coordination. • Minimize the opening of "non-main" proceedings for all of the enterprise group members. • Protection of the interests of creditors including the treatment of their claims.
Key Provisions	• Planning Proceeding • Group Insolvency Solution • Synthetic Proceedings—Mechanisms to facilitate the treatment of foreign creditor claims in the planning proceeding in accordance with the law that would have been applicable to those proceedings.
Path Towards Adoption	Can be adopted as a stand-alone law or as an addition to law enacting CBI Model Law. Is adoption necessary in the European Union given that the EU Regulation on Insolvency Proceedings contains a chapter dedicated to enterprise groups?

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Obligations of Directors in Period Approaching Insolvency

Need for Clarification	In the enterprise group context, the issue of directors' obligations in the period approaching insolvency does not appear to be widely addressed by national legislation. Where a 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, addressing the financial difficulties of that company in isolation is likely to be difficult. The requirement to act in the interests of the directed company may be further complicated when a director of one group member performs that function or holds a managerial position in one or more 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. Moreover, the interests of those group members may be affected by the competing economic goals of other group members and those of the enterprise group collectively. A/CN.9/WG.V/WP.153
Goal	• 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. • To avoid unnecessarily adversely affecting other enterprise group members in a member's insolvency proceeding.

Key Recommendations	• Director 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 person may take into account the possible benefits of maximizing the value of the enterprise group as a whole, while 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.
	• A broad formulation of individuals who owe a duty to include any person formally appointed as a director or exercising factual control and performing the functions of a director.
	• Where a director sits on the boards of the parent and other group members, that director needs to be able to demonstrate that any transaction involving the parent took into account, and was fair and reasonable to, the group member. Reasonable steps include:
	  • Obtaining advice to establish the nature and extent of the different obligations;
	  • Disclosure to the appropriate parties of the nature and extent of the conflict;
	  • Identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant enterprise group members on the matters giving rise to a conflict of obligations, or (ii) be present at any board meeting at which such matters are to be considered;
	  • Seeking the appointment of an additional director when the conflict of obligations cannot be reconciled; and
	  • Where there is no alternative course of action available, resigning from the relevant board(s) of directors.

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Simplified Insolvency Regime for Micro, Small, and Medium-Sized Enterprises

Need for Model Law	The establishment of a simplified insolvency regime for micro and small business debtors is usually justified because of (a) the specific characteristics of micro and small business debtors, and (b) features of the existing insolvency regimes (business, consumer, and personal) that are not suitable to accommodate those characteristics. A/CN.9/WG.V/WP.166
Goal	• To put in place an expeditious, simple, and low cost insolvency regime capable of providing quick relief and a fresh start to deserving debtors while deterring re-entry into the market of dishonest or incompetent entrepreneurs; • To encourage, facilitate, and incentivize early access to such a regime by micro and small business debtors; and • To reduce the social stigma and personal risks of individuals who create businesses.

Key Recommendations	• Remove disincentives from the use of preventive out-of-court debt restructuring and facilitate the participation of all creditors in negotiations.
	• Simplified in-court proceedings with shorter timelines, simplified commencement standards, and simplified procedures including for submission, verification, and admission or denial of creditor claims.
	• Types of in-court proceedings:
	  • Zero-asset proceedings
	  • Simplified liquidation
	  • Expedited proceedings
	  • Simplified reorganization

Outstanding Issues	• It does not define the conditions for access to such regime; eligibility is left to each enacting state.
Current Status	Deliberations continue.

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Potential Future Work of Working Group V

- **Proposal of the United States of America on asset tracing and recovery**
  - The great importance of the topic was recognized and support was expressed for the proposal, but there were differing views on the advisability for the Commission to undertake work on asset tracing and recovery in insolvency proceedings. A/CN.9/972
- **Proposal of the European Union on harmonizing choice of law rules in cross-border insolvency proceedings**
  - Development of a model law on choice of law in cross-border insolvency proceedings that could cover issues including:
    - Minimum scope of the *lex fori concursus*
    - Applicable law to avoidance actions
    - Applicable law to provisions on automatic termination of contracts (or on provisions prohibiting "insolvency termination clauses")
    - Applicable law to rights *in rem*
    - Applicable law to set-off rights and limitations
  - It was considered premature to recommend any form that the work on that topic might take. If the Commission decided to take up that topic, it was considered essential to ensure close coordination between UNCITRAL, the Hague Conference on Private International Law, and the European Union.

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Q&A

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Evan J. Zucker
Blank Rome LLP
New York, USA
+1.212.885.5207
ezucker@blankrome.com

Hon. Christopher M. Klein
U.S. Bankruptcy Court
(E.D. Calif.)
Sacramento, USA

Antonio Tullio
Tullio & Partners
Studio Legale
Modena, Italy
+39 059 225018
antonio.tullio@tulcor.it

Robert van Galen
NautaDutilh N.V.
Amsterdam, Netherlands
+31 20 71 71 677
Robert.vanGalen@nautadutilh.com

Kathlene M. Burke
Skadden, Arps, Slate,
Meagher & Flom LLP
London, U.K.
+44.20.7519.7208
kathlene.burke@skadden.com

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Enterprise group insolvency: draft guide to enactment

Note by the Secretariat

Contents

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I. Introduction

1. The background information on the current work on the topic of enterprise group insolvency in the Working Group is provided in paragraphs 6 and 7 of the provisional agenda of the fifty-fifth session of the Working Group (A/CN.9/WG.V/WP.164).

2. The present note contains a draft guide to enactment of what is expected to become the UNCITRAL Model Law on Enterprise Group Insolvency. The version of the draft model law on enterprise group insolvency contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-fourth session (Vienna, 10–14 December 2018) (A/CN.9/966) was used as the basis for preparing the current draft. The draft guide incorporates amendments agreed to be made to the earlier version of the draft guide found in document A/CN.9/WG.V/WP.162 that was considered by the Working Group at its fifty-fourth session (A/CN.9/966, paras. 105–108).

3. The draft guide found in this note follows the same format as the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and the Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ), and draws upon those Guides as applicable. Several articles of the draft model law are the same as, or similar to, articles of MLCBI and to a lesser extent, MLIJ. The relevant explanations for those articles set out in the draft guide to enactment found in this note are therefore based upon the explanations contained in MLCBI or MLIJ Guides, as well as upon part three of the *UNCITRAL Legislative Guide on Insolvency Law* addressing treatment of enterprise groups in insolvency and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.

II. Draft guide to enactment

“I. Purpose and origin of the Model Law

A. Purpose of the Model Law

1. The [UNCITRAL Model Law on Enterprise Group Insolvency] (the Model Law), adopted in …, is designed to equip States with modern legislation addressing the domestic and cross-border insolvency of enterprise groups, complementing the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide, part three).

2. The Model Law includes provisions on:

(a) Coordination and cooperation between courts, insolvency representatives and a group representative (where appointed), with respect to multiple insolvency proceedings concerning members of an enterprise group;

(b) Development of a group insolvency solution for the whole or part of an enterprise group through a single insolvency proceeding commenced at the location where at least one group member has the centre of its main interests (COMI);

(c) Voluntary participation of multiple group members in that single insolvency proceeding (a planning proceeding) for the purposes of coordinating a group insolvency solution for relevant enterprise group members and access to foreign courts for enterprise group members and representatives;

(d) Appointment of a representative (a group representative) to coordinate the development of a group insolvency solution through a planning proceeding;

(e) Approval of post-commencement finance arrangements in the enterprise group insolvency context and authorization of the provision of funding under those arrangements, as required;

(f) Cross-border recognition of a planning proceeding to facilitate the development of the group insolvency solution, as well as measures to support the recognition and formulation of a group insolvency solution;

(g) Measures designed to minimize the commencement of non-main insolvency proceedings relating to enterprise group members participating in the planning proceeding, including measures to facilitate the treatment of claims of creditors of those enterprise group members, including foreign claims, in a main proceeding; and

(h) The formulation and recognition of a group insolvency solution.

3. What distinguishes the Model Law from MLCBI, which concerns itself with insolvency proceedings concerning a single debtor, is the focus on insolvency proceedings relating to multiple debtors that are members of the same enterprise group. Measures provided by the Model Law, although they draw upon and, in several respects, are similar to the measures available under MLCBI, are designed to address specific needs of insolvency proceedings affecting multiple enterprise group members.

B. Origin of the Model Law – preparatory work and adoption

4. At its forty-third session (New York, 21 June–9 July 2010),[1] the Commission adopted the Legislative Guide, part three, which deals with the treatment of enterprise groups in insolvency. That text provides a discussion of relevant issues relating to both the domestic and cross-border insolvency treatment of enterprise groups, including the advantages and disadvantages of different solutions, as well as a set of legislative recommendations.

5. At the same session, the Commission gave Working Group V (Insolvency Law) a mandate to provide guidance on the interpretation and application of selected concepts of MLCBI relating to centre of main interests and possibly to develop a model law or provisions addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.[2] The first part of the mandate was completed through revision of the Guide to Enactment of the MLCBI, resulting in adoption of the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency in July 2013.[3]

6. At its forty-seventh session (New York, 7–18 July 2014), the Commission expressed support for continuing the work on insolvency of enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of MLCBI and the Legislative Guide, part three and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the Practice Guide).[4] That second part of the mandate was completed with the negotiation of the Model Law between April 2014 and December 2018, the Working Group devoting a part of 10 sessions (forty-fifth–fifty-fourth) to work on the project.

7. [The final negotiations on the Model Law took place during the fifty-second session of UNCITRAL, held in Vienna from … to … 2019. UNCITRAL adopted the Model Law by consensus on … . In addition to the 60 States members of UNCITRAL, representatives of … observer States and ... international organizations participated in the deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution .../.. of ... [*to be annexed*], in which it...]

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 228–233.
[2] Ibid., para. 259(a).
[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 195–198.
[4] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

II. Purpose of the Guide to Enactment

8. The Guide to Enactment is designed to provide background and explanatory information on the Model Law. That information is primarily directed to executive branches of Governments and legislators preparing legislative revisions necessary to enact the Model Law, but may also provide useful insight to those charged with interpretation and application of the Model Law as enacted, such as judges, and other users of the text, such as practitioners and academics. That information might also assist States in considering which, if any, of the provisions might be adapted to address particular national circumstances (see paras. 12–13 below).

9. The Guide was considered by Working Group V at its fifty-fourth (December 2018) [and fifty-fifth (May 2019)] sessions. It is based on the deliberations and decisions of the Working Group at those sessions [and of the Commission at its fifty-second session, when the Model Law was adopted].

III. A model law as a vehicle for the harmonization of laws

10. A model law is a form of text recommended to States for incorporation into their national law through the enactment of legislation. Unlike an international convention, a model law does not require the enacting State to notify the United Nations or other States that may have also enacted the text. However, the General Assembly resolution endorsing a UNCITRAL model law usually invites States that have used the text to advise the Commission accordingly.

11. A model law is inherently flexible, enabling States to make various modifications to the text when enacting it as domestic law. Some modifications may be expected, in particular, when a model law text is closely related to national court and procedural systems. Modification means that the degree of, and certainty about, harmonization achieved through a model law may be lower than in the case of a convention.

A. Fitting the Model Law into existing national law

12. The Model Law is intended to operate as an integral part of the existing law of the enacting State. In incorporating the text of the Model Law into its legal system, a State may modify or elect not to incorporate some of its provisions. The flexibility to introduce modifications in the Model Law should however be utilized with due consideration for the need for uniformity in its interpretation (see notes on art. 7 below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in treating enterprise group insolvency.

13. In order to achieve a satisfactory degree of harmonization and certainty, States may therefore wish to make as few changes as possible when incorporating the Model Law into their legal systems. That approach would not only assist in making national law as transparent and predictable as possible for foreign users. It would also contribute to fostering cooperation between insolvency proceedings as the laws of different States will be the same or very similar; to reducing the costs of proceedings because of greater efficiency in the conduct of cross-border proceedings affecting enterprise group members; and to improving consistency and fairness of treatment in those proceedings.

14. While the Model Law has been drafted as a standalone text, States that have enacted or are considering enacting MLCBI and the Model Law, might note that several provisions of MLCBI are repeated in the Model Law with some adjustments dictated by the different scope of the Model Law and the use of enterprise group insolvency specific terminology (see section B below). Those provisions include articles 3 (on international obligations), 4 (on competent court or authority), 6 (on public policy exception), 7 (on additional assistance under other laws), 8 (on interpretation), 10 (on limited jurisdiction), 22 (on protection of creditors and other

interested persons) as well as provisions of article 16 on presumption of authenticity of documents submitted in support of the application for recognition and provisions on relief, recognition and cooperation. Additional considerations may arise from the enactment of the Model Law either simultaneously with, or subsequent to, the enactment of MLCBI and MLIJ. The Secretariat may provide technical assistance with identifying those considerations on a case-by-case basis (see chapter VI below).

B. Use of terminology

15. The Model Law introduces several new terms, including "group representative", "group insolvency solution" and "planning proceeding". Other terms, such as "insolvency representative", "insolvency proceeding", "main" and "non-main" proceeding, "enterprise", "enterprise group" and "control" are used in other UNCITRAL insolvency texts or, like "group representative" are based upon definitions included in those other texts.

16. The Model Law refers directly to "insolvency proceedings" rather than to a proceeding commenced under the laws of the enacting State relating to insolvency as in MLCBI. This approach is used only to simplify the drafting of the Model Law since the definition of "insolvency proceedings" (see paras. 18–19 below) already refers to those proceedings being commenced pursuant to the law relating to insolvency. It is not intended to signify a departure from the approach of MLCBI; both texts should be interpreted as applying to proceedings commenced under the law of the enacting State relating to insolvency.

17. Chapter 4 refers to "foreign planning proceedings" to ensure there is a clear distinction between that chapter, which introduces a regime for cross-border recognition of foreign planning proceedings, and chapter 3 which refers only to a planning proceeding commenced in the enacting State. Chapter 2 refers generally to "insolvency proceedings" as it may apply both in the situation where there are domestic and foreign proceedings, as well as situations in which there are multiple domestic proceedings and it is desirable that there be cooperation and coordination between those proceedings.

"Insolvency proceeding"

18. The Model Law relies upon the definition provided in the glossary of the Legislative Guide (Introd., subpara. 12(u)), which is consistent with the definition of "foreign proceeding" in MLCBI.

19. In some jurisdictions, the expression "insolvency proceeding" has a narrow technical meaning in that it may refer, for example, only to a collective proceeding involving a company or a similar legal person or only to a collective proceeding with respect to a natural person. In the Model Law, the term refers only to collective proceedings concerning enterprises as defined in article 2, subparagraph (a). A detailed explanation of the various elements of the definition is included in the Guide to Enactment and Interpretation of MLCBI with respect to the definition of "foreign proceeding", at paragraphs 65–80.

"This State"

20. The words "this State" are used throughout the text to refer to the State that enacts the text (i.e., the enacting State), which may include a territorial unit in a State with a federal system.

"Court"

21. Like MLCBI, the Model Law envisages the functions referred to in the Model Law (i.e., those relating to the recognition of a foreign planning proceeding and cooperation with courts, insolvency representatives and any group representative) being performed by a judicial or other authority competent to control or supervise an

insolvency proceeding. To simplify the text, the word "court" should be interpreted as including that other authority as designated under article 5.

"Subject to" or "participating in" insolvency proceedings

22. These words are used throughout the text to distinguish between an enterprise group member with respect to which an insolvency proceeding has commenced (i.e., the debtor "subject" to that proceeding) and an enterprise group member that is only participating in an insolvency proceeding, principally a planning proceeding. Participation is described in article 18. An enterprise group member could be both subject to an insolvency proceeding and participating in other insolvency proceedings, such as a planning proceeding, for the purposes of developing a group insolvency solution that could affect that group member. Those different proceedings might be taking place in different jurisdictions. As used in the text, an enterprise group member "subject to" a planning proceeding is the insolvency debtor in the main proceeding that led to the planning proceeding under article 19, paragraph 1.

"Main proceeding"

23. The Model Law defines this term by reference to the concept of an enterprise group member's COMI, drawing upon the substance of the definition of "foreign main proceeding" contained in article 2, subparagraph (b) of MLCBI. The Model Law does not define an enterprise group member's COMI, but as is the case with MLCBI, it should be interpreted by reference to the explanatory materials contained in the Guide to Enactment and Interpretation of MLCBI at paragraphs 144–147.

"Non-main proceeding"

24. The Model Law defines this term by adopting the definition of "foreign non-main proceeding" contained in article 2, subparagraph (c) of MLCBI, which is based upon the notion of establishment. The definition of "establishment" in the Model Law follows the definition of that term in article 2, subparagraph (f) of MLCBI.

"Assets and operations"

25. The Model Law refers to "assets and operations" of enterprise group members to include physical assets (such as business premises), non-physical assets (such as intellectual property rights and licenses) and operations of the business (such as accounting and auditing services). In some instances, assets may be owned by one enterprise group member, while various operations of that group member may be performed by another enterprise group member or a third party.

IV. Main features of the Model Law

26. As indicated above, the Model Law is intended to provide a legislative framework to address the insolvency of an enterprise group, including both domestic and cross-border aspects of that insolvency. Part A is a set of core provisions, dealing with matters that are regarded as key to facilitating the conduct of enterprise group insolvencies. Part B, comprising articles 30–32, includes several supplemental provisions that go further than the measures provided in the core provisions, as explained further in paragraph 28 below.

27. Part A, chapters 1, 3 and 5 are intended to supplement domestic insolvency law and facilitate the conduct of insolvency proceedings affecting two or more enterprise group members in the enacting State. Chapter 2 provides a framework for cross-border cooperation and coordination with respect to multiple proceedings affecting enterprise group members; these provisions draw upon MLCBI and the recommendations of the Legislative Guide, part three. Chapter 4 provides a framework for recognition of a foreign planning proceeding, the provision of relief to assist the development of an insolvency solution for the enterprise group, as well as

approval of a group insolvency solution, again drawing upon the recognition regime provided by MLCBI. Chapter 5, which consists of a single article that addresses protection of the interests of creditors and other interested persons, is intended to apply to relief granted under chapters 3, 4 and 6. Chapter 6 permits the claims of an enterprise group member located in one jurisdiction (a non-main jurisdiction) to be treated in a main proceeding concerning another enterprise group member taking place in another jurisdiction in accordance with the law applicable to those claims, provided that an undertaking to accord such treatment has been given in the main proceeding. Where such an undertaking has been given, chapter 6 enables the court in the non-main jurisdiction to approve that treatment in the main proceeding and to stay or decline to commence a local non-main proceeding, provided the interests of creditors are adequately protected. The enacting State may be either the location of the main proceeding or of a non-main proceeding. More detail is provided in the notes to the specific articles below.

28. Part B sets out supplemental provisions that have been included for States that may wish to adopt a more extensive approach with respect to treatment of the claims of foreign creditors. These provisions concern (a) the effect on the relief that may be ordered in a creditor's home State on the treatment of that creditor's claims in a foreign insolvency proceeding, and (b) court approval of a group insolvency solution, based on the adequate protection of creditors. These provisions go a step further than the core provisions contained in part A, enabling the court in the situation outlined above to stay or decline to commence a local main proceeding (i.e., where the group member whose claims are being treated in the foreign proceeding has COMI in the declining jurisdiction). They would also allow a court to approve 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.

29. Creditors and other third parties usually expect that a company would be subject to insolvency proceedings in the jurisdiction of that company's COMI. The use of the supplemental provisions might bring a different result. Any departure from the basic principle that insolvency proceedings commence in the jurisdiction of a company's COMI should therefore be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency outweighs any negative effect on creditors' expectations, in particular, and on legal certainty in general. Such a departure would appear to be justified in only limited circumstances, such as:

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

(b) Where the enterprise group in question was closely integrated and there was, therefore, an obvious benefit in treating enterprise group member claims in the planning proceeding in lieu of commencing main proceedings in another jurisdiction (i.e., proceedings that would be conducted at the enterprise group member's COMI); and

(c) Where the use of the provisions of part A (if available) could not achieve a similar result.

30. The Model Law preserves the possibility of excluding or limiting any action based on overriding public policy considerations (art. 6), although it is expected that the public policy exception would be rarely used.

Documents referred to in this Guide

31. (a) "MLCBI": UNCITRAL Model Law on Cross-Border Insolvency (1997);

(b) "Guide to Enactment and Interpretation": Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, as revised and adopted by the Commission on 18 July 2013;

(c) "Practice Guide": UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(d) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including part three: treatment of enterprise groups in insolvency (2010) and part four: obligations of directors in the period approaching insolvency (2013);

(e) "Judicial Perspective": UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (updated 2013); and

(f) "MLIJ": UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018).

V. Article-by-article remarks

Title

"Model Law"

32. If the enacting State decides to incorporate the provisions of the Model Law into an existing national statute, the title of the enacted provisions would have to be adjusted accordingly, and the word "Law", which appears in various articles, would have to be replaced by the appropriate phrase.

Part A. Core Provisions

Chapter 1. General provisions

Preamble

The purpose of this Law is to provide effective mechanisms to address cases of cross-border insolvency affecting the members of an enterprise group, in order to promote the objectives of:

(a) Cooperation between courts and other competent authorities of this State and foreign States involved in those cases;

(b) Cooperation between insolvency representatives appointed in this State and foreign States in those cases;

(c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

(d) Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors of those enterprise group members and other interested persons, including the debtors;

(e) Protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole;

(f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and

(g) Adequate protection of the interests of the creditors of each enterprise group member participating in a group insolvency solution and of other interested persons.

33. The goal of the preamble is to provide a succinct statement of the basic policy objectives of the Model Law of facilitating cooperation and coordination between insolvency proceedings affecting different members of an enterprise group in order to achieve a group insolvency solution that might apply to the whole or part of that enterprise group. This goal is in contrast (but complementary) to that of MLCBI, which focuses on multiple proceedings for a single debtor.

34. While it is not customary in all States to include in legislation an introductory policy statement along the lines of the preamble, consideration might nevertheless be given to including such a statement of objectives either in the body of the statute or in a separate document, to provide a useful reference for interpretation of the law.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1 note [1]
A/CN.9/898, para. 109
A/CN.9/WG.V/WP.146, footnote 2
A/CN.9/903, para. 86
A/CN.9/931, para. 65
A/CN.9/WG.V/WP.158, II, para. 1
A/CN.9/937, paras. 51–52
A/CN.9/WG.V/WP.161, paras. 1–2
A/CN.9/966, para. 84

Article 1. Scope

1. This Law applies to enterprise groups where insolvency proceedings have commenced for one or more of its members, and addresses the conduct and administration of those insolvency proceedings and cross-border cooperation between those insolvency proceedings.

2. This Law does not apply to a proceeding concerning [*designate any types of entity, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

35. The Model Law applies in the context of insolvency proceedings relating to enterprise groups. It addresses the conduct and administration of insolvency proceedings relating to two or more enterprise group members (i.e., multiple insolvency debtors), whether those proceedings are local proceedings commenced in the enacting State, foreign proceedings commenced in another State or proceedings commenced in both States. Coordination and cooperation between those proceedings may be required. Where insolvency proceedings have commenced in different States for two or more members of an enterprise group, the text is intended to: (a) support cross-border cooperation and coordination with respect to those proceedings; and (b) establish new mechanisms that can be used to foster the development and implementation of an insolvency solution for the enterprise group as a whole or for a part or parts of the group (a group insolvency solution) through a single insolvency proceeding (a planning proceeding).

36. Paragraph 2 of article 1 contemplates that States may wish to indicate possible exceptions to application of the Model Law, reflecting a similar exception contained in article 1, paragraph 2, of MLCBI. With a view to making the domestic insolvency law more transparent (for the benefit of foreign users of a law based on the Model Law), it is advisable that exclusions from the scope of the law be expressly mentioned by the enacting State in paragraph 2.

37. Like MLCBI, proceedings concerning banks, insurance companies and other similar entities are mentioned as examples of proceedings that the enacting State might decide to exclude from the scope of the Model Law. Since it is not unusual for such entities to be part of an enterprise group, consideration might be given to the circumstances in which such entities should be excluded from the Model Law. The enacting State might wish, for example, to preserve the ability of an enterprise group member of the type that might be excluded under article 1, subparagraph 2, to participate in a planning proceeding in accordance with article 18, irrespective of whether it is itself subject to some form of specialized procedure (e.g., bank resolution). There may also be circumstances in which it is desirable to preserve the possibility of recognizing a planning proceeding based upon a proceeding

commenced with respect to one of those types of entity where the insolvency of such an entity is subject to the insolvency law of the originating State.

38. In enacting paragraph 2, a State may also wish to make sure that it does not inadvertently and undesirably limit the ability of an insolvency or group representative or court to seek assistance under chapter 2 or recognition abroad with respect to a proceeding concerning such an enterprise group member. Even if the particular insolvency is governed by special regulation, it may be advisable, before generally excluding those cases from the Model Law, to consider whether it would be useful for certain features of the Model Law (e.g., chapter 2 on cooperation and coordination and possibly on certain types of discretionary relief) to be applicable in that case.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [2]
A/CN.9/898, para. 110
A/CN.9/WG.V/WP.146, footnote 3
A/CN.9/903, para. 87
A/CN.9/WG.V/WP.152, paras. 1–2
A/CN.9/931, para. 66
A/CN.9/WG.V/WP.158, II, para. 2
A/CN.9/937, para. 53
A/CN.9/WG.V/WP.161, para. 3
A/CN.9/966, para. 84

Article 2. Definitions

For the purposes of this Law:

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

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

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

(d) "Enterprise group member" means an enterprise that forms part of an enterprise group;

(e) "Group representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

(f) "Group insolvency solution" means a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members;

(g) "Planning proceeding" means a main proceeding commenced in respect of an enterprise group member provided:

(i) One or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution;

(ii) The enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and

(iii) A group representative has been appointed;

Subject to the requirements of subparagraphs (g)(i) to (iii), the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of this Law;

(h) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of an enterprise group member debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(i) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the enterprise group member debtor's assets or affairs or to act as a representative of the insolvency proceeding;

(j) "Main proceeding" means an insolvency proceeding taking place in the State where the enterprise group member debtor has the centre of its main interests;

(k) "Non-main proceeding" means an insolvency proceeding, other than a main proceeding, taking place in a State where the enterprise group member debtor has an establishment within the meaning of subparagraph (l) of this article; and

(l) "Establishment" means any place of operations where the enterprise group member debtor carries out a non-transitory economic activity with human means and goods or services.

39. The definitions contained in article 2, subparagraphs (a) to (c) derive from the Legislative Guide, part three (Glossary, subparas. 4 (a), (b) and (c)). The definition of "enterprise group member" in subparagraph (d) is provided to circumscribe the limits of the use of that term throughout the text. The definition of an "enterprise" is not intended to refer to a division of a company in a particular region or State.

40. Other definitions are taken from, or are based upon, MLCBI, namely "insolvency proceeding", "insolvency representative", "main proceeding", "non-main proceeding" and "establishment". These have been included in the Model Law for the sake of completeness, as it is drafted as a standalone text. A State that has enacted MLCBI and wishes to enact this Model Law may not need to repeat these definitions if this Model Law was to form part of the legislation enacting or supplementing enactment of MLCBI.

41. The definition of "group representative" is based upon the definitions of "foreign representative" in MLCBI (art. 2, subpara. (d)) and "insolvency representative" in the Legislative Guide (Introd., subpara. 12(v)). The functions that the group representative is authorized to undertake within the framework of the Model Law are described in the substantive articles (e.g., arts. 19, 21 and 25) but they mostly cover those related to a foreign planning proceeding. Domestic law would need to address in more detail the powers of the group representative in the enacting State with respect to domestic planning proceedings. Some of those powers are already covered by the Model Law, such as the authority to seek relief under article 19, paragraph 2. Additional powers may include the ability to participate in proceedings concerning group members. An enacting State, for which the concept of "group representative" is new would need to remove any ambiguities as regards the group representative's prerogatives as compared to those of the insolvency representative with respect to a domestically initiated planning proceeding. It might be noted that an insolvency representative appointed on commencement of a main proceeding that led to a planning proceeding and the "group representative" appointed to that planning proceeding could be the same person (whether legal or natural), although there is no requirement to that effect. It may be desirable to separate the functions of insolvency representative and group representative in certain situations, in particular in order to avoid a possible conflict of interests, as discussed in paragraph 103 below.

42. "Group insolvency solution" is a new term and is intended to be a flexible concept. A group insolvency solution may be achieved in different ways, depending on the circumstances of the specific enterprise group, its structure, business model, degree and type of integration between enterprise group members and other factors. Such a solution could include the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the enterprise group members or a combination of liquidation and reorganization proceedings for different enterprise group members. The solution should seek to include measures that would, or would be likely to, either maintain or add value to the enterprise group as a whole or at least to the enterprise group members involved.

43. A group insolvency solution is intended to be developed, coordinated and implemented through a planning proceeding, and it may or may not require insolvency proceedings to be commenced for all relevant enterprise group members. There may be other ways of dealing with creditor claims, depending on the availability of the mechanisms elaborated in articles 28 and 30, that could facilitate the treatment of foreign creditor claims in the planning proceeding in accordance with the law applicable to those claims.

44. "Planning proceeding" is also a new term. It is intended to refer to the proceeding through which a group insolvency solution could be developed. Such proceeding under the Model Law is, as a general rule, a "main proceeding" commenced with respect to an enterprise group member. A "main proceeding" is defined as a proceeding taking place in the State where the debtor has COMI, drawing on the definition of a "foreign main proceeding" in MLCBI. The meaning and interpretation of COMI is discussed in detail in the Guide to Enactment and Interpretation of MLCBI (at paras. 144–149) and in the Judicial Perspective (at paras. 93–135). Article 16, paragraph 3, of MLCBI provides that, in the absence of proof to the contrary, the debtor's registered office (in the case of an incorporated entity) is presumed to be COMI. The additional text at the end of the definition in subparagraph (g) indicates that a court could, subject to subparagraphs (g) (i) to (iii), recognize as a planning proceeding a proceeding that is separate to the main proceeding, provided that the separate proceeding has been approved by the court with jurisdiction over the main proceeding. It is not intended that there could be only one planning proceeding in an insolvency concerning an enterprise group. In some circumstances, such as where the enterprise group is horizontally organized in relatively independent units or where different plans are required for different parts of the enterprise group, more than one planning proceeding could be envisaged.

45. The enterprise group member with respect to which the planning proceeding commences must be one that is likely to be a necessary and integral part of the resolution of the enterprise group's (or a part of the enterprise group's) financial difficulties. In other words, it should be apparent that the group insolvency solution in question could not be developed and implemented without the involvement of that particular enterprise group member. The main proceeding commenced with respect to that enterprise group member can become a planning proceeding and that enterprise group member is described in the text as being "subject to" the planning proceeding. A main proceeding commenced with respect to an enterprise group member that would be peripheral to the development of a group insolvency solution cannot become a planning proceeding, although that enterprise group member could participate in the planning proceeding. No criteria are provided for determining whether an enterprise group member is likely to be a necessary and integral part of a group insolvency solution, as this will depend on several factors. Those relate to the structure of the enterprise group, the degree of integration between members, the group insolvency solution that is to be proposed, the members that will need to be included in that group insolvency solution and so forth.

46. To facilitate the development and implementation of a group insolvency solution, the text provides for the relevant enterprise group members to "participate" in the planning proceeding (art. 18). Those group members may also have COMI or an establishment in the State in which the planning proceeding is taking place or in

another State. In either case, article 18 makes it clear that participation is voluntary and that an enterprise group member may commence or opt out of participation at any time; the ability to do so would not have any impact on the operation of the Model Law. Article 18 also establishes the legal effect of such participation. In terms of participation in a planning proceeding, the Model Law simply refers to enterprise group members regardless of whether an enterprise group member is solvent or insolvent or subject to insolvency proceedings. The central idea is that participation of all enterprise group members relevant to development of the group insolvency solution should be facilitated, irrespective of their financial status.

47. However, the Model Law makes it clear that relief in support of a planning proceeding (art. 20, para. 2) or of recognition of a foreign planning proceeding (art. 22, para. 4 and art. 24, para. 3) may not be granted with respect to the assets and operations of an enterprise group member for which no insolvency proceeding has commenced, unless the reason for not commencing relates to the goal of minimizing commencement of insolvency proceedings under the Model Law. The rationale of such a goal would be to avoid the costs and complexity associated with managing and coordinating multiple concurrent insolvency proceedings, when other mechanisms to simplify insolvency proceedings relating to the enterprise group might be available. These might include the availability of measures such as an undertaking of the type contemplated in article 28. Thus, in the circumstances covered by the exception, relief might be available with respect to the assets and operations located in the enacting State of the enterprise group member for which no insolvency proceeding has commenced. That said, nothing in the Model Law is intended to preclude an enterprise group member from voluntarily participating in or contributing to a planning proceeding.

48. The final element of a planning proceeding is that a group representative has been appointed. As noted above, that representative might be the same person as the insolvency representative appointed in the relevant main proceeding, or it may be a different person (art. 17, addressing appointment of the same or a single insolvency representative, may have some application in this context). In either case, the role to be played by the group representative with respect to the planning proceeding is set out in the Model Law. The Model Law does not address the manner in which such a representative might be appointed, the qualifications required for appointment or the obligations applicable on appointment, leaving those issues to be determined in accordance with the applicable law of the State in which the planning proceeding commences. General considerations with respect to appointments of an insolvency representative discussed in the Legislative Guide, part two, chapter III, paragraphs 35–74 and recommendations 115–125 may be taken into account.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [3]–[7]
A/CN.9/898, paras. 111–114
A/CN.9/WG.V/WP.146, footnotes 4–7
A/CN.9/903, paras. 88–91
A/CN.9/WG.V/WP.152, paras. 3–4
A/CN.9/931, paras. 67–75
A/CN.9/WG.V/WP.158, II, paras. 3–5
A/CN.9/937, paras. 54–55
A/CN.9/WG.V/WP.161, paras. 4–5
A/CN.9/966, paras. 41–48 and 85–97

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

49. Article 3, expressing the principle of supremacy of international obligations of the enacting State over domestic law, has been modelled on similar provisions in other model laws prepared by UNCITRAL, including MLCBI.

50. To the extent that the domestic enactment of the Model Law conflicts with obligations of the enacting State arising out of a treaty or agreement binding on that State, the requirements of that treaty or agreement will prevail. Binding legal obligations issued by regional economic integration organizations that are applicable to members of that organization may be treated as obligations arising from an international treaty or agreement. The provision can also be adapted in domestic law to refer to binding international instruments with non-State entities, where such instruments could apply to matters within the scope of the Model Law.

51. In enacting the article, the legislator may wish to consider whether it would be desirable to take steps to avoid an unnecessarily broad interpretation of international treaties. For example, the article might result in giving precedence to international treaties that, while dealing with matters covered also by the Model Law (e.g., access to courts and cooperation between courts or administrative authorities, such as court officials), were aimed at the resolution of problems other than those addressed by the Model Law. Some of those treaties, only because of their imprecise or broad formulation, may be misunderstood as dealing also with matters dealt with by the Model Law. Such a result would compromise the goal of achieving uniformity and facilitating cross-border cooperation in insolvency matters and would reduce certainty and predictability in the application of the Model Law. The enacting State might wish to provide that for article 3 to displace a provision of the domestic law, a sufficient link must exist between the international treaty concerned and the issue governed by the provision of the domestic law in question. Such a condition would avoid the inadvertent and excessive restriction of the effects of the legislation implementing the Model Law. However, such a provision should not go so far as to impose a condition that the treaty concerned has to deal specifically with insolvency matters in order to satisfy that condition.

52. In some States binding international treaties are self-executing. Where they are not self-executing, it might be inappropriate or unnecessary to enact article 3 or it might be appropriate to enact it in a modified form.

Discussion in UNCITRAL and the Working Group

A/CN.9/937, para. 58
A/CN.9/WG.V/WP.161, para. 6
A/CN.9/966, para. 98

Article 4. Jurisdiction of the enacting State

Where an enterprise group member has the centre of its main interests in this State, nothing in this Law is intended to:

(a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member;

(b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member's participation in a group insolvency solution being developed in another State;

(c) Limit the commencement of insolvency proceedings in this State, if required or requested; or

(d) Create an obligation to commence an insolvency proceeding in this State in respect of that enterprise group member when no such obligation exists.

53. Article 4 is intended to clarify the scope of the Model Law by indicating that it is not seeking to interfere with the jurisdiction of the courts of the enacting State in the areas mentioned in subparagraphs (a) to (d) explained below.

Subparagraph (a)

54. Subparagraph (a) confirms that nothing in the Model Law is intended to limit the jurisdiction of the courts of the enacting State with respect to any enterprise group member that has COMI in that State. Accordingly, such an enterprise group member participating in a planning proceeding in another State for the purpose of developing a group insolvency solution may still be subject to a main proceeding in the enacting State The provisions of chapter 2 would be relevant to ensuring cooperation and coordination between the main proceeding and the planning proceeding.

Subparagraph (b)

55. This subparagraph is intended to preserve the jurisdiction of the courts of the enacting State with respect to the participation, in a group insolvency solution taking place in another State, of an enterprise group member subject to the jurisdiction of the enacting State. If the law of the enacting State precludes such an enterprise group member from participating in a proceeding, such as a planning proceeding, taking place in another State unless certain approvals are obtained, this subparagraph confirms that those requirements are not affected by the Model Law.

Subparagraph (c)

56. Subparagraph (c) recognizes that, as a general principle, in the enterprise group context, it might not always be necessary to commence an insolvency proceeding for every enterprise group member experiencing financial difficulty, but where such proceedings are required or requested, commencement should not be restricted. It does not address the status of those insolvency proceedings, i.e., main or non-main, or the place in which such proceedings might be commenced.

57. Non-main 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 single unit, or differences in the potentially multiple legal systems concerned are so great that difficulties may arise if the effects deriving from the law of the State of the commencement of proceedings were to be extended to other States in which assets are located. For that reason, the insolvency representative in the main proceeding may request the commencement of non-main proceedings when and where that would lead to the efficient administration of the insolvency estate. However, non-main proceedings may also hamper the efficient administration of an insolvency estate, especially in the group context, where numerous non-main proceedings might be commenced for different group members. There may thus be situations in which the court seized of a request to commence a non-main proceeding might be able, at the request of the insolvency representative in the main proceeding, to postpone or refuse to commence a non-main proceeding in order to preserve the efficiency of the main proceeding. Such a postponement or refusal might be subject to the condition that the interests of creditors of the relevant enterprise group member and other stakeholders are protected (see for example, arts. 27 and 32).

Subparagraph (d)

58. This subparagraph complements the other subparagraphs of article 4 by confirming that, while it is not the intention of the article to limit the jurisdiction of the enacting State, it is also not the intention of the article to create an obligation to commence an insolvency proceeding where that obligation does not otherwise exist.

Discussion in UNCITRAL and the Working Group

A/CN.9/864, para. 14
A/CN.9/WG.V/WP.137/Add.1, principles 1 and 1bis
A/CN.9/870, para. 13
A/CN.9/WG.V/WP.142/Add.1, note [2], para. 5
A/CN.9/898, para. 110
A/CN.9/WG.V/WP.146, footnote 9

A/CN.9/903, para. 92
A/CN.9/WG.V/WP.152, para. 5
A/CN.9/931, para. 76
A/CN.9/WG.V/WP.158, part II, paras. 6–7
A/CN.9/937, para. 56
A/CN.9/WG.V/WP.161, paras. 7–9
A/CN.9/966, paras. 99-101

Article 5. Competent court or authority

The functions referred to in this Law relating to the recognition of a foreign planning proceeding and cooperation with courts, insolvency representatives and any group representative appointed shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

59. The competence for the judicial functions addressed in the Model Law may lie with different courts in the enacting State. Enacting States should tailor the text of the article to its own system of court competence. The value of article 5, as enacted in a given State, would be to increase the transparency and ease of use of the legislation for the benefit, in particular, of foreign insolvency and group representatives and foreign courts. If, in the enacting State, any of the functions mentioned in article 5 are performed by an authority other than a court, the State would insert in that article, and in other appropriate places in the enacting legislation, the name of the competent authority.

60. In defining jurisdiction in matters mentioned in article 5, it is desirable that the implementing legislation not unnecessarily limit the jurisdiction of other courts in the enacting State, to entertain, in particular, requests for provisional relief by a foreign insolvency or group representative.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.146, footnote 11
A/CN.9/903, para. 93
A/CN.9/931, para. 78
A/CN.9/937, para. 57
A/CN.9/WG.V/WP.161, para. 10
A/CN.9/966, para. 102

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

61. Article 6 of the Model Law is an overarching provision that applies to all matters covered by the Model Law. Such a provision is included in other UNCITRAL model laws, including MLCBI and MLIJ. The notion of public policy is grounded in domestic law and may differ from State to State. No uniform definition of that notion is attempted in article 6.

62. In some States, the expression “public policy” may be given a broad meaning in that it might relate in principle to any mandatory rule of domestic law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular, constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do so would contravene those fundamental principles.

63. The purpose of the expression “manifestly”, which is also used in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State, such as the security or sovereignty of the State.

64. Cooperation among courts, including through the recognition of a planning proceeding, should not be hampered by an expansive interpretation of public policy.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.146, footnote 10
A/CN.9/903, para. 93
A/CN.9/931, para. 77
A/CN.9/937, para. 57
A/CN.9/WG.V/WP.161, para. 11
A/CN.9/966, para. 103

Article 7. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

65. A provision similar to the one contained in article 7 appears in a number of private law treaties (e.g., art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[5]). More recently, it has been recognized that such a provision would also be useful in a non-treaty text, such as a model law, on the basis that a State enacting a model law would have an interest in its harmonized interpretation. Article 7 has been modelled on article 8 of MLCBI and article 8 of MLIJ.

66. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL. (For further information about the system, see para. 221 below.)

Discussion in UNCITRAL and the Working Group

A/CN.9/937, para. 58
A/CN.9/WG.V/WP.161, para. 12
A/CN.9/966, para. 103

Article 8. Additional assistance under other laws

Nothing in this Law limits the power of a court or an insolvency representative to provide additional assistance to a group representative under other laws of this State.

67. The purpose of the Model Law is to increase and harmonize the assistance available in the enacting State with respect to enterprise group insolvency. The law of the enacting State may, at the time of enacting the Model Law, already have in place various provisions under which a group representative could obtain assistance. It is not the purpose of the Model Law to replace or displace those provisions to the extent they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law. The enacting State may consider whether article 8, which specifically refers to assistance to be provided to a group

[5] United Nations, *Treaty Series*, vol. 1498, No. 25567.

representative by the court or an insolvency representative in the enacting State, is needed to make that point clear.

Discussion in UNCITRAL and the Working Group

A/CN.9/966, para. 104

Chapter 2. Cooperation and coordination

68. As noted above (para. 3), the provisions of MLCBI focus on a single debtor, albeit with assets in different States. For that reason, MLCBI has limited applicability to enterprise groups with multiple debtors in different States, where the link between multiple proceedings is not a common debtor, but rather the fact that the debtors are all members of the same enterprise group. Unless the existence (and possibly the extent) of that enterprise group is or can be recognized under domestic law, proceedings concerning enterprise group members may appear to be unrelated to each other. Moreover, cross-border cooperation may appear to be unwarranted on the basis that it could interfere with the independence of domestic courts or be deemed unnecessary because each proceeding is, essentially, a domestic proceeding. While it may be possible in some instances to treat each enterprise group member entirely separately, for many enterprise groups, resolution of the financial difficulty of a number of enterprise group members may be achieved through a more widely-based, potentially group-wide, insolvency solution that reflects the manner in which the enterprise group conducted its business before the onset of insolvency and addresses the future of the enterprise group as a whole or in part. Such an approach may be of particular importance where the business of the enterprise group is conducted in a closely integrated manner.

69. For those reasons, it may be desirable that an insolvency law recognizes the existence of enterprise groups and the need for courts to cooperate with other courts, with insolvency representatives of different enterprise group members and with group representatives, both domestically and cross-border. Accordingly, the drafting of the articles of chapter 2 does not distinguish between local or foreign courts or insolvency representatives (where “foreign” would refer to courts located or insolvency representatives appointed in a State other than the enacting State). Moreover, cooperation would be important not only with respect to insolvency proceedings concerning the same enterprise group member debtor, but also with respect to insolvency proceedings concerning different enterprise group members, especially those that may be taking part in developing a group insolvency solution for the group as a whole or in part.

70. The articles in chapter 2 of the Model Law should be considered core articles that are intended to apply not only to the conduct of insolvency proceedings involving different enterprise group members, where cooperation and coordination are considered to be useful, but also to cases in which a group insolvency solution is being developed through a planning proceeding (as addressed in chapter 3). Chapter 2 does not prevent an enacting State from using other tools for cooperation and coordination that might be available domestically; this is reflected in article 8.

71. Chapter 2 draws upon MLCBI and its Guide to Enactment and Interpretation (chap. IV, paras. 209–223), the recommendations and commentary of the Legislative Guide, part three (chap. III, paras. 14–54 and recs. 239–254) and the Practice Guide (chap. II). As such, those texts serve as background information and should be read in conjunction with articles 9–18 of the Model Law. International guidelines that have been developed to assist the conduct of cross-border cooperation and coordination in insolvency cases might also be noted.

Article 9. Cooperation and direct communication between a court of this State and other courts, insolvency representatives and any group representative appointed

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, other courts, insolvency representatives or any group representative appointed.

72. Article 9, paragraph 1, requires the court to cooperate to the maximum extent possible with courts, insolvency representatives and, where appointed in the context of a planning proceeding, a group representative, wherever those courts or representatives might be located. Accordingly, it applies both domestically and in a cross-border context. The Model Law enables the court to cooperate directly with those courts and representatives. At the same time, the Model Law recognizes that such direct cooperation may not always be possible under applicable laws and rules. It therefore provides the flexibility to facilitate that cooperation through any locally appointed insolvency representative or other person appointed by the court, such as a court official, for that specific purpose. Paragraph 2 provides authorization for direct communication between those parties to avoid the use of traditional, time-consuming procedures, such as letters rogatory or diplomatic channels. This ability may be critical where a court considers that it should act with urgency to avoid potential conflicts, to preserve the value of assets and operations of affected enterprise group members and of the enterprise group as a whole or to address issues considered to be time-sensitive.

73. The focus of article 9 is on the matters referred to in article 1 concerning insolvency proceedings commenced for one or more enterprise group members, i.e., conduct and administration of those proceedings, as well as cross-border cooperation. Coordination and cooperation in that context might involve several different courts and insolvency representatives appointed in proceedings concerning different enterprise group members, in addition to a group representative where there is a planning proceeding. For that reason, it might require a somewhat different view to be taken to the one that might be appropriate in the case of concurrent insolvency proceedings affecting a single debtor. The ability and willingness of courts to take a global view of the business of the enterprise group and what is occurring in proceedings relating to different enterprise group members in different States might be key to the resolution of the enterprise group's overall financial difficulties. For the purposes of the Model Law, the term "concurrent insolvency proceedings" means proceedings taking place at the same time with respect to different enterprise group members, irrespective of whether they are in the same or different jurisdictions.

74. Additional material on coordination and cooperation can be found in the Legislative Guide, part three, chapter III, paras. 15–19 on general issues and recommendations 240, 242, and 243; and paragraph 20 on means of communication, as well as in the Practice Guide, chapter II, paragraphs 4–10.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [8]–[9]
A/CN.9/898, para. 62
A/CN.9/WG.V/WP.146, footnote 12
A/CN.9/903, para. 94
A/CN.9/931, para. 79
A/CN.9/WG.V/WP.158, section II, para. 8
A/CN.9/WG.V/WP.161, paras. 13–14
A/CN.9/966, paras. 18–19

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

For the purposes of article 9, cooperation to the maximum extent possible 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 other courts, an insolvency representative or any group representative appointed;

(c) Coordination of the administration and supervision of the affairs of enterprise group members;

(d) Coordination of concurrent insolvency proceedings commenced with respect to enterprise group members;

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

(f) Approval and implementation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(g) Cooperation among courts as to how to allocate and provide for the costs associated with cooperation and communication;

(h) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;

(i) Approval of the treatment and filing of claims between enterprise group members;

(j) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

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

75. Article 10, which draws upon recommendation 241 of the Legislative Guide, part three, is suggested for use by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by article 9. As such it provides guidance on how cooperation "to the maximum extent possible" under article 9 might be interpreted and implemented. It is not intended to provide an exclusive or exhaustive list, as that approach might inadvertently preclude certain forms of appropriate cooperation. Such a list may be particularly helpful in States with a limited tradition of direct cross-border judicial cooperation, particularly in cases involving enterprise groups, and in States where judicial discretion has traditionally been limited.

76. Some of the elements of article 10 are discussed in detail in the Legislative Guide, part three, chapter III:

(a) Paragraph 20 – means of communication;

(b) Paragraphs 21–34 – establishing rules of procedures for court-to-court communication (including time, place and manner of communication, notice of proposed communication, right to participate, recording of communication as part of the record of the proceedings, confidentiality, costs of communication and effect of communication);

(c) Paragraphs 35–36 – coordination of the debtor's assets and affairs (see also the Practice Guide, chap. II, para. 11); and

(d) Paragraph 37 – appointment of a court representative to act at the direction of the court (see also the Practice Guide, chap. II, paras. 2–3). The reference to a "person or body" in subparagraph (e) is intended to provide the court with flexibility

in accordance with local laws and rules, so that it could appoint, for example, a particular person or a specific office or organization through which the coordination might be conducted (thus including both natural and legal persons).

77. The agreements referred to in subparagraph (f) are analysed and discussed extensively in the Practice Guide.

78. As an overarching consideration with respect to coordination, the advantages of enterprise group insolvency coordination should not be outweighed by the associated costs. For that reason, it may be appropriate to consider how the costs should be determined, e.g., in accordance with the law of the State of the planning proceeding, and how they should be shared by relevant enterprise group members.

79. Cross-border insolvencies may give rise to disputes between enterprise group members concerning claims, whether arising within or outside the enterprise group. These disputes might be resolved through the use of alternative dispute resolution mechanisms, an approach that could be particularly helpful when the disputes are of a cross-border nature. Subparagraph (h) authorizes the use of mediation and arbitration in such cases, provided the appropriate arbitration agreements are in place for the relevant parties or the parties agree to use such arbitration mechanisms after the dispute arises.

80. The implementation of cooperation would be subject to any mandatory rules applicable in the enacting State. In the case of requests for information, for example, rules restricting the communication of information, such as for reasons of protection of privacy or confidentiality, would apply.

81. In some jurisdictions, an insolvency representative may or must file claims in any jurisdiction in which there is a proceeding involving the same debtor. This is typically done on behalf of all the creditors participating in the proceeding to which that insolvency representative was appointed but subject to certain conditions, including where that course of action will benefit the creditors. Thus, every claim made in any proceeding may be asserted in all proceedings through the insolvency representative, and therefore every claim may share in the distribution in every proceeding. Subparagraph (j) permits recognition of cross-filing where it may be used in the enterprise group context as a means of facilitating coordination and cooperation between proceedings with respect to treatment of claims. This would be subject to the usual safeguards to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions (see art. 32 of MLCBI).

82. Subparagraph (k) offers the enacting State the possibility of including additional forms of cooperation. Those might include, for example, suspension or termination of existing proceedings in the enacting State (see arts. 29 and 31) or other forms of assistance not expressly mentioned that are available under the law of the enacting State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [10]–[11]
A/CN.9/898, paras. 63–64
A/CN.9/WG.V/WP.146, footnote 13
A/CN.9/903, para. 95
A/CN.9/WG.V/WP.152, para. 6
A/CN.9/931, para. 80
A/CN.9/WG.V/WP.161, para. 15
A/CN.9/966, paras. 20–22

Article 11. Limitation of the effect of communication under article 9

1. With respect to communication under article 9, a 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.

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

(a) A waiver or compromise 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.

83. Article 11 is based upon recommendation 244 of the Legislative Guide. Where a court communicates with another court in the context of cross-border insolvency proceedings, paragraph 1 makes it clear that the court retains its independent jurisdiction; the mere fact that communication has taken place does not imply a substantive effect on the authority or powers of the court, the matters before it, its orders or the rights and claims of parties participating in the communication. Such a proviso reassures the parties that any communication between those involved in the insolvency proceedings will not jeopardize their rights or affect the authority and independence of the court before which they are appearing. It is also likely to reduce the likelihood of objections to planned communication and furnish the courts and their representatives with greater flexibility in managing their cooperation with each other. Further, it may ensure that courts and their representatives do not operate beyond the limits of their authority in engaging in communication with their counterparts in different jurisdictions. Notwithstanding such a proviso, it should be possible for the courts to explicitly reach agreement on a range of matters, including approval of insolvency agreements developed in cross-border proceedings.

84. For the avoidance of doubt, paragraph 2 elaborates on the effect of communication under article 9, with some specific examples of what should not be implied from a court's participation in such communication.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [12]–[13]
A/CN.9/898, para. 65
A/CN.9/WG.V/WP.146, footnote 14
A/CN.9/903, para. 96
A/CN.9/WG.V/WP.152, para. 7
A/CN.9/931, para. 81
A/CN.9/937, paras. 60–61
A/CN.9/966, paras. 23–24

Article 12. Coordination of hearings

1. A court may conduct a hearing in coordination with another court.

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

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

85. Article 12 is based upon recommendation 245 of the Legislative Guide. (See also the Practice Guide, chapter III, paras. 154–159.)

86. Hearings that might variously be described as joint, simultaneous or coordinated ("coordinated hearings") can significantly promote the efficiency of concurrent insolvency proceedings involving enterprise group members by bringing relevant parties in interest together at the same time to share information and discuss and resolve outstanding issues or potential conflicts. This can help to avoid protracted negotiations and resulting time delays. What needs to be emphasized with respect to such hearings, however, is that each court should reach its own decision independently and without influence from any other court, as indicated in paragraph 3 of the article.

87. While such hearings may be relatively convenient to organize in a domestic setting, they can be difficult to organize in an international setting, as they may involve different languages, time zones, laws, procedures and judicial traditions. They may result in a deadlock if, for example, the competencies of the courts and officials engaged in the hearing are not precisely agreed or established before the hearing. It is thus generally advisable to agree on procedures before such coordinated hearings are held, including on questions of competence and limitations applicable to any participants, officials or court representatives, as suggested by paragraph 2 of the article.

88. An agreement on the conditions to govern the coordinated hearing might address, for example, use of pre-hearing conferences; conduct of the hearings, including the language to be used and need for interpretation; requirements for the provision of notice; methods of communication to be used so that the courts can simultaneously hear each other; conditions applicable to the right to appear and be heard; documents that may be submitted; the courts to which participants may make submissions; the manner of submission of documents to the court and their availability to other courts; questions of confidentiality; limitations on the jurisdiction of each court with respect to the parties appearing before it (see e.g., art. 18, para. 4 or art. 21, para. 5); and the rendering of decisions. Once a hearing has been concluded, the relevant officials or representatives may further communicate to assess the content of the hearing, discuss next steps (including the need for additional hearings), develop or modify the agreement for future hearings, consider whether issuing joint orders would be feasible or warranted and determine how certain procedural issues that were raised in the hearing should be resolved.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [14]
A/CN.9/898, para. 66
A/CN.9/903, para. 97
A/CN.9/WG.V/WP.152, para. 8
A/CN.9/931, para. 82
A/CN.9/937, para. 59
A/CN.9/966, para. 25

Article 13. Cooperation and direct communication between a group representative, insolvency representatives and courts

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts and insolvency representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A 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 other courts and insolvency representatives of other enterprise group members.

Article 14. Cooperation and direct communication between an insolvency representative appointed in this State, other courts, insolvency representatives of other group members and any group representative appointed

1. An insolvency representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts, insolvency representatives of other enterprise group members and any group representative appointed.

2. An insolvency representative appointed in this State 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 other courts, insolvency representatives of other enterprise group members and any group representative appointed.

89. Articles 13 and 14 address cooperation and coordination between the various office holders appointed in insolvency proceedings concerning enterprise group members and between those office holders and the relevant courts, whether in the enacting State or in another jurisdiction. They provide the necessary authorization for communication to take place between the insolvency proceedings of different enterprise group member debtors. These articles draw upon recommendations 246–249 of the Legislative Guide. (See also the Practice Guide, chapter III, paras. 160–166.)

90. Such office holders play a central role in the effective and efficient implementation of the insolvency law, with day-to-day responsibility for administration of the insolvency estates of the various debtors involved in an enterprise group insolvency. Thus, they will play a key role in ensuring the successful coordination of multiple proceedings concerning those enterprise group members by working with each other and with the courts concerned. In order to fulfil that role, they, like the courts, will need to have appropriate authorization to undertake the necessary tasks of, for example, sharing information, coordinating day-to-day administration and supervision of the debtors' affairs and negotiating insolvency agreements, including in cross-border proceedings, as provided by the Model Law.

91. Such arrangements for cooperation and coordination cannot diminish or remove the obligations insolvency representatives (including a group representative) will have under the law governing their appointment, including professional rules and ethical guidelines.

Discussion of article 13 in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [15]
A/CN.9/898, para. 68
A/CN.9/WG.V/WP.146, footnote 15
A/CN.9/903, para. 98
A/CN.9/WG.V/WP.152, para. 9
A/CN.9/931, para. 83
A/CN.9/WG.V/WP.158, part II, para. 9(a)

A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, paras. 16–20
A/CN.9/966, paras. 26–27

Discussion of article 14 in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [15]
A/CN.9/898, para. 68
A/CN.9/WG.V/WP.146, footnote 16
A/CN.9/903, para. 99
A/CN.9/WG.V/WP.152, para. 9
A/CN.9/931, para. 84
A/CN.9/WG.V/WP.158, part II, para. 9(a)
A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, para. 21
A/CN.9/966, para. 28

Article 15. Cooperation to the maximum extent possible under articles 13 and 14

For the purposes of article 13 and 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, provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(c) Allocation of responsibilities between an insolvency representative appointed in this State, insolvency representatives of other group members and any group representative appointed;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members; and

(e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

92. Article 15 draws upon recommendation 250 of the Legislative Guide and is suggested for use by the enacting State to provide an indicative list of the types of cooperation that are authorized by articles 13 and 14. As such, it provides guidance on how "cooperation to the maximum extent possible" under those articles might be interpreted and implemented. It is not intended to provide an exclusive or exhaustive list, as that approach might inadvertently preclude certain forms of appropriate cooperation. Such a list may be particularly helpful in States with a limited tradition of direct cooperation, including in a cross-border context, particularly in cases involving enterprise groups, and in States where discretion has traditionally been limited.

93. The information-sharing referred to in subparagraph (a) may be key to facilitating coordination and cooperation and should be encouraged as far as possible (sharing of information between the parties and with third parties is discussed in some detail in the Practice Guide, chap. III, paras. 160–166). The proviso relating to confidential information should not be interpreted as providing a basis for declining to share information, but appropriate safeguards need to be put in place to ensure that information not in the public domain is protected as required, that third parties are not placed in a position where they can take unfair advantage of that information and that sensitive information relating to enterprise group members not subject to insolvency proceedings does not become widely available. Different methods of protection may be used, as described in the Practice Guide (chap. III, paras. 178–181).

The agreements referred to in subparagraph (b) are extensively analysed and discussed in the Practice Guide. It might be noted that subparagraph (b) is not intended to refer only to cross-border agreements, but also to include agreements concerning enterprise group insolvency proceedings in the enacting State.

94. Provisions in the Legislative Guide, part three, chapter II, such as those addressing procedural coordination in the domestic context (paras. 22–37 and recs. 202–210), could be relevant in the context of coordination and cooperation between the group representative and insolvency representatives, where the insolvency representatives have been appointed in proceedings concerning other enterprise group members also located in the enacting State, i.e., in what would be a domestic situation concerning cooperation and coordination between local proceedings.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [16]–[18]
A/CN.9/898, para. 69
A/CN.9/WG.V/WP.146, footnote 17
A/CN.9/903, para. 100
A/CN.9/931, para. 85
A/CN.9/937, para. 62
A/CN.9/WG.V/WP.161, paras. 22–23
A/CN.9/966, paras. 29–31

Article 16. Authority to enter into agreements concerning the coordination of insolvency proceedings

An insolvency representative and any group representative appointed may enter into an agreement concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed.

95. Article 16 draws upon recommendations 253–254 of the Legislative Guide. It recognizes the desirability of authorizing the relevant parties – insolvency representatives and a group representative where appointed – to conclude agreements concerning the coordination of insolvency proceedings relating to different enterprise group members. Such agreements may be useful for developing and implementing a group insolvency solution. They are analysed and discussed in some detail in the Practice Guide (chap. III, paras. 48–54). While the Practice Guide focuses on cross-border insolvency agreements, the discussion is relevant also to insolvency agreements concerning proceedings affecting different enterprise group members that are taking place in the enacting State. Different States may have different form requirements that will have to be observed in order for the agreements to be effective. Accordingly, article 16 does not require the agreement to be approved by the court, leaving that issue to domestic law and the decision of the representatives involved.

96. While the insolvency law of certain States may permit courts to approve agreements regarding the same debtor (for example, through provisions analogous to art. 27 of MLCBI), that authorization may not necessarily extend to the use of such agreements in the enterprise group context. What might be required to facilitate the global resolution of an enterprise group's financial difficulties (be it global reorganization or a combination of different procedures) is an agreement to coordinate multiple proceedings with respect to different debtors in different States, albeit members of the same enterprise group. Since many laws may lack the provisions necessary to enable a court to approve or recognize an agreement relating not only to debtors subject to its jurisdiction, but also to debtors that are not, even if they are members of the same enterprise group, article 16 provides the relevant authorization.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [19]
A/CN.9/898, para. 70
A/CN.9/WG.V/WP.146, footnote 18
A/CN.9/903, para. 101
A/CN.9/WG.V/WP.152, para. 10
A/CN.9/931, para. 86
A/CN.9/WG.V/WP.158, part II, para. 9(b)
A/CN.9/937, para. 63
A/CN.9/WG.V/WP.161, paras. 24–25
A/CN.9/966, paras. 32–33

Article 17. Appointment of a single or the same insolvency representative

A court may coordinate with other courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group.

97. Article 17 is based upon the discussion in the Legislative Guide, part three, on appointing a single or the same insolvency representative as a means of facilitating the conduct and coordination of multiple insolvency proceedings concerning enterprise group members (see chap. II, paras. 142–144, chap. III, paras. 43–47 and recs. 232 and 251). In practice, it might be possible to appoint one person to administer multiple proceedings or it might be necessary to appoint the same person to each of the proceedings to be coordinated, depending on the procedural requirements of the relevant States and the number of courts involved. Article 17 is intended to apply both when multiple proceedings take place in the enacting State, as well as when this happens in a cross-border context.

98. When the same or a single insolvency representative is to be appointed in different jurisdictions in multiple insolvency proceedings affecting members of the same enterprise group, that person (whether natural or legal) would need to meet applicable requirements in the appointing jurisdictions. For example, where a person is appointed in the enacting State and in another State, the appointment in the other State could not diminish that person's obligations under the law of an enacting State (see the Legislative Guide, part three, chap. II, paras. 139–145 with respect to domestic proceedings). Such an appointment has the potential to greatly facilitate cooperation between the different proceedings and the reorganization of the enterprise group as a whole.

99. Although the administration of each of the relevant enterprise group members would remain separate, an appointment of a single or the same insolvency representative could help to ensure coordination of the administration of the various enterprise group members, reduce related costs and delays and facilitate the gathering of information on the enterprise group as a whole. With respect to the latter point, care might need to be exercised in how that information is treated, ensuring in particular that confidentiality requirements with respect to separate enterprise group members are observed.

100. In deciding whether it would be appropriate to appoint a single or the same insolvency representative, the nature of the enterprise group, including the level of integration of its members and its business structure, would need to be considered. In addition, it is highly desirable that any person to be appointed in that capacity have the appropriate experience and knowledge (see the Legislative Guide, part two, chap. III, paras. 36–47, especially para. 39) of insolvency matters, including international experience and knowledge where relevant, and that that knowledge and experience be carefully scrutinized before the appointment is made to ensure that it is appropriate to the particular enterprise group members concerned and the business they conduct. It is also desirable that a single or the same insolvency representative

be appointed to administer two or more enterprise group members only where it will be in the interests of the insolvency proceedings to do so.

101. The appointment could be of a natural person qualified to act in different jurisdictions or a legal person, where that legal person employed or had as its members appropriately qualified persons who could serve as insolvency representatives in a number of different jurisdictions. Although the availability of those qualified persons might generally be limited, there may be regions where such an appointment is more common or the globalization of trade and services makes it increasingly feasible.

102. It might also be noted that the Model Law contemplates that the insolvency representative might also be a debtor-in-possession.

Conflict of interest

103. Where a single or the same insolvency representative is appointed to administer several members of an enterprise group with complex financial and business relationships and different groups of creditors, there is the potential for loss of neutrality and independence. Conflicts of interest may arise, for example, if the same insolvency representative is appointed in situations involving cross-guarantees, intra-group claims and debts, post-commencement finance, lodging and verification of claims or wrongdoing by one enterprise group member with respect to another enterprise group member. The obligation to disclose potential or existing conflicts of interest (as reflected in recs. 116, 117, 233 and 252 of the Legislative Guide) would be relevant to the enterprise group context. As a safeguard against possible conflicts, the insolvency representative could be required to provide an undertaking or be subject to a practice rule or statutory obligation to seek direction from the court. Additionally, the insolvency law could provide for the appointment of one or more further insolvency representatives to administer the relevant enterprise group members in the event of a conflict of interest, a situation that would render article 17 inapplicable. Any additional appointment might relate to the specific area of conflict, with the appointment being limited to its resolution, or it might be a more general appointment for the duration of the proceedings.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [20]
A/CN.9/898, para. 71
A/CN.9/WG.V/WP.146, footnote 19
A/CN.9/903, para. 102
A/CN.9/931, para. 87
A/CN.9/WG.V/WP.158, II, para. 8
A/CN.9/937, paras. 64–65
A/CN.9/WG.V/WP.161, para. 26
A/CN.9/966, paras. 34–35

Article 18. Participation by enterprise group members in an insolvency proceeding commenced in this State

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State with respect to an enterprise group member that has the centre of its main interests in this State, any other enterprise group member may participate in that insolvency proceeding for the purpose of facilitating cooperation and coordination under this Law, including developing and implementing a group insolvency solution.

2. An enterprise group member that has the centre of its main interests in another State may participate in an insolvency proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. Participation by any other enterprise group member in an insolvency proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.

4. An enterprise group member participating in an insolvency proceeding referred to in paragraph 1 has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. The sole fact that an enterprise group member is participating in such a proceeding does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation.

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.

104. Article 18, which applies generally to enterprise group-related insolvency proceedings, is intended to provide an additional tool for cooperation by facilitating the participation of enterprise group members (wherever located) in the main proceeding, as defined in article 2, subparagraph (j), commenced in the enacting State with respect to an enterprise group member having COMI in that State. For that reason, and because the development of a group insolvency solution is only one possible result of participation, the article forms part of chapter 2, rather than chapter 3 of the Model Law. The bundle of rights that might constitute "participation" is indicated in paragraph 4 and includes the right to appear and to be heard in the main proceeding, to make written submissions to the court of the enacting State on matters affecting the interests of that enterprise group member and to take part in negotiations to develop and implement a group insolvency solution, in cases where that is relevant.

Paragraph 2

105. The qualification "subject to paragraph 2" at the beginning of paragraph 1 of article 18 is intended to mean that paragraph 2 contains the only limitation applicable to participation in an insolvency proceeding. Paragraph 2 permits an enterprise group member with COMI in a State other than the enacting State to participate in the proceeding in the enacting State, unless the law or a court in the other State prohibits it from so doing. This echoes the substance of article 4, subparagraphs (a) and (b), which emphasize that the Model Law does not interfere with the ability of the State with jurisdiction over an enterprise group member to limit such participation.

Paragraph 3

106. Paragraph 3 confirms that the participation referred to in paragraph 1 is entirely voluntary and that an enterprise group member may commence its participation or opt out of it at any time during the course of the proceeding. Its ability to do so may be moderated by the impact of domestic law, such as company law.

Paragraph 4

107. The second sentence of paragraph 4 is based upon article 10 of MLCBI and constitutes a "safe conduct" rule aimed at ensuring that a court in the enacting State would not assume jurisdiction over an enterprise group member on the sole ground that the enterprise group member had standing to "participate" in the main proceeding. The article responds to concerns about exposure to all-embracing jurisdiction that might otherwise be triggered by such participation.

108. The limitation on jurisdiction over the enterprise group member embodied in article 18, paragraph 4, is not absolute. It is only intended to shield the enterprise group member to the extent necessary to make court access for the purposes of participation a meaningful proposition. Other possible grounds for jurisdiction over the enterprise group member under the laws of the enacting State are not affected. For example, a tort or misconduct committed by the enterprise group member or its

authorized representative may provide grounds for jurisdiction to deal with the consequences of such an action.

109. The limitation in article 18, paragraph 4, may appear superfluous in States where the rules on jurisdiction do not allow a court to assume jurisdiction over a person on the sole ground of the person's appearance in court. Enacting that provision in those States could be useful, however, to eliminate potential concerns of enterprise group members over the possibility of jurisdiction being exercised on the sole ground of their participation in the main proceeding.

110. The participation referred to in article 18 is intended to apply to all enterprise group members, irrespective of their financial status. Accordingly, it makes no distinction between an enterprise group member that might be subject to insolvency proceedings and an enterprise group member that is not, avoiding any distinction based upon financial status, such as between what might be described as an "insolvent" or "solvent" enterprise group member. The focus of the article is the usefulness or desirability of an enterprise group member participating in such a main proceeding, whether because it has something to contribute to the resolution of the financial difficulty of the enterprise group member subject to that proceeding (e.g., it may own intellectual property that is key to the insolvency solution being developed for the enterprise group) or because it seeks to protect its own interests. Such participation by enterprise group members is, in fact, not unusual in practice as they can often aid the reorganization or liquidation of the enterprise group members subject to the insolvency proceedings (see the Legislative Guide, rec. 238). Where the enterprise group member seeking to participate is not subject to an insolvency proceeding and thus not restricted by the application of insolvency law, the decision to participate is likely to be an ordinary business decision of that member (subject to the application of art. 18, para. 2). The consent of creditors would not be necessary unless required by applicable law. Caution would need to be exercised in dealing with any information relating to that enterprise group member and its business affairs that may have been or may have to be disclosed in the course of participation in the main proceedings. Such participation may also give rise to a possible conflict of obligations of directors of enterprise group members as discussed in [the Legislative Guide, part IV, second section dealing with obligations of directors of enterprise group companies in the period approaching insolvency.]

111. The articles addressing relief under the Model Law (art. 20, para. 2; art. 22, para. 4; and art. 24, para. 3) confirm that relief may not be granted in the enacting State against the assets and operations of a participating enterprise group member for which no insolvency proceeding has commenced, unless the exception contained in those articles applies. That situation is discussed further in the commentary to article 20 (see in particular paras. 131–135 below).

Paragraph 5

112. Where an enterprise group member participates in a proceeding under article 18, paragraph 5, of the article provides that that enterprise group member should be kept informed of actions relating to the development of a group insolvency solution, where one is being developed. It does not indicate how that information should be provided or by whom, leaving those procedural issues to the applicable domestic law.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [21]–[22]
A/CN.9/898, paras. 72–74
A/CN.9/WG.V/WP.146, footnotes 20–25
A/CN.9/903, paras. 103–106
A/CN.9/WG.V/WP.152, para. 11
A/CN.9/931, paras. 88–90
A/CN.9/WG.V/WP.158, II, para. 10
A/CN.9/937, paras. 66–67

A/CN.9/WG.V/WP.161, paras. 27–28
A/CN.9/966, paras. 36–38

Chapter 3. Relief available in a planning proceeding in this State

113. Chapter 3 of the Model Law addresses the situation where a planning proceeding is taking place in the enacting State, focusing on the appointment of a group representative and the provision of relief to support the development of a group insolvency solution in the planning proceeding. As such, the provisions are intended to supplement the law of the enacting State as it relates to the conduct and administration of insolvency proceedings.

114. Additional mechanisms, such as those discussed in the Legislative Guide, part three, chapter II, that are designed to facilitate the insolvency treatment of enterprise groups in a domestic context might also be considered by enacting States. Those provisions address joint application for commencement, procedural coordination and, in limited circumstances, substantive consolidation (the Legislative Guide, recs. 199–210 and 219–231).

Article 19. Appointment of a group representative and authority to seek relief

1. When the requirements of article 2, subparagraphs (g)(i) and (ii) are met, the court may appoint a group representative. Upon that appointment, a group representative shall seek to develop and implement a group insolvency solution.

2. To support the development and implementation of a group insolvency solution, a group representative is authorized to seek relief pursuant to article 20 in this State.

3. A group representative is authorized to act in a foreign State on behalf of the planning proceeding and, in particular, to:

(a) Seek recognition of the planning proceeding and relief to support the development and implementation of a group insolvency solution;

(b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and

(c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding.

115. Article 19 indicates that a group representative may be appointed when the proceeding meets the requirements of article 2, subparagraphs (g)(i) and (ii) (i.e., one or more enterprise group members in addition to the enterprise group member subject to the main proceeding are participating in that proceeding for the purpose of developing and implementing a group insolvency solution and the enterprise group member subject to that main proceeding is likely to be a necessary and integral participant in that group insolvency solution). What constitutes participation is described in more detail in article 18, paragraph 4. Upon appointment, the group representative's task is to seek to develop a group insolvency solution. To do so, the group representative can seek relief under article 20 and is authorized to act in another State as the foreign representative of the planning proceeding.

116. The group representative appointed to the planning proceeding and the insolvency representative appointed to the main proceeding could be the same person but there is no requirement to that effect in the Model Law. Where they are the same person, provision may need to be made to avoid potential conflicts of interest between the two appointments (see para. 103 above, and the Legislative Guide, part three, chap. II, para. 144 and rec. 233, and chap. III, para. 47), as the obligations and responsibilities may overlap.

117. However, the tasks to be undertaken by the insolvency representative with respect to the main proceeding and by the group representative with respect to the planning proceeding might differ. The task of the group representative is

representation of the planning proceeding and development of a group insolvency solution, rather than administration of the insolvency proceedings with respect to individual members, which is the focus of the insolvency representatives. That task will require the group representative to work with the insolvency representatives of the relevant group members, as indicated in the coordination and cooperation provisions of chapter 2.

Paragraph 2

118. Paragraph 2 specifies that the relief that might be sought by a group representative in the enacting State is the relief available under article 20 of the Model Law to distinguish it from the relief that would be available following recognition of a foreign planning proceeding under chapter 4 of the Model Law. As noted in paragraph 41 above, domestic law may need to address other powers of the group representative in the enacting State with respect to domestically commenced planning proceeding.

Paragraph 3

119. Paragraph 3 is intended to equip the group representative with the authorization required to act abroad as foreign representative of the planning proceeding. The absence of such authorization in some States can prove to be an obstacle to effective international cooperation in cross-border cases. An enacting State in which a group representative might already be equipped to act as foreign representative of the planning proceeding may decide to forgo inclusion of this provision, although retaining it would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.

120. Clearly, however, the group representative's ability to act in the foreign State will depend upon what is permitted by the foreign law and courts. Accordingly, the paragraph is drafted in terms of authorizing the group representative "to seek" to do certain things. Action that the group representative appointed in the enacting State may wish to take in a foreign State will be action of the type dealt with in the Model Law. However, the authority given by the enacting State to the group representative to act in a foreign State is not conditional on whether that foreign State has also enacted legislation based on the Model Law.

121. The authorization provided in subparagraphs 3(b) and (c) concerns foreign proceedings relating both to group members participating in the planning proceeding and those group members not so participating. This is based on the possibility that those foreign proceedings or elements of those proceedings might be relevant to the development and implementation of a group insolvency solution, whether because there is information to be obtained from or provided to those proceedings or for some other reason. The reference to "a foreign proceeding" in both of these subparagraphs is not limited to insolvency proceedings and could include other types of proceeding relating to the relevant enterprise group members.

122. In addition to the authorization provided by article 19, the group representative can participate, under article 25, in any proceedings relating to enterprise group members in a State recognizing a planning proceeding. Under article 28 or 30, the group representative is authorized to give, jointly with an insolvency representative, an undertaking relating to the treatment of foreign claims.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [23]–[24]
A/CN.9/898, paras. 75–76
A/CN.9/WG.V/WP.146, footnotes 26–29
A/CN.9/903, paras. 107–109
A/CN.9/WG.V/WP.152, paras. 12–13
A/CN.9/931, paras. 91–92
A/CN.9/WG.V/WP.158, II, paras. 11–12

A/CN.9/937, paras. 68–69
A/CN.9/WG.V/WP.161, paras. 29–30
A/CN.9/966, paras. 40–49

Article 20. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

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

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

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

(d) Entrusting the administration or 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, in order to protect, preserve, realize or enhance the value of assets;

(e) 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;

(f) Staying any insolvency proceeding concerning a participating enterprise group member;

(g) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

3. With respect to the assets and operations located in this State of an enterprise group member that has the centre of its main interests in another State, relief under this article may only be granted if that relief does not interfere with the administration of insolvency proceedings taking place in that other State.

123. Article 20 details the types of relief that might be included in domestic law in order to support the development of a group insolvency solution. The types of relief specified are typical of, or frequently ordered in, insolvency proceedings; the list is not exhaustive and the court is not unnecessarily restricted in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case. Given the context in which relief might be sought, the article addresses enterprise group members that are both subject to and participating in a planning proceeding. In respect of the latter, the availability of the relief would be subject to certain limitations. These would include that (a) the enterprise group member had assets or operations in the State in which the planning proceeding is

taking place, (b) those assets or operations could be subject to the relief sought, and (c) the relief to be granted did not interfere with the conduct and administration of any insolvency proceeding taking place at that enterprise group member's COMI in another State, as provided by paragraph 3 of the article. In addition, in accordance with article 27, the court, while granting, denying, modifying or terminating any relief, must be satisfied that the interests of creditors and other interested persons are adequately protected. Under article 27, paragraph 2, the court may subject any relief granted under article 20 to any conditions it considers appropriate.

Paragraph 1

Subparagraphs (a) and (b)

124. Subparagraph (a) makes it clear that execution against the assets of the enterprise group member can be stayed, while subparagraph (b) provides for suspension of the transfer, encumbrance or other disposal of the enterprise group member's assets. The rationale of these provisions is to allow steps to be taken to ensure that the planning proceeding can be conducted in a fair and orderly manner.

125. The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under subparagraph (b). Those sanctions vary, depending on the legal system; they might include criminal sanctions, penalties and fines or the acts themselves might be void or capable of being set aside. From the viewpoint of creditors, the main purpose of those sanctions is to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor. The setting aside of such transactions could be considered more effective for such purpose than the imposition of criminal or administrative sanctions on the debtor.

Subparagraph (c)

126. Subparagraph (c), by not distinguishing between various kinds of individual action, would also cover actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is additional to other possible limitations existing under domestic law that may restrict the freedom of the parties to agree to arbitration (e.g., limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 1958.[6] However, bearing in mind the particularities of international arbitration, specifically its relative independence from the legal system of the State in which the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in the same State as the planning proceeding, it may be difficult to enforce the stay of the arbitral proceedings. Apart from that, the interests of the parties may be a reason for allowing an arbitral proceeding to continue, except where to do so would interfere with the administration of insolvency proceedings under paragraph 3 of the article.

127. Subparagraph (c) refers not only to "individual actions" but also to "individual proceedings" in order to cover, in addition to "actions" instituted by creditors in a court against the debtor or its assets, enforcement measures initiated by creditors outside the court system, being measures that creditors are allowed to take under certain conditions in some States. Subparagraph (a) makes it clear that execution against the assets of the debtor is covered by the stay.

Subparagraphs (d) and (e)

128. Subparagraphs (d) and (e) reflect typical types of relief that are available in insolvency proceedings.

[6] United Nations, *Treaty Series,* vol. 330, No. 4739.

Subparagraph (f)

129. Subparagraph (f) relates specifically to enterprise group members participating in the planning proceeding and permits the court to stay any insolvency proceedings taking place in the enacting State concerning those enterprise group members. The rationale is that it may be essential to the negotiation of a group insolvency solution that that enterprise group member and its assets be preserved. This provision enables that to be achieved through application of a stay on insolvency proceedings. If the enterprise group member ceases to participate in the planning proceeding, perhaps because it is decided it does not need to be part of the group insolvency solution, the stay would cease to apply and any insolvency proceedings commenced could continue.

Subparagraph (g)

130. The relief available under article 20 might include, as noted in subparagraph (g), approval of the arrangements concerning funding of an enterprise group member, which may include post-commencement finance, as well as authorization to continue those arrangements. In considering whether to accord such approval and authorization, the court might take into consideration various criteria, including whether the funding arrangement is necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of its estate, whether any harm to creditors of that enterprise group member will be offset by the benefit to be derived from continuing that funding arrangement, whether the funding arrangement safeguards the development of a group insolvency solution and whether the interests of local creditors are protected, as required under article 27. The Legislative Guide, part three addresses both post-application finance (chap. II, paras. 47–51) and post-commencement finance in the enterprise group insolvency context (chap. II, paras. 55–74 and recs. 211–216).

Paragraph 2

131. Paragraph 2 limits the relief available under article 20 to the assets and operations located in the enacting State of enterprise group members participating in the planning proceeding, where those enterprise group members are subject to insolvency proceedings at the time that relief is sought; relief may not be granted in respect of a participating enterprise group member if it is not subject to an insolvency proceeding, unless the exception contained in paragraph 2 applies. The enterprise group member may not be subject to an insolvency proceeding for various reasons. It may not be eligible under the applicable law of the relevant State (e.g., it does not satisfy the applicable insolvency tests), in which case no relief may be ordered. It may also not be subject to an insolvency proceeding because, as stated in paragraph 2, a decision has been taken to minimize the commencement of insolvency proceedings, for example non-main proceedings, in accordance with the Model Law (see for example arts. 28 and 29). In the latter case, relief may be granted.

132. Paragraph 2 describes enterprise group members by reference to whether they are subject to insolvency proceedings rather than by reference to their financial status (i.e., solvent or insolvent), to avoid the difficulties and the differences associated with defining that status under domestic law and the fact that under some laws, insolvency is not a requirement for commencement of an insolvency proceeding. That approach of “subject to insolvency proceedings” is consistent with the usage in the Legislative Guide.

133. As noted above under article 18 (see para. 110), there may be circumstances in which different levels of participation in a planning proceeding by an enterprise group member not subject to an insolvency proceeding might be both appropriate and feasible, on a voluntary basis, including where no proceeding is commenced in accordance with the Model Law (for example, pursuant to art. 29). Such participation by those enterprise group members is not, in fact, unusual in practice. That enterprise

group member could thus aid the group insolvency solution being developed for other enterprise group members.

134. The decision by such an enterprise group member to participate in a planning proceeding is likely to be an ordinary business decision of that member (subject to the application of art. 18, para. 2) and the consent of creditors would not be necessary, unless required by applicable law. As the explanation of article 1, paragraph 2, points out (see paras. 36–38 above), it is increasingly the case that enterprise groups include members that might be subject to special insolvency regimes, such as banks, financial institutions, insurance companies and similar entities. It may be important to preserve the ability of such members to participate in a group insolvency solution. Where that member is subject to some form of specialized proceeding (e.g., a bank resolution proceeding), any decision to participate is likely to be made by the person administering that proceeding rather than by the member.

135. As noted above, caution would need to be exercised to protect information disclosed in the planning proceeding where it relates to the affairs of an enterprise group member not subject to an insolvency proceeding.

Paragraph 3

136. Paragraph 3 pursues the objective of coordinating relief between insolvency proceedings affecting enterprise group members, especially where a group insolvency solution is being developed. Relief might be sought under article 20 with respect to the assets and operations located in the enacting State of an enterprise group member with COMI in another State, where that enterprise group member is participating in the planning proceeding and such relief might be required to support the development of a group insolvency solution. Relief granted under this article in the enacting State with respect to those assets and operations should not interfere with the administration of any insolvency proceedings concerning that enterprise group member that are taking place in the COMI State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [25]–[29]
A/CN.9/898, paras. 77–85
A/CN.9/WG.V/WP.146, footnotes 30–33
A/CN.9/903, paras. 110–112
A/CN.9/WG.V/WP.152, paras. 14–21
A/CN.9/931, para. 93
A/CN.9/WG.V/WP.158, II, paras. 13–22
A/CN.9/937, paras. 70–77
A/CN.9/WG.V/WP.161, paras. 31–35
A/CN.9/966, paras. 50–52

Chapter 4. Recognition of a foreign planning proceeding and relief

137. Chapter 4 establishes a framework for cross-border recognition of a foreign planning proceeding. That framework draws upon elements of the similar framework provided by MLCBI. The goal is to provide a simple, expeditious procedure through which a group representative can obtain recognition of a planning proceeding, as well as relief, both of an interim nature and on recognition, where it may be required to support the possibility of developing a group insolvency solution in the planning proceeding. It might be noted with respect to the provisions on recognition that since the definition of “planning proceeding” envisages that such a proceeding may not itself be a main proceeding, albeit related to a main proceeding (art. 2, subpara. (g)), caution may need to be exercised in applying the recognition provisions.

Article 21. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the foreign planning proceeding to which the group representative was appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision appointing the group representative; or

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

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

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

(a) A statement identifying each enterprise group member participating in the foreign planning proceeding;

(b) A statement identifying all members of the enterprise group and all insolvency proceedings that are known to the group representative that have been commenced in respect of enterprise group members participating in the foreign planning proceeding; and

(c) A statement to the effect that the enterprise group member subject to the foreign planning proceeding has the centre of its main interests in the State in which that planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.

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

5. The sole fact that an application pursuant to this Law is made to a court in this State by a group representative does not subject the group representative to the jurisdiction of the courts of this State for any purpose other than the application.

6. The court is entitled to assume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

138. The article establishes the core procedural requirements of an application for recognition of a foreign planning proceeding. In incorporating the provision into domestic law, it is desirable that the process not be encumbered with requirements additional to those specified in paragraph 2 of the article.

Paragraph 1

139. Paragraph 1 establishes standing for a group representative to seek recognition in the enacting State of the foreign planning proceeding to which the group representative has been appointed.

Paragraph 2

140. Paragraph 2 lists the documents or evidence that must be produced to support the application for recognition. Subparagraphs (a) to (c) focus on the evidence to be provided concerning the appointment of the group representative. To avoid refusal of recognition because of non-compliance with a mere technicality (e.g., where the applicant is unable to submit documents that in all details meet the requirements of subparas. (a) and (b)), subparagraph (c) allows evidence other than that specified in subparagraphs (a) and (b) to be taken into account. That provision, however, maintains the court's power to insist on the presentation of evidence acceptable to it. It is advisable to retain that flexibility in enacting the Model Law.

141. It will be recalled that the proceeding in which the group representative was appointed must meet the requirements of article 2, subparagraph (g)(i) and (ii), in order to become a planning proceeding. Article 21 makes no provision for the receiving court to embark on a consideration of whether the proceeding that has led to the planning proceeding was correctly commenced under applicable law; provided the requirements of article 21 are met, recognition should follow in accordance with article 23.

142. What constitutes a "certified copy" should be determined by reference to the law of the State in which the foreign planning proceeding is taking place.

Paragraph 3

143. Paragraph 3 specifies various statements relating to the enterprise group and the foreign planning proceeding that should accompany an application for recognition of that planning proceeding. Subparagraph (a) requires a statement identifying each enterprise group member participating in the planning proceeding. Subparagraph (b) requires a statement identifying all members of the enterprise group and all insolvency proceedings known to the group representative that have commenced with respect to enterprise group members participating in the planning proceeding. Subparagraph (c) requires the group representative to provide a statement to the effect that the enterprise group member subject to the foreign planning proceeding has COMI in the jurisdiction in which that proceeding is taking place.

144. Subparagraph (c) also requires a statement that the foreign planning proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding. That might be possible where, for example, it can be shown that a group insolvency solution or a reorganization plan or a going concern sale that is being developed in the planning proceeding can preserve the value of the business (whether of the enterprise group as a whole or in part), that would otherwise be destroyed in an approach that treats individual enterprise group members separately.

145. The information referred to in paragraph 3 is required by the court for the purposes of recognition, but also for any decision granting relief in favour of a foreign planning proceeding. To tailor that relief appropriately and ensure it does not interfere with other insolvency proceedings, as required by articles 20, 22 and 24, the court needs to be aware of any other proceedings that may be taking place in third States concerning those enterprise group members participating in the planning proceeding. It will also provide the court with an idea of the overall structure of the enterprise group, as well as information on the relationship between enterprise group members subject to the planning proceeding and other enterprise group members, as well as on the enterprise group as a whole. This information may be particularly important in the context of coordination and cooperation.

Paragraph 4

146. Paragraph 4 entitles, but does not compel, the court to require a translation of some or all of the documents submitted under paragraphs 2 and 3 of the article. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time if the court is in a position to consider the request without the need for translation of the documents.

Paragraph 5

147. Paragraph 5 is based upon article 10 of MLCBI. See the explanation provided with respect to article 18, paragraph 4, in paragraphs 107–111 above.

Paragraph 6

148. Paragraph 6, based upon article 16, paragraph 2 of MLCBI, dispenses with requirements for legalization. The Model Law presumes that documents submitted in

support of the application for recognition need not be authenticated in any special way, in particular by legalization. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

149. It follows from article 21, paragraph 6 (according to which the court "is entitled to assume" the authenticity of documents accompanying the application for recognition) that the court retains discretion to decline to rely on the presumption of authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the ability of the court to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, in particular when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g., because in some States they may involve various authorities at different levels).

150. The provision relaxing any requirement of legalization may raise the question of a possible conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 1961[7] adopted under the auspices of the Hague Conference on Private International Law, which provides specific simplified procedures for the legalization of documents originating from signatory States. In many instances, however, the treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures and a conflict is unlikely to arise. For example, as stated in article 3, paragraph 2, of the above-mentioned convention:

> "However, [legalisation] cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation."

151. According to article 3 of the Model Law, if there is a conflict between the Model Law and a treaty, the treaty will prevail.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [30]–[34]
A/CN.9/898, paras. 86–89
A/CN.9/WG.V/WP.146, footnotes 34–35
A/CN.9/903, paras. 113–114
A/CN.9/WG.V/WP.152, paras. 22–27
A/CN.9/931, paras. 53–55
A/CN.9/WG.V/WP.158, II, paras. 23–25
A/CN.9/937, para. 78
A/CN.9/WG.V/WP.161, para. 37
A/CN.9/966, paras. 54–56

[7] United Nations, *Treaty Series*, vol. 527, No. 7625.

Article 22. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition of a foreign planning proceeding until the application is decided upon, where relief is urgently needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court may, at the request of the group representative, grant relief of a provisional nature, including:

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

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

(c) Staying any insolvency proceeding concerning the enterprise group member;

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

(e) In order to protect, preserve, realize or enhance the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(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) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

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

3. Unless extended under article 24, subparagraph 1(a), the relief granted under this article terminates when the application for recognition is decided upon.

4. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

152. Article 22 deals with “urgently needed” relief that may be ordered at the discretion of the court and is available as of the moment recognition of a foreign planning proceeding is sought (unlike the relief under art. 24, which is also discretionary, but available only upon recognition). The rationale for making such

interim relief available is to preserve the possibility of developing or implementing a group insolvency solution, to protect the assets of an enterprise group member that is subject to or participating in a planning proceeding or to protect the interests of the creditors of any such enterprise group member. The opening words of paragraph 1 allude to the urgency of the measures. The relief available under article 22, with the exception of subparagraph 1(g), is not limited to a single enterprise group member and can relate to both the enterprise group member subject to the planning proceeding, as well as to other enterprise group members participating in the planning proceeding under article 18. The relief available under subparagraph 1(g) is only available with respect to those enterprise group members participating in the planning proceeding.

153. Article 22 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings (i.e., the same type of relief as available under art. 24), as opposed to the "individual" type of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure (i.e., measures covering specific assets identified by a creditor). The discretionary "collective" relief under article 22 is slightly narrower than the relief available under article 24 following recognition.

154. The objectives of making interim relief available, as noted above, could be frustrated if collective relief was not available. On the other hand, since recognition has not yet been granted, the collective relief is restricted to urgent and provisional measures.

Paragraph 1

155. Subparagraph (a) permits a stay to be granted to prevent execution against assets of the relevant enterprise group member, while subparagraph (b) suspends the disposal of any assets of the relevant enterprise group member. Subparagraph (c) permits any insolvency proceedings commenced in the enacting State with respect to relevant enterprise group members to be stayed in order to assist the development of the group insolvency solution.

156. The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under article 22, subparagraph 1(b). As noted in paragraph 125 above, although those sanctions may vary from jurisdiction to jurisdiction, their main purpose, from the viewpoint of creditors, would be the same – to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor.

157. Since article 22, subparagraph 1(d) repeats article 20, subparagraph 1(c), the same considerations apply (see paras. 126–127 above).

158. Subparagraph 1(e) provides for relief to protect certain types of assets that are perishable or otherwise susceptible to devaluation or deterioration. In the first instance, those assets could be entrusted to an insolvency representative appointed in the State receiving the application for recognition, in the situation where insolvency proceedings concerning the relevant enterprise group member have commenced in that State. Where no insolvency representative has been appointed or, for some reason, the insolvency representative is not able to properly administer or realize those assets, those tasks could be entrusted to the group representative or another person designated by the court in the State receiving the application for recognition. Entrusting those tasks to the group representative may give rise to concerns that since that position does not represent any particular insolvency estate, there are no assets that could afford some protection in the event of losses sustained through the actions of the group representative. It should be noted, however, that the Model Law contains several safeguards designed to ensure the protection of the interests of creditors and other stakeholders before assets can be turned over as provided in subparagraph 1(e). Those safeguards include: the provision in article 27, paragraph 1, that the court should not authorize the turnover of assets until it is assured that the interests of creditors and other stakeholders are protected; and article 27, paragraph 2, according

to which the court may subject the relief it grants to any conditions it considers appropriate.

159. Subparagraph 1(g) addresses an issue of some importance to reorganization and, in particular, the development of a group insolvency solution in the foreign planning proceeding. The continued operation of the enterprise group's business and activities after commencement of insolvency proceedings may be critical to reorganization and, to a lesser extent liquidation, where the enterprise group or various members of the enterprise group are to be sold as going concerns. If ongoing funding is not available to meet the costs of continuing the business(es), there is little prospect of reorganizing an enterprise group or selling some parts or all of it as a going concern. The purpose of subparagraph 1(g) is to enable the court to approve enterprise group funding arrangements as they relate to enterprise group members subject to or participating in the planning proceeding and to authorize the continued provision of funding under those arrangements. Article 27 would apply to enable the court to apply any conditions it may deem necessary to protect the interests of creditors and other stakeholders.

160. Subparagraph 1(h) enables the court to grant any additional forms of relief that might be available under the law of the enacting State and are needed in the circumstances of the case.

Paragraph 2

161. Laws of many States contain requirements for notice to be given (either by the insolvency representative upon the order of the court or by the court itself) when relief of the type mentioned in article 22 is granted. Paragraph 2 is the appropriate place for the enacting State to make provision for such notice.

Paragraph 3

162. Relief available under article 22 is provisional in that, as provided in paragraph 3, it terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure under article 24, subparagraph 1(a). The court might wish to do so, for example, to avoid a hiatus between a provisional measure issued before recognition and a measure issued after recognition.

Paragraph 4

163. Paragraph 4, which is also included in articles 20 and 24, is intended to exclude the assets and operations of those enterprise group members not subject to insolvency proceedings from the relief provisions of the Model Law, unless the exception in paragraph 4 applies. See the explanation provided in paragraphs 131–135 above.

Paragraph 5

164. Provisions similar to those contained in paragraph 5 are also included in articles 20 and 24 and pursue the objective of coordinating relief between insolvency proceedings affecting enterprise group members, especially where a group insolvency solution is being developed (see para. 136 above).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [35]–[38]
A/CN.9/898, paras. 90–101
A/CN.9/WG.V/WP.146, footnotes 36–40
A/CN.9/903, paras. 115–119
A/CN.9/WG.V/WP.152, paras. 28–31
A/CN.9/931, paras. 56–57
A/CN.9/WG.V/WP.158, section II, paras. 26–31
A/CN.9/937, paras. 70, 76 and 79

A/CN.9/WG.V/WP.161, paras. 38–39
A/CN.9/966, paras. 57–58

Article 23. Recognition of a foreign planning proceeding

1. A foreign planning proceeding shall be recognized if:

(a) The application meets the requirements of article 21, paragraphs 2 and 3;

(b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(c) The application has been submitted to the court referred to in article 5.

2. An application for recognition of a foreign 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 material changes in the status of the foreign planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

165. Article 23 is designed to ensure that, if the application meets the requirements set out in the article and if recognition is not contrary to the public policy of the enacting State (see art. 6), recognition will be granted. Article 23 thus aims to ensure that the recognition process is certain, predictable and expeditious.

166. In deciding whether a foreign planning proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition, which requires a determination that the proceeding is a planning proceeding within the meaning of article 2, subparagraph (g). Article 23 makes no provision for the receiving court to embark on a consideration of whether the planning proceeding was correctly commenced under applicable law; provided the requirements of article 21 are met, the application was submitted to the court specified in article 5 and article 6 is not applicable, recognition should follow in accordance with article 23.

Paragraph 2

167. The ability to obtain early recognition (and the consequential ability to invoke art. 24) is often essential for the effective protection of the assets of the debtor from dissipation and concealment. For that reason, paragraph 2 obligates the court to decide on the application “at the earliest possible time”. The phrase “at the earliest possible time” has a degree of flexibility. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, “the earliest possible time” might be measured in weeks. Interim relief will be available under article 22, if some order is necessary while the recognition application is pending.

Paragraph 3

168. A decision to recognize a foreign planning proceeding would normally be subject to review or rescission, in the same manner as any other court decision. Paragraph 3 clarifies that the decision on recognition may be revisited if it becomes apparent that the grounds for granting it were fully or partially lacking or have subsequently ceased to exist.

169. Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign planning proceeding has been terminated or if the nature of the underlying proceeding has changed (e.g., a reorganization proceeding might be

converted into a liquidation proceeding) or if the status of the group representative's appointment has changed or the appointment has been terminated. Also, new facts might arise that require or justify a change of the court's decision, for example, if the group representative misled the court. The court's ability to review the recognition decision is assisted by the obligation imposed on the group representative under paragraph 4 to inform the court of such changed circumstances.

170. A decision on recognition may also be subject to a review of whether, in the decision-making process, the requirements for recognition were observed. Some appeal procedures give the appellate court the authority to review the merits of the case in its entirety, including factual aspects. It would be consistent with the purpose of the Model Law and with the nature of the decision granting recognition (which is limited to verifying whether the applicant fulfilled the requirements of the article), if an appeal of the decision would be limited to the question of whether the requirements of articles 21 and 23 were observed in deciding to recognize the foreign planning proceeding.

Paragraph 4

171. Paragraph 4 obligates the group representative to inform the court promptly, after the time of the application for recognition of the foreign planning proceeding is made, of any material changes in the status of the planning proceeding or the status of their appointment, as well as other changes that might have a bearing on the relief granted. When those changes occur before the decision on recognition is made, the purpose of the obligation is to allow the court to take those changes into consideration in making its decision on recognition. As noted above, it is possible that, after the application for recognition is made, changes occur in the planning proceeding that would have affected the decision on recognition or the relief granted on an interim basis. When the changes occur after recognition, they may affect the continuation of recognition and any relief granted based on recognition.

172. Changes relevant to paragraph 4 could include, for example, termination of the foreign planning proceeding, conversion of the underlying proceeding from one type of proceeding to another (e.g., from reorganization to liquidation), or changes concerning the information required under article 21. Paragraph 4 takes into account the fact that technical modifications in the status of the proceedings or the group representative's appointment are frequent, but that only some of those modifications would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information on "material" changes. It is particularly important that the court be informed of such modifications when recognition is granted to a group representative "appointed on an interim basis" (see art. 2, subpara. (e)).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [39]–[40]
A/CN.9/898, paras. 91–92
A/CN.9/WG.V/WP.146, footnote 41
A/CN.9/903, para. 120
A/CN.9/WG.V/WP.152, paras. 31–32
A/CN.9/931, paras. 58–59
A/CN.9/WG.V/WP.158, II, paras. 32–33
A/CN.9/937, para. 89
A/CN.9/WG.V/WP.161, para. 40
A/CN.9/966, paras. 59–61

Article 24. Relief that may be granted upon recognition of a foreign planning proceeding

1. Upon recognition of a foreign planning proceeding, where necessary to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in the foreign planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:

(a) Extending any relief granted under article 22, paragraph 1;

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

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

(d) Staying any insolvency proceeding concerning the enterprise group member;

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

(f) In order to protect, preserve, realize or enhance the value of assets for the purpose of developing or implementing a group insolvency solution, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;

(g) 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;

(h) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(i) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. In order to protect, preserve, realize or enhance the value of assets for the purposes of developing or implementing a group insolvency solution, the distribution of all or part of the enterprise group member's assets located in this State may be entrusted to an insolvency representative appointed in this State. Where that insolvency representative is not able to distribute all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task.

3. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

173. A basic principle of the Model Law is to provide the relief considered necessary for the orderly and fair conduct of a cross-border insolvency, whether that is provided on an interim basis or as a consequence of recognition. As such, the text does not take a position on whether the consequences of the foreign law are imported into the insolvency system of the enacting State or whether the relief in the foreign proceeding includes the relief that will be available under the law of the enacting State.

174. The relief available under article 24 is discretionary in nature and typical of the relief most frequently granted in insolvency proceedings. In accordance with article 27, the court, while granting, denying, modifying or terminating the relief, must be satisfied that the interests of creditors and other interested persons are adequately protected. With the inclusion of subparagraph 1(i), the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case. The use of the words "upon recognition" in paragraph 1 aligns the drafting of that paragraph with article 21 of MLCBI. Article 21 of MLCBI has been interpreted to mean that recognition is the pre-condition for granting discretionary relief and that that relief may be sought at any time after recognition has been granted; its availability is not limited to the time at which recognition is granted. Although in practice relief is often initially sought at the same time as recognition, this article ensures that it can be sought at a later time if required.

175. Since subparagraph 1(e) is the same as article 20, subparagraph 1(c), the explanation provided in paragraphs 126–127 above would also apply to article 24. Subparagraph 1(b) has been added to make it abundantly clear that the stay referred to in subparagraph 1(e) covers execution against the assets of the enterprise group member.

176. The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under article 24, subparagraph 1(c) (see para. 156 above).

177. It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 27, paragraph 2, which enables the court to subject the relief granted to any conditions it considers appropriate.

Paragraph 2

178. The "turnover" of assets as envisaged in paragraph 2 is discretionary. In the first instance, the assets may be turned over to the insolvency representative appointed in the recognizing State. Only where no such representative has been appointed or the appointed representative is unable to distribute those assets can they be turned over to the group representative or some other party designated by the court. It should be noted that the Model Law contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative. Those safeguards include the following: the general statement in article 27, paragraph 1, of the principle of protection of local interests; and article 27, paragraph 2, according to which the court may subject any relief it grants to conditions it considers appropriate.

Paragraph 3

179. Paragraph 3 is also included in articles 20 and 22 and is intended to exclude from the relief provisions of the Model Law the assets and operations of an enterprise group member for which no insolvency proceeding has commenced, unless the exception in paragraph 3 applies. See the explanation provided in paragraphs 131–135 above.

Paragraph 4

180. Provisions similar to those found in paragraph 4 are included also in article 20, paragraph 3 and article 22, paragraph 5 (see para. 136 above).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [41]–[44]
A/CN.9/898, paras. 93–95
A/CN.9/WG.V/WP.146, footnotes 42–46
A/CN.9/903, paras. 121–124
A/CN.9/WG.V/WP.152, paras. 33–34
A/CN.9/931, para. 60
A/CN.9/WG.V/WP.158, II, paras. 34–35
A/CN.9/937, paras. 70, 76 and 79
A/CN.9/WG.V/WP.161, para. 41
A/CN.9/966, paras. 62–63

Article 25. Participation of a group representative in proceedings in this State

1. Upon recognition of a foreign planning proceeding, the group representative may participate in any proceeding concerning an enterprise group member that is participating in the foreign planning proceeding.

2. The court may approve participation by a group representative in any insolvency proceeding in this State concerning an enterprise group member that is not participating in the foreign planning proceeding.

181. The purpose of article 25 is to ensure that the group representative, as a consequence of recognition of the foreign planning proceeding, will have standing to participate in any proceeding taking place in the recognizing State with respect to an enterprise group member participating in the planning proceeding. Those proceedings would include insolvency proceedings and individual actions brought by or against the enterprise group member by a third party. In such a situation, where the proceeding concerns insolvency, "participation" by the group representative would typically include the ability to petition, request or make submissions to the court concerning issues such as protection, realization or distribution of assets of the enterprise group member or cooperation with the planning proceeding. With respect to other types of proceeding, "participation" would provide the necessary standing for the group representative to appear in court and be heard.

182. Under paragraph 2, the court may also approve participation by the group representative in any proceeding taking place in another State affecting a group member that is not participating in the foreign planning proceeding. This paragraph thus gives effect to the group representative's ability under article 19, subparagraph 3(c), to seek such participation. As with paragraph 1, the phrase "foreign proceeding" in those provisions of article 19 is not limited to proceedings commenced under the law relating to insolvency, but includes other proceedings brought by the enterprise group member or against it by a third party. Such participation might be relevant where, for example, the enterprise group member in question is not permitted to participate in the planning proceeding (e.g., where it is prohibited from doing so under art. 18, para. 2), where the group representative wishes to encourage a local court to permit the participation of an enterprise group member that has been prohibited from doing so, or where that enterprise group member, notwithstanding its non-participation, might be relevant to the development of the group insolvency solution.

183. Article 25 is limited to giving the group representative standing and does not vest that representative with any specific powers or rights. The article does not specify the kinds of motions that the group representative might make and does not affect the provisions of the law of the enacting State that govern the fate of any such motions.

184. If the law of the enacting State uses a term other than "participate" to express the concept, that other term might be used in enacting the provision.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [45]
A/CN.9/898, paras. 96–97
A/CN.9/WG.V/WP.146, footnote 47
A/CN.9/903, para. 125
A/CN.9/WG.V/WP.152, para. 35
A/CN.9/931, para. 61
A/CN.9/WG.V/WP.158, para. 36
A/CN.9/937, para. 83
A/CN.9/WG.V/WP.161, paras. 42–43
A/CN.9/966, paras. 64–67

Article 26. Approval of a group insolvency solution

1. Where a group insolvency solution affects an enterprise group member that has the centre of its main interests or an establishment in this State, the portion of the group solution affecting that enterprise group member shall have effect in this State once it has received any approvals and confirmations required in accordance with the law of this State.

2. A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of a group insolvency solution.

185. The purpose of article 26 is to address the approval of a group insolvency solution and the effect of approval in the enacting State. The basic principle is that while a group insolvency solution might be developed globally to address the insolvency of the enterprise group as a whole or in part, the group insolvency solution should be approved locally with respect to affected individual enterprise group members, by the court of the State in which each affected enterprise group member has a COMI or an establishment, in accordance with the laws of that State. It might be noted that recognition of the foreign planning proceeding in which the group insolvency solution was developed is not a pre-condition for approval of the relevant part of the group insolvency solution.

186. Article 26 does not address the procedure for seeking approval of the group insolvency solution, leaving it to the law of the approving State to indicate the approvals and procedures required. However, once those approvals have been obtained, the group insolvency solution should have effect in that State. Where the group insolvency solution affects or modifies an enterprise group member's interests, it may be helpful to the approving court to consider the group insolvency solution in its entirety, rather than only the portion affecting the particular enterprise group member. That approach would provide the court with the overall context for resolving the enterprise group's financial difficulties of which the particular enterprise group member is a part. It would also assist the court in assessing the potential success of the group insolvency solution, which may be relevant to a decision to stay or decline to commence a proceeding under article 29 or 31.

Paragraph 2

187. Paragraph 2 establishes standing for the group representative to be heard in the enacting State on any issues relating to the approval and implementation of the group insolvency solution. According the group representative standing is intended to ensure cooperation and coordination between the courts of the enacting State and the foreign planning proceeding. It would enable the group representative to bring to the attention of the court information that might be relevant to development and implementation of the group insolvency solution and to be heard on any issues that might be relevant to approval of the relevant portion of the group insolvency solution in the enacting State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [47]–[51]
A/CN.9/898, paras. 99–100
A/CN.9/WG.V/WP.146, footnote 49
A/CN.9/903, paras. 127–129
A/CN.9/WG.V/WP.152, paras. 46–49
A/CN.9/931, paras. 63–64
A/CN.9/WG.V/WP.158, paras. 41–47
A/CN.9/937, paras. 85–91
A/CN.9/WG.V/WP.161, paras. 47–48
A/CN.9/966, paras. 71–72

Chapter 5. Protection of creditors

Article 27. Protection of creditors and other interested persons

1. In granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors of each enterprise group member subject to or participating in a planning proceeding and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under this Law to conditions it considers appropriate, including the provision of security.

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

188. The idea underlying article 27, which draws upon article 22 of MLCBI, is that there should be a balance between relief available under the Model Law and the protection of interests of the persons (natural and legal) that may be affected by such relief. In addition to the enterprise group member subject to the relief, such persons could include other enterprise group members participating in the planning proceeding, creditors of participating enterprise group members and other stakeholders. This balance is essential to achieving the objectives of cross-border insolvency legislation and ensuring adequate protection of the interests of those mentioned above. The words “adequate protection” are intended to ensure that, for example, the value of a creditor’s lien does not deteriorate or that other interested parties will not be disadvantaged as a consequence of relief granted. Paragraph 1 makes it clear that the reference to creditors is to the creditors of those enterprise group members participating in the planning proceeding; it does not refer to the interests of creditors of the enterprise group generally or to creditors of enterprise group members not involved in the planning proceeding.

189. The reference to the interests of creditors and other interested parties in article 27, paragraph 1, provides useful elements to guide the court in exercising its powers under the Model Law, particularly articles 20, 22 and 24 (but also art. 29 and 31). In order to tailor the relief appropriately to provide adequate protection, the court is clearly authorized, under article 27, paragraph 2, to subject the relief to conditions and, under article 27, paragraph 3, to modify or terminate any relief granted. An additional feature of paragraph 3 is that it expressly gives standing to the group representative, as well as to a person who may be affected by any relief granted under the Model Law, to petition the court to modify or terminate those consequences. Otherwise, article 27 is intended to operate in the context of the procedural system of the enacting State.

190. In many cases, the affected creditors will be “local” creditors. Nevertheless, in enacting article 27, it is not advisable to attempt to limit it to local creditors. Any express reference to local creditors in paragraph 1 would require a definition of those creditors. An attempt to draft such a definition (and to establish criteria according to

which a particular category of creditors might receive special treatment) would not only show the difficulty of crafting an appropriate text, but would also reveal that there is no justification for discriminating against creditors on the basis of criteria such as place of business or nationality. The general policy of the Model Law is that all creditors, wherever they might be considered to be located, should be treated fairly and as far as possible be accorded the same treatment.

191. Protection of all interested persons is linked to provisions in domestic laws on notification requirements. Those provisions may include general publicity requirements, designed to notify potentially interested persons (e.g., local creditors or local agents of a debtor) that a foreign planning proceeding has been recognized or there may be requirements for individual notifications that the court, under its own procedural rules, should issue to persons that would be directly affected by recognition or relief it might grant. Domestic laws vary as to the form, time and content of notice required to be given of the recognition of foreign planning proceedings and the Model Law does not attempt to modify those laws.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, note [46]
A/CN.9/898, para. 98
A/CN.9/WG.V/WP.146, footnote 48
A/CN.9/903, para. 126
A/CN.9/WG.V/WP.152, para. 36
A/CN.9/931, para. 62
A/CN.9/WG.V/WP.158, paras. 37–40
A/CN.9/937, para. 84
A/CN.9/WG.V/WP.161, paras. 44–46
A/CN.9/966, paras. 68–70

Chapter 6. Treatment of foreign claims

192. Certain measures have been developed in practice to assist the coordination of cross-border insolvency proceedings involving members of an enterprise group. Often referred to as synthetic non-main proceedings, these measures involve according the claim of a foreign creditor the same treatment in a main proceeding as it would receive in a foreign non-main proceeding under the applicable law, were such a non-main proceeding to commence. For example, if a main proceeding for a particular enterprise group member commences in one State and that enterprise group member has creditors in another State, the claims of those creditors could be addressed in the first State in accordance with the treatment they would receive under the relevant applicable law if a non-main proceeding were to commence in the second State. The use of the word “treatment” refers to the status of the claim and the manner in which it would be handled under the applicable law; if, for example, the claim is for unpaid wages, it would have the same priority and the same statutory conditions as to amount, if any, that may be applicable under the relevant law.

193. The treatment to be accorded to the foreign claims where these measures are used typically relies upon an undertaking given by the insolvency representative appointed in the main proceeding or, where a group representative has been appointed in a planning proceeding, by the insolvency representative and the group representative jointly. To ensure a creditor will have recourse in the event the undertaking is not performed, the undertaking should be binding and enforceable upon the insolvency estate in the main proceeding.

194. For the purposes of article 28, the reference to “treatment” of the foreign claim means that when the insolvency representative giving the undertaking distributes assets or proceeds received as a result of the realization of assets, it will comply with the distribution and priority rights under the domestic law that governs those claims, thus according them the treatment they would have received in non-main proceedings. The entitlement of a foreign creditor under the applicable law might be greater than

their entitlement under the law of the main proceedings. In practice, any concern that may have arisen on that issue has been addressed by the court of the main proceeding approving the payment of those entitlements in accordance with the foreign law, in order to achieve the purpose of the main proceedings.

195. The purpose of these measures is to facilitate the coordinated treatment of claims and to minimize the need, or limit the circumstances in which it might be necessary, to commence a non-main proceeding. They have been used in enterprise group insolvency cases where a group insolvency solution was being devised or pursued in a main proceeding for multiple enterprise group members (which may have commenced in a single jurisdiction) and the commencement of non-main proceedings for any of those enterprise group members in another jurisdiction would have adversely affected the achievement of that group insolvency solution. Although typically used in an enterprise group insolvency context, these measures have also been applied in respect of individual debtors.

196. The use of these measures may have numerous benefits, including: cost savings associated with minimizing the number of insolvency proceedings required to administer the insolvency of enterprise group members (e.g., payment of the fees of only one insolvency representative and the costs of only one court); shorter time frames for completion of the proceedings with fewer disputes and less competition between different proceedings; more efficient creditor participation; reduced need for coordination and cooperation between potentially numerous concurrent proceedings; more effective cross-border reorganization; and reduction of the obstructions caused by the removal of part of the assets of the debtor from the control of the insolvency representative of the main proceeding.

197. There may be situations in which the use of such measures may be limited. For example, where the law applicable to the foreign claims in their State of origin cannot be applied in the main proceedings in the other State; where the claims in the State of origin are not of a purely monetary nature and cannot realistically be treated in the main proceeding as they may require, for example, some kind of sanction by the courts of the State of origin; or where there are irreconcilable differences between the insolvency law of the State of origin of the claims and the law applicable to the main proceeding.

198. Certain safeguards are typically associated with these measures. Those safeguards are principally directed at protecting the interests of the creditors whose claims are subject to treatment in the foreign main proceeding and ensuring that they receive what is promised in the undertaking. Approval by the court in the main proceeding, as well as by the courts in the State in which the non-main proceeding could have commenced, may assist in achieving creditor protection.

Article 28. Undertaking on the treatment of foreign claims: non-main proceedings

1. To minimize the commencement of non-main proceedings or facilitate the treatment of claims in an enterprise group insolvency, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with the treatment it would be accorded in the non-main proceeding, provided:

(a) An undertaking to accord such treatment is given by the insolvency representative appointed in the main proceeding in this State. Where a group representative is appointed, the undertaking should be given jointly by the insolvency representative and the group representative;

(b) The undertaking meets the formal requirements, if any, of this State; and

(c) The court approves the treatment to be accorded in the main proceeding.

2. An undertaking given under paragraph 1 shall be enforceable and binding on the insolvency estate of the main proceeding.

199. Article 28 deals with the situation in which an insolvency representative appointed in a main proceeding in the enacting State gives an undertaking to accord certain treatment in that main proceeding to foreign claims that could be brought in the State in which the relevant enterprise group member has an establishment. The purpose of these provisions is to minimize the commencement of non-main proceedings in that second State and facilitate the centralized treatment of claims in an enterprise group insolvency.

200. The measures referred to in article 28 are intended to apply independently of the existence of a planning proceeding, and thus would also be relevant where there is no agreement to have a planning proceeding or the pre-conditions for such a proceeding do not exist.

201. Although the use of these measures in practice is typical in situations where the main and non-main proceedings relate to the same enterprise group member, the drafting of the provision does not preclude application of the provision in situation in which those proceedings relate to different enterprise group members. For example, the provision could be used in the following two situations: (a) a claim that could be brought in a non-main proceeding in one State relating to an enterprise group member that is subject to a main proceeding in the enacting State could be treated in that main proceeding in accordance with the law applicable to the claim; and (b) a claim that could be brought in a non-main proceeding in one State relating to an enterprise group member that is participating in a planning proceeding in the enacting State could be treated in the planning proceeding in accordance with the law applicable to the claim. Application in the second scenario would seem to be a logical extension of the provisions permitting such participation provided the law or a court in the State where the non-main proceeding could be brought does not prevent it (art. 18, para. 2).

202. To accord the prescribed treatment, the Model Law requires an undertaking to be given by the insolvency representative appointed in a main proceeding in the enacting State. Where a group representative has been appointed, the undertaking should be given jointly by the insolvency and the group representatives. While the goal of the Model Law is to create a new framework in which the group representative is authorized to undertake certain functions with respect to the planning proceeding, the requirement for a joint undertaking reflects various concerns. These include that since the group representative is appointed as a representative of the planning proceeding, rather than of a particular insolvency estate (unless the group representative and the insolvency representative of the underlying COMI proceeding are the same person), there are no assets that can be relied upon to support the giving of an undertaking of the kind referred to in article 28, paragraph 1. However, where the undertaking is given jointly, the assets of the insolvency estate to which the insolvency representative has been appointed can provide support for the undertaking, as provided by paragraph 2, and the undertaking will thus be binding upon that insolvency estate.

203. The undertaking should meet the formal requirements of the law of the enacting State, including any requirements as to form and language. The law of that State might also require the undertaking to include or be accompanied by additional information, such as statements specifying the facts and assumptions upon which it is based, including the value of the assets located in the non-main State and the options for realization of those assets.

204. Where the insolvency representative and the group representative are the same person, provisions addressing potential conflict of interest would become relevant (see para. 103 above).

205. The Model Law does not address the sanctions that might be applicable if the representative giving the undertaking fails to provide the treatment agreed, leaving that issue to the law of the State that governs the undertaking (see, for example, the discussion on sanctions that may be applicable to acts preformed in defiance of a suspension of transfers of assets in para. 125 above).

206. For the undertaking to become enforceable and binding on the insolvency estate of the main proceeding, paragraph 1, subparagraph (c) requires the court, in which the main proceeding is taking place, to approve the treatment to be accorded to the foreign claims pursuant to that undertaking. The Model Law does not address the procedure for seeking approval, leaving it to the law of the approving State to indicate the approvals and procedures required. The undertaking given under article 28 enables a court in the other State to decline to commence a non-main proceeding, pursuant to article 29, subparagraph (b).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [53]–[54]
A/CN.9/898, paras. 102–103
A/CN.9/WG.V/WP.146, footnote 50
A/CN.9/903, paras. 130–135
A/CN.9/WG.V/WP.152, para. 40
A/CN.9/931, paras. 45–47
A/CN.9/WG.V/WP.158, para. 48
A/CN.9/937, paras. 92–96
A/CN.9/WG.V/WP.161, para. 49
A/CN.9/966, paras. 73–74

Article 29. Powers of the court of this State with respect to an undertaking under article 28

If an insolvency representative or a group representative from another State in which a main proceeding is pending has given an undertaking in accordance with article 28, a court in this State, may:

(a) Approve the treatment to be provided in the foreign main proceeding to the claims of creditors located in this State; and

(b) Stay or decline to commence a non-main proceeding.

207. Non-main insolvency proceedings can serve different purposes, in addition to the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a single unit, or the differences in the legal systems concerned are so great that difficulties may arise if the effects deriving from the law of the State of the commencement of proceedings are extended to other States where the debtor's assets are located. In other circumstances, non-main insolvency proceedings may hamper the efficient administration of insolvency estates. For that reason, article 29 enables (but does not require) the court of the enacting State, which is the State in which the claim could have been brought but for undertaking given under article 28, to approve the treatment to be accorded in the (foreign) main proceeding and to stay any non-main proceedings already commenced or refuse the commencement of such proceedings. The Model Law does not address the procedure for seeking approval, leaving it to the law of the approving State to indicate the approvals and procedures required.

208. Article 27 would apply and the court should be satisfied that the interests of the creditors and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected. Relevant considerations might include whether the commencement of the non-main proceedings: (a) would improve either protection of the creditor's interests or the realization of assets in the enacting State; (b) were required to address the claims or the realization of assets in the enacting State; (c) might impede achievement of the purpose of the main proceedings, for example where the goal of those proceedings was reorganization, and any proceedings sought in the enacting State would be liquidation; and (d) might interfere with the conduct of the main proceedings and the development and implementation of a global group insolvency solution.

209. Recognition of the foreign main proceeding is not a requirement for a court to take the action contemplated by article 29, and the other relief provisions of the Model Law therefore do not apply (unless art. 32, which is a supplemental provision, is also enacted – see below). As noted above, the use of this article and article 28 is not limited to the situation in which there is a planning proceeding and may thus apply in the enterprise group insolvency context where there is no planning proceeding or in respect of individual debtors.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [53]–[54]
A/CN.9/898, paras. 102–103
A/CN.9/WG.V/WP.146, footnote 50
A/CN.9/903, paras. 130–135
A/CN.9/WG.V/WP.152, paras. 41–42
A/CN.9/931, para. 48
A/CN.9/WG.V/WP.158, para. 49
A/CN.9/937, para. 97
A/CN.9/966, para. 75

Part B. Supplemental provisions

210. Articles 30, 31 and 32 are supplemental provisions that a State may wish to enact. They take the core provisions in part A, chapter 6, a step further. Article 30 permits use of the measures described in articles 28 and 29 in a proceeding taking place in the enacting State with respect to an enterprise group member whose COMI is in another jurisdiction. The court of the enacting State is permitted to approve the use of such measures under article 31 and, under article 32, paragraph 1, to provide additional relief, including staying or declining to commence a main proceeding. With respect to a group insolvency solution, the court is given the power to approve, under article 32, paragraph 2, the portion of a group insolvency solution relating to a local enterprise group member, provided it determines that creditors are or will be adequately protected under the group insolvency solution (in that case, art. 26 concerning approval of a group insolvency solution would not apply). These measures can help to avoid duplication of proceedings and minimize costs and conflicts between proceedings affecting enterprise group members, including where a group insolvency solution is contemplated.

211. Use of the supplemental provisions might result, however, in an enterprise group member's insolvency being handled in a manner that is not consistent with the prior expectations of creditors and other third parties, namely that the legal entity would be subject to, for example, insolvency proceedings in the jurisdiction in which COMI was located. As a consequence, departing from that basic principle of commencing proceedings on the basis of –COMI should be limited to exceptional circumstances, namely to cases where the benefits, in terms of efficiency, largely outweigh any negative effect on creditors' expectations in particular and legal certainty in general. This approach would appear to be justified only in the instances noted above in paragraph 29.

Article 30. Undertaking on the treatment of foreign claims: main proceedings

To minimize the commencement of main proceedings or to facilitate the treatment of claims that could otherwise be brought by a creditor in an insolvency proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may undertake to accord to those claims the treatment in this State that they would have received in an insolvency proceeding in that other State and the court in this State may approve that treatment. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

212. Article 30 expands upon the concept introduced in article 28, permitting treatment of a foreign claim in a proceeding in the enacting State, irrespective of whether that proceeding is a main or non-main proceeding.

213. The undertaking under article 30 can be made either by an insolvency representative appointed in a State other than the enacting State (e.g., to facilitate the conduct in a single jurisdiction of insolvency proceedings relating to multiple enterprise group members based in different States, whether or not a group insolvency solution is ultimately developed), or by a group representative appointed in a planning proceeding in the enacting State.

214. As is the case under article 28, the Model Law requires the undertaking to meet the formal requirements of the law of the enacting State, including requirements as to form and language. There is no requirement for the court of the enacting State to approve the treatment to be accorded pursuant to the undertaking; the article preserves the court's discretion with respect to approval. The Model Law does not address the procedure for seeking approval, leaving it to the law of the approving State to indicate the approvals and procedures required. The undertaking given under article 30 enables a court in the other State to decline to commence a main proceeding, pursuant to article 31, subparagraph (b).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [53]–[54]
A/CN.9/898, paras. 104–107
A/CN.9/WG.V/WP.146, footnote 51
A/CN.9/903, paras. 136–137
A/CN.9/WG.V/WP.152, para. 57
A/CN.9/931, paras. 49–50
A/CN.9/WG.V/WP.158, paras. 50–52
A/CN.9/937, para. 98
A/CN.9/WG.V/WP.161, para. 50
A/CN.9/966, paras. 76–81

Article 31. Powers of a court of this State with respect to an undertaking under article 30

If an insolvency representative or a group representative from another State in which an insolvency proceeding is pending has given an undertaking under article 30, a court in this State may:

(a) Approve the treatment in the foreign insolvency proceeding of the claims of creditors located in this State; and

(b) Stay or decline to commence a main proceeding.

215. Like article 29, article 31 addresses the situation in which the enacting State is the State in which the claim would have been brought but for the undertaking given under article 30 in another State. Unlike article 30, however, the enacting State may be the location of the relevant group member's COMI. It enables the court of the enacting State to approve the treatment to be afforded to the claims of local creditors in the foreign proceeding and to stay any main proceeding already commenced or decline to commence such a main proceeding. In so doing, the court should be satisfied, in accordance with article 27, that the interests of the creditors and other interested persons, including the enterprise group member in respect of which the claims could otherwise be brought, are adequately protected (see para. 188). The Model Law does not address the procedure for seeking approval, leaving it to the law of the approving State to indicate the approvals and procedures required.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [53]–[54]
A/CN.9/898, paras. 104–107
A/CN.9/WG.V/WP.146, footnote 51
A/CN.9/903, paras. 136–137
A/CN.9/WG.V/WP.152, paras. 58–59
A/CN.9/931, para. 51
A/CN.9/WG.V/WP.158, para. 53
A/CN.9/937, para. 99
A/CN.9/WG.V/WP.161, para. 51
A/CN.9/966, paras. 76–79 and 82

Article 32. Additional relief

1. If, upon recognition of a foreign planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in that proceeding, particularly where an undertaking under article 28 or 30 has been given, the court, in addition to granting any relief described in article 24, may stay or decline to commence an insolvency proceeding in this State with respect to any enterprise group member participating in the foreign planning proceeding.

2. Notwithstanding article 26, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of the creditors of the affected enterprise group member are or will be adequately protected, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 24 that is necessary for implementation of the group insolvency solution.

216. The additional relief available under article 32 will only apply if a State decides to enact the supplemental provisions. Since application of article 32 requires recognition of a planning proceeding, it provides relief that is additional to that available under article 24 of the Model Law.

217. Paragraph 1 permits the court of the enacting State, following recognition of a foreign planning proceeding, to stay or decline to commence an insolvency proceeding relating to an enterprise group member participating in that planning proceeding, provided it is satisfied that the interests of creditors of that participating enterprise group member are or will be adequately protected in the planning proceeding. As such, article 32 is broader than articles 29 and 31 because the court's decision is not based upon an undertaking of the kind referred to in article 28 or 30, but rather on the court satisfying itself that adequate protection is or will be provided in the planning proceeding.

218. Where the court decides not to commence a proceeding under paragraph 1, relief under article 24 would still be available because the enterprise group member, while not subject to an insolvency proceeding, would fall within the terms of the exception in article 24, paragraph 3, i.e., the proceeding was not commenced for the purpose of minimizing the commencement of proceedings in accordance with the Model Law.

219. Paragraph 2 provides a means of approving a group insolvency solution that is different to that referred to in article 26. Where a group insolvency solution has been submitted to the court for approval, the court itself can approve the group insolvency solution if it is satisfied that the interests of creditors of affected enterprise group members are or will be adequately protected in the group insolvency solution. The provision also specifies that the court may grant any relief available under article 24 that might be necessary for implementation of the group insolvency solution. Without that specific authorization, relief under article 24 is only available following recognition of a planning proceeding, which is not a pre-condition for the operation of article 32, paragraph 2.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.142/Add.1, notes [56]–[57]
A/CN.9/898, pars. 108
A/CN.9/WG.V/WP.146, footnotes 52–53
A/CN.9/903, para. 138
A/CN.9/WG.V/WP.152, para. 60
A/CN.9/931, para. 52
A/CN.9/WG.V/WP.158, para. 54
A/CN.9/937, paras. 100–103
A/CN.9/WG.V/WP.161, para. 52
A/CN.9/966, paras. 76–79 and 83

VI. Assistance from the UNCITRAL Secretariat

A. Assistance in drafting legislation

220. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, PO Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: uncitral@un.org; Internet home page: uncitral.un.org).

B. Information on the interpretation of legislation based on the Model Law

221. The Case Law on UNCITRAL Texts (CLOUT) information system is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL, including the Model Law. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The Secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL."

Obligations of directors of enterprise group companies in the period approaching insolvency

Contents

Introduction and purpose of this section

1. This section 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 to directors[1] in the context of enterprise groups. Recommendations 257 to 266 of the first section continue to apply in the enterprise group context, 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 contained in this section.

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

3. This section should be read in conjunction with the first section and also in conjunction with part three of the Legislative Guide. In addition, in 2019, UNCITRAL adopted a legislative text, the "UNCITRAL Model Law on Enterprise Group Insolvency", which seeks to facilitate insolvency proceedings for enterprise groups. That text and its accompanying Guide to Enactment provide a framework that is intended to streamline the conduct of such proceedings and assist in the development of a group insolvency solution, including by providing a regime for cross-border recognition of group insolvency solutions and the relief that might be needed to support their development. That Model Law and its accompanying Guide to Enactment provide information that will prove useful to the directors and other office holders that are the focus of this section.

Glossary

4. This section uses the same terminology as other parts of the Legislative Guide. The following additional terms relate specifically to this section and should be read in conjunction with the terms and explanations included in the main glossary and the glossary accompanying part three of the Legislative Guide:

(a) "Enterprise group member" means an enterprise that forms part of an enterprise group;

(b) "Group representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

(c) "Group insolvency solution" means a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members;

(d) "Main proceeding" means an insolvency proceeding taking place in the State where the enterprise group member debtor has the centre of its main interests; and

(e) "Planning proceeding" means a main proceeding commenced in respect of an enterprise group member provided:

(i) One or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution;

[1] The question of who may be considered a director for the purposes of this section is discussed in the first section, chap. II, paras. 13–16. Although there is no universally accepted definition of the term, this section continues to refer generally to "directors" for ease of reference.

(ii) The enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and

(iii) A group representative has been appointed;

Subject to the requirements of subparagraphs (i) to (iii) above, the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of the UNCITRAL Model Law on Enterprise Group Insolvency.

I. Background

5. The first section 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.[2] The first section 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.[3] 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.

6. 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.

7. Part three of the Legislative Guide, which addresses the treatment of enterprise groups in insolvency, 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 enterprise group members and may involve different levels of ownership and control. Those factors, together with adherence to the separate entity approach and the widespread lack of any explicit acknowledgement of the enterprise group reality in the legislation applicable to individual enterprise group members, raise a number of issues for directors of enterprise group members. Adherence to the separate entity approach 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. That is to be achieved irrespective of the interests of the enterprise group as a whole, the position of the director's company in the enterprise group structure, the degree of independence or integration among enterprise 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 enterprise 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. Failing to

[2] See chap. I of the first section, paras. 8–10.
[3] Ibid., para. 6.

understand the complexity 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 enterprise group members or of the enterprise group more widely.[4]

8. The requirement to act in the interests of the directed company may be further complicated in the enterprise group context when a director of one enterprise group member performs that function or holds a managerial or executive position in one or more other enterprise group members. In such a situation, it may be difficult for the director to separately identify the interests of each of those enterprise group members and treat them in isolation. Moreover, the interests of those enterprise group members may be affected by the possibly competing economic goals or needs of other enterprise group members and those of the enterprise group collectively. The short and long-term implications for the interests of the different enterprise 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 enterprise 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 to protect the interests of creditors of the affected enterprise group members and other stakeholders.

9. Some examples of situations in which the interests of individual enterprise group members may be affected by those of the enterprise group more widely may include where one enterprise group member is a key supplier, or provides finance to another enterprise group member or acts as a guarantor for finance provided by an external lender to another enterprise group member, in an attempt to keep the enterprise group as a whole afloat, including its own business; where one enterprise group member agrees to transfer its business or assets or surrender a business opportunity to another enterprise 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 the enterprise group member agreeing to such transfer, surrender or contract; or where an enterprise group member enters into cross-guarantees with other enterprise group members to assist the enterprise group as a whole to use its assets more effectively in financing enterprise group operations.

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

11. In determining the best interests of the directed enterprise group member, a director may weigh and consider various interests. These interests may also include the interests of other enterprise group members, or the enterprise group as a whole, where those interests are also consistent with the interests of the directed enterprise group member. To the extent that the course of action a director chooses to follow in such circumstances is reasonable and aimed at avoiding insolvency or minimizing its impact on the directed enterprise group member, that director should not be liable for breach of their obligations. Where having weighed the competing interests of the directed enterprise group members, the course of action chosen gives rise to a conflict between the obligations the director owed to those different enterprise group members, that conflict should be disclosed to the affected enterprise group members. Resolving such a conflict might require mediation or negotiation of the opposing interests.

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

12. 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 enterprise group member or members, some jurisdictions may permit directors to have regard, for example, to the direct or derivative commercial benefits accruing to that enterprise group member from pursuing a particular course of action with other enterprise group members and to the extent to which their enterprise group member's prosperity or continued existence depends on the well-being of the enterprise 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 enterprise group member as a result of the course of action taken and to consider the position of their enterprise 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 granted for a loan to another enterprise group member, especially where the survival of that other enterprise group member is not critical to the solvency of the enterprise group member giving the guarantee or security.

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

14. This section identifies the extent to which a director of an enterprise group member may take account of considerations beyond the enterprise group member managed by that director 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 members 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. While recognizing the desirability of achieving the goals of insolvency law (outlined in part one of the Legislative Guide, chap. I, paras. 1–14 and rec. 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.

15. This section does not deal with the liability of directors under criminal law, company law or tort law. It focuses 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 members in the period approaching insolvency

A. The nature of the obligations

16. The underlying rationale of imposing obligations on directors in the proximity of insolvency is addressed in the first section (chap. I, paras. 1–7), and remains equally applicable in the enterprise group context. The obligations of directors of an enterprise 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 of the Legislative Guide) and the possibility of maximizing value in the enterprise group by designing a group insolvency solution to the enterprise group's financial difficulties that includes the whole enterprise group or some of its parts. Group insolvency solutions may require a director of an enterprise group member in financial difficulty to take steps that may appear, at first glance, to be detrimental to that enterprise 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 enterprise group member in financial difficulty may expose directors to liability for failure to discharge their obligations reasonably.

17. One consideration for directors evaluating the steps to be taken to address the enterprise group member's financial difficulties is the impact of those steps on creditors of that enterprise 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 enterprise 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.

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

19. 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 enterprise group members and procedurally coordinating those proceedings, as discussed in part three of the Legislative Guide.[5]

Recommendations 267–268

Purpose of legislative provisions

The purpose of 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 enterprise 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 enterprise group member, including in situations where they are also responsible for making decisions concerning the management of other enterprise 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, while taking reasonable steps to ensure that the creditors of that enterprise group member and its other stakeholders are no worse off than if that enterprise 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 a group insolvency solution for the enterprise group as a whole or some of its parts; the position of the enterprise group member in the enterprise group; and the degree of integration between enterprise group members;

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

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

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 person specified in accordance with recommendation 258 with respect to a company that is a member of an enterprise group;

(b) Insofar as not inconsistent with those obligations, the person referred to in subparagraph (a) may take reasonable steps to promote a group insolvency solution that addresses the insolvency of the enterprise group as a whole or some of its parts. In so doing, the person may take into account the possible benefits of maximizing the

[5] Ibid., recs. 202–210.

value of the enterprise group as a whole, while taking reasonable steps to ensure that the creditors of the enterprise group member and its other stakeholders are no worse off than if that enterprise group member had not been managed so as to promote such a group insolvency solution.

Reasonable steps for the purposes of recommendation 267

268. For the purposes of recommendations 255 and 267, and to the extent not inconsistent with the obligations of the person referred to in recommendation 267, subparagraph (a) to the enterprise group member to which that person was appointed, reasonable steps in the enterprise group context might include, in addition to the steps outlined in recommendation 256:

1. (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 group insolvency solution for the enterprise group as a whole or some of its parts;

(b) Considering the financial and other obligations of the enterprise 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;

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

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

(e) Holding and participating in informal negotiations with creditors, such as voluntary restructuring negotiations,[6] where organized for the enterprise group as a whole or some of its parts; and

(f) Considering whether formal insolvency proceedings should be commenced.

2. Where formal insolvency proceedings are to be commenced, considering the court in which they should be commenced, whether a joint application[7] with other relevant enterprise group members is possible or appropriate and whether proceedings should be procedurally coordinated.[8]

B. Identifying the persons who owe the obligations

20. 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 enterprise 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 an enterprise group member to take appropriate steps to address the financial difficulties of the directed enterprise group member or involve that member in the financial difficulties of other enterprise group members, to the detriment of the creditors of the directed enterprise group member. This may occur in numerous circumstances, such as where the boards of the two enterprise group members consist of substantially the same persons; where the majority of the board of one enterprise group member is nominated by the other enterprise group member, which is in a position of control; where one enterprise group member controls the management and financial decision-making of the enterprise group; or where one enterprise group member

[6] Ibid., part one, chap. II, paras. 2–18.
[7] Ibid., part three, recs. 199–201.
[8] Ibid., recs. 202–210.

interferes in a sustained and pervasive manner in the management of another enterprise group member, typically in the situation of a parent and controlled enterprise group member.

21. There may also be some enterprise groups in which it is difficult to identify the precise boundaries between enterprise group members because management responsibilities across different boards are blurred. In addition, relevant executives and decision makers may be employed by enterprise group members several steps removed from the enterprise group member in question and the separate identity and liability of that enterprise group member may be generally disregarded in the daily business of the enterprise 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 enterprise group member in question and to the enterprise group member by which they are employed.

22. Persons that might be considered to be a director in the enterprise group context could include another enterprise group member or the director of another enterprise group member, including a shadow director[9] of that other enterprise group member. While some laws do not permit an enterprise group member to be formally appointed as a director of another enterprise group member, such an enterprise group member might nevertheless be regarded as a shadow director of that other member when it exercises influence over or directs its activities.

23. The first section (chap. II, paras. 13 to 16) discusses the persons 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 to that recommendation 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 section.

C. Conflict of obligations

24. 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 enterprise group member, whether as a result of the ownership and control structure of the enterprise group, the alliances between enterprise group members, family ties across the enterprise group or some other aspect of the manner in which the business or businesses of the enterprise group are organized.[10] Whatever the reason, a director who sits on the boards of, or has managerial responsibility for, a number of different enterprise group members may face, in the period approaching insolvency, a potential conflict between the obligations owed to those different enterprise 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 enterprise group member. The nature and complexity of the conflict may relate to the position of the directed enterprise group members in the enterprise group hierarchy, the related degree of integration between enterprise group members, and the incidence of control and ownership. Where a director sits on the boards of the parent and controlled enterprise 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 enterprise group member.

25. In addition, the interests of the directed enterprise group members may be closely intertwined with the enterprise group more widely, requiring the economic reality of the enterprise 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 enterprise

[9] The term is explained in the first section, chap. II, footnote 11 to para. 13.
[10] Legislative Guide, part three, chap. I, paras. 6–15.

group more widely and it may be appropriate for that subsidiary to provide funding in the short term for other enterprise group members in order to keep that wider business operating and ultimately save the business of the subsidiary itself.

26. 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 enterprise 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.

27. 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, 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 enterprise 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 enterprise group member or members without the expertise necessary to address their financial difficulties. As noted in the first section (chap. II, para. 27), 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.

28. Good corporate governance that supports analysis of the situations of the respective enterprise 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 enterprise 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 enterprise group members can also lead to conflicting solutions and outcomes, which need to be carefully reviewed and assessed by directors.

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 enterprise group member. That situation may give rise, in the period approaching insolvency, to a conflict between the obligations owed to the different enterprise 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, from the point of time referred to in recommendation 257, 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 enterprise group members.

Reasonable steps to manage a conflict of obligations

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

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

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

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

(d) Seeking the appointment of an additional director when the conflict of 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 of micro, small and medium-sized enterprises

Draft text on a simplified insolvency regime

Note by the Secretariat

Contents

V.19-01938 (E)

I. Introduction

1. The background to the project of the Working Group on insolvency of micro, small and medium-sized enterprises (MSMEs) is provided in the provisional agenda of the fifty-fifth session of the Working Group (A/CN.9/WG.V/WP.164, paras. 8–11). This note sets out in chapter II a draft commentary and recommendations focusing on features of a simplified insolvency regime that may in particular be suitable to the insolvency of micro and small business debtors. It would be left to States to define conditions for access to such a simplified insolvency regime.

2. The draft commentary and recommendations draw on notes by the Secretariat A/CN.9/WG.V/WP.159 and A/CN.9/WG.V/WP.163 considered by the Working Group at its fifty-third and fifty-fourth sessions (New York, 7–11 May 2018, and Vienna, 10–14 December 2018, respectively), and on the comments made at those sessions with respect to those documents (A/CN.9/937, paras. 105–120; and A/CN.9/966, paras. 114–143). They also take into account reports of the World Bank Group addressing the insolvency of MSMEs and natural persons and publications of other international organizations and academic writers on those subjects.

3. Pending the final decision on the form that a text on simplified insolvency regime should take (see A/CN.9/966, para. 117), the draft commentary and recommendations set out in this note were prepared, as a working assumption, as a supplement to the *UNCITRAL Legislative Guide on Insolvency Law* (i.e., its part five). Accordingly, the draft recommendations in this note were numbered sequentially after recommendation 270, the last recommendation in the draft text on obligations of directors of enterprise group companies in the period approaching insolvency (A/CN.9/990), which upon adoption by the Commission at its fifty-second session in 2019 will form an additional section of part four of the *Guide*. The glossary found in other parts of the *Guide* may need to be supplemented by an additional glossary of terms specific to a simplified insolvency regime.

4. Alternatively, it may be decided that a text on simplified insolvency regime should form part of an overarching document addressing legal aspects of MSMEs throughout their business lifecycle, starting with simplified incorporation and ending with simplified insolvency. In such case, the style and structure of a text on a simplified insolvency regime will be adjusted to the style and structure of such an overarching document.

II. Draft commentary and recommendations on a simplified insolvency regime

“Introduction

1. The *UNCITRAL Legislative Guide on Insolvency Law* (the “*Guide*”) focuses on insolvency proceedings commenced under the insolvency law and conducted in accordance with that law, against a debtor, whether a legal or natural person, that is engaged in economic activity. Informal insolvency processes, which are not regulated by the insolvency law and will generally involve voluntary negotiations between the debtor and some or all of its creditors, briefly introduced in part one, and discussed in more detail in the context of expedited reorganization proceedings in part two, of the *Guide*, are outside the scope of the legislative chapters of the *Guide*.

2. “Insolvency proceedings” covered by the *Guide* are collective proceedings, subject to court supervision. The term “court” is explained in the glossary of the *Guide* as a judicial or other authority competent to control or supervise insolvency proceedings. The *Guide* notes that alternatives to court supervision may be considered in designing the insolvency law, in particular where the capacity of the courts is limited (whether for reasons of lack of resources or lack of requisite experience). It invites States to consider whether the role of the courts can be limited with respect to

different parts of the proceedings or balanced by the role of other participants, such as the creditors and the insolvency representative.[1]

3. The *Guide* also presupposes, as a general rule, reliance on an insolvency representative throughout the insolvency proceedings. Unlike other UNCITRAL texts in the area of insolvency law, the term "insolvency representative" in the *Guide* is construed narrowly and does not encompass a debtor in possession. The debtor-in-possession approach is not addressed in detail in the *Guide.* The *Guide* notes that the debtor-in-possession approach depends upon strong corporate governance rules and institutional capacity and affects the design of a number of provisions of an insolvency regime, including preparation of the reorganization plan, exercise of avoidance powers, treatment of contracts and obtaining post-commencement finance.[2]

4. This document was prepared in recognition of the fact that in some cases the application of elements of the standard business insolvency processes described above, in particular the central role of the court and extensive involvement of an insolvency professional who replaces the debtor in the management of the insolvent business, may be less appropriate. That may in particular be the case in insolvency of individual entrepreneurs and micro and small businesses of an essentially individual or family nature with intermingled business and personal debts (collectively referred to in this document as "micro and small business debtors").[3] Such debtors may be discouraged by standard business insolvency processes because of their length, procedural inflexibility and costs, as well as the inherent risks of loss of control over the business. Micro and small business debtors might prefer less costly, faster and simpler proceedings and those that facilitate a fresh start through discharge and provide for confidentiality, which would, among other things, alleviate concerns over the social stigma of insolvency.

5. Efforts are being made at the international, regional and national levels to find solutions tailored to the needs of micro and small business debtors in insolvency, recognizing the impact of their insolvency on job preservation, the supply chain, entrepreneurship and the economic and social welfare of society. In particular, there is a growing recognition of the negative consequences of unresolved financial difficulties for micro and small business debtors that, burdened by old debt, may be discouraged from taking new risks or become trapped in a cycle of debt or driven to the informal sector of economy. Solutions are being sought to allow micro and small business debtors to remain in the labour market by preserving their know-how and skills and restarting entrepreneurial activity, drawing on lessons from the past.

Purpose

6. This document focuses on the features of a simplified insolvency regime, such as out-of-court procedures and fast-track in-court insolvency proceedings, so as to develop workable alternatives to standard business insolvency processes. The key insolvency principles and the general guidance provided in the *Guide* remain relevant in the context of simplified insolvency regimes. The substance of the *Guide* is therefore applicable to simplified insolvency regimes with some variations noted in this document.

7. This document recognizes that the positions of States with respect to both the desirability of developing a simplified insolvency regime and the conditions for access to that regime and its features vary greatly. Some commonly found features include a presumption of good faith, quick discharge, debtor-led and debtor-in-possession processes and appropriate safeguards against abuse of a simplified insolvency regime. Those safeguards may be contained in a range of options made

[1] The *UNCITRAL Legislative Guide on Insolvency Law*, Introduction, para.7, and part one, chap. III, Institutional framework.
[2] Ibid., part two, chap. III.A, para. 18.
[3] See A/CN.9/966, paras. 118–119 and 127.

available to parties in interest[4] for deployment when justified. Those options may include replacing a debtor in possession with an insolvency professional when dealing with an uncooperative debtor, converting one type of proceedings to another in order to accord an appropriate treatment to a viable as opposed to non-viable business and vice versa, refusing or imposing a longer period for discharge and applying different types of disqualification of various duration.

8. In some States a simplified insolvency regime may focus on reorganization, while in others it may focus on liquidation. Some States may create incentives for out-of-court debt restructuring negotiations, including procedures for quick court approval of agreements reached out-of-court while other States may favour putting in place specialized in-court proceedings for micro and small businesses debtors. Some States may favour a liberal approach to discharge while other States may be concerned about the effect of such approach on their economies. Constitutional, cultural, social and economic norms of the State as well as regional integration dynamics and "forum shopping" considerations, i.e., situations when micro and small business debtors would consider relocating their business to other jurisdictions to access more friendly regimes, will dictate policy choices on these matters.

9. In addition, approaches to developing a simplified insolvency regime may be different. In some jurisdictions, while there is a single insolvency framework applicable to all business enterprises, certain requirements of such a framework are not made applicable to insolvency of micro and small business debtors (such as those regarding the formation and functions of a creditor committee). In other jurisdictions, two separate insolvency regimes may exist: one for micro and small business debtors and the other for larger enterprises. Some States have enacted laws to deal with the insolvency of micro and small business debtors that include both consumers and micro and small businesses. Other States make available household insolvency provisions to micro unincorporated businesses without employees.

10. This document offers a range of tools, from purely contractual out-of-court debt restructuring negotiations to standard business insolvency proceedings, for use by States that may decide to include a simplified insolvency regime in their legal framework, either by adjusting some features of the standard business insolvency law or establishing a separate simplified insolvency regime. It is for policymakers in each jurisdiction to identify features of such a regime and eligible debtors that might not be served well by the standard business insolvency regime and would thus benefit from access to a simplified insolvency regime. Each cluster of issues includes cross-references to the applicable recommendations of the *Guide.* Additional recommendations specific to a simplified insolvency regime are offered where necessary.

Glossary

11. The following terms relate specifically to a simplified insolvency regime and should be read in conjunction with the terms and explanations included in the glossary of the *Guide*:

(a) [*to be completed at a later stage*];

[4] The *Guide* explains the term "party in interest" as referring, in addition to a debtor and a creditor, to the insolvency representative, an equity holder, a creditor committee, a government authority or any other person affected by insolvency proceedings, excluding persons with remote or diffuse interests affected by those proceedings. (See Introduction, Glossary, 12 (dd)).

I. Background

A. Reasons for establishing a simplified insolvency regime

12. The establishment of a simplified insolvency regime for micro and small business debtors is usually justified because of (a) the specific characteristics of micro and small business debtors, and (b) features of the existing insolvency regimes (business, consumer and personal) that are not suitable to accommodate those characteristics.

1. Specific characteristics of debtors intended to be covered by a simplified insolvency regime

13. Micro and small business debtors tend to be relatively undiversified as regards creditor, supply and client base. As a result, they often face the cash flow problems and higher default risks that follow from the loss of a significant business partner or from late payments by their clients. Micro and small business debtors themselves could be the clients of other micro or small businesses that would share the same characteristics and may heavily depend on payments from their clients, with the consequence that one business failure may cause additional business failures in the supply chain (see further chap. VII, sect. A, below).[5]

14. Micro and small business debtors also face scarcity of working capital, higher interest rates and larger collateral requirements, which make raising finance, especially in situations of financial distress, difficult, if not impossible. Excessive collateral requirements in comparison to the amount of the loan (referred to as "over-collateralisation") are often imposed because of the asymmetry of bargaining power and the lack of financial information about micro and small businesses making the assessment of business risks more difficult.

15. Access to credit by micro and small business debtors is often made subject to the granting of personal guarantees by the owners or their relatives and friends whose personal assets could be of equal or greater value than that of the micro and small business. A personal guarantee will typically extend liability for the debts of the micro and small business to those individuals, affecting both personal effects (such as the family home) and business assets. Owners thus frequently provide not just equity, but also debt funding. It is also not unusual for owners to use personal assets for business purposes with the result that it is often difficult to separate business from personal assets.

16. Any physical assets of micro and small businesses, which may be the main or the only assets of the value to creditors, may already be encumbered to one or a very limited number of secured creditors, e.g., a bank holding a mortgage on the residential property or other physical assets of the debtor. Those secured creditors are usually able and willing to use enforcement methods available to them under law; hold-outs by such secured creditors in a position of influence are thus common in the context of negotiating a solution to financial difficulties of the micro and small business debtors.

17. Unencumbered assets are usually of little or no value for distribution to unsecured creditors. Those creditors may not be interested in participating in the insolvency proceedings because the costs of participating may outweigh the return. This may jeopardise reorganization of micro and small business debtors, leaving liquidation as the only option.

18. Micro and small business debtors often have poor or non-existent records in respect of transactions and relationships between owners, family members, friends and other individuals involved in the operation and financing of the business. There may be no clearly established ownership of key commercial assets (such as tools or

[5] A/CN.9/966, para. 143(a).

other essential equipment), work for the micro and small business may not be documented or remunerated in accordance with typical commercial practices and the owner may use their own finances to fund or support the business without necessarily documenting that expenditure.

19. Micro and small business debtors are also characterized by a centralized governance model in which ownership, control and management overlap (often within a family). An owner may hide a financial crisis out of fear of damaging a good commercial name, relationships with employees, suppliers and the market and disrupting existing lines of credit. The management may be unwilling to request the commencement of insolvency proceedings at the risk of losing control over the business. Micro and small business debtors may also be prone to adopt more high-risk strategies, attempting to save their business, which may be their only source of income, at all costs. These factors may contribute to the financial crisis and lead to the micro and small business debtors addressing financial difficulties too late when liquidation of the business might be the only solution left.

2. Unsuitability of the existing insolvency regimes (business, consumer and personal) for micro and small business debtors

20. In most cases, micro and small business debtors would be looking for fast and simple debt forgiveness, debt restructuring and debt repayment options or liquidation and discharge, which existing insolvency regimes (business, consumer and personal) may not provide.

21. Few existing insolvency regimes have been designed with the needs of micro and small business debtors in mind. [6] Most standard business insolvency regimes reflect the complexity and sophistication of larger companies. They assume that the business liabilities and debts of a company debtor are clearly separated from the personal liabilities of the company's owners and managers, whereas even in incorporated micro and small businesses with limited liability, shareholders, managers or family members of such persons are often personally liable for company's debts because they have given personal guarantees for the loans of the company, as stated in paragraph 15 above.

22. Micro and small business debtors that do not have a corporate form or are sole proprietorships may not enjoy legal personality or limited liability protection in most jurisdictions. They may be in a similar situation as artisans, craftsmen, traders or farmers who earn living by providing services to a small number of different clients. Electronic commerce has indeed transformed many providers of low-skill services from employees into self-employed service-providers. Natural persons who engage in small scale business activity in their own name or in a partnership in which the partners have personal liability for the debts of partnership may be treated in the case of business insolvency as individual defaulters and as such be subject to personal insolvency frameworks, where such frameworks exist. The latter may not provide temporary protection from creditors, nor allow for debt restructuring procedures and discharge. Where a discharge is available, a long waiting period before discharge may apply, leaving full personal liability for many years after liquidation of the business. Heavy penalties, including limitations on freedom of movement and other personal restrictions, may also apply.

23. In some jurisdictions, consumer insolvency laws may address insolvency of unincorporated micro and small business debtors [7] but those laws may treat the business aspects of the distress inadequately.

24. Standard business insolvency regimes may also assume the presence of an extensive estate of significant value and the active engagement of interested stakeholders, particularly creditors, which is usually not the case in the micro and

[6] A/CN.9/966, para. 143(b).

[7] In some countries, the consumer bankruptcy provisions apply to individual entrepreneurs whose business debts comprise 50 per cent or more of their total debts.

small business debtor context, as noted in paragraphs 16 and 17 above. In addition, standard business insolvency regimes usually presuppose the active involvement of courts, the engagement of an insolvency representative for administration of the insolvency estate, various filing requirements, including to file audited balance sheets, and rigid procedural steps for liquidation or reorganization. They may be too complex, lengthy and expensive for micro and small business debtors, which are characterized by low value, low sophistication and low complexity and often have insufficient or no assets to cover the costs of standard business insolvency proceedings. Micro and small business debtors may fail to meet commencement standards under those insolvency laws that would require the court to refuse commencement of proceedings, or terminate proceedings that may have commenced, in insufficient or no-asset cases.

25. Even where sufficient assets exist, the involvement of professionals and the automatic separation of owners and management from the ordinary administration of business may operate as a disincentive to apply for insolvency. Many micro and small business debtors may also have difficulties collecting and distributing relevant information because of inefficient or non-existent record keeping systems (see para. 18 above), whether due to a lack of resources, of formal obligations to maintain such records or of an understanding of any need for them. The uncertainty of costs generated by the insolvency process may also deter micro and small business debtors from applying for insolvency. Where a single disputed or unpaid claim is involved, most provisions of insolvency law devised to ensure protection of different categories of creditors and different classes of claims would be inapplicable (see further para. 92 below).

B. Key objectives of a simplified insolvency regime

26. A significant number of micro and small business debtors avoid seeking relief or may seek relief far too late, for reasons discussed in section A above. Overarching goals of a simplified insolvency system would thus be: (a) to put in place an expeditious, simple and low cost insolvency regime capable of providing quick relief and a fresh start to deserving debtors while deterring re-entry into the market of dishonest or incompetent entrepreneurs; (b) to encourage, facilitate and incentivize early access to such a regime by micro and small business debtors; and (c) to reduce the social stigma and personal risks of individuals who create businesses.

27. Those objectives are pursued in particular by minimizing the complexity of insolvency procedures and the associated costs, providing for fast-track procedures, favouring a debtor-in-possession approach and presumption of good faith and creating conditions for an early rescue, including out-of-court, of viable businesses, and a quick exit of non-viable businesses. The social stigma of insolvency is addressed through exceptions to public disclosure of insolvency-related information (although these measures raise sensitive policy issues), identification of appropriate commencement standards [8] and reduction of the number of restrictions, disqualifications and prohibitions imposed on a discharged debtor.

28. At the same time, simplified insolvency regimes usually include safeguards against abuse, fraud and irresponsible behaviour. One of the commonly found safeguards is to restrict the frequency of access by either preventing multiple applications by the same debtor within a certain period or subjecting a recurrent applicant to more intense scrutiny, with commencement permitted only in exceptional circumstances and with longer discharge periods.

29. The *Guide* addresses key objectives of an effective insolvency law, including the need to provide for timely, efficient and impartial resolution of insolvency, in recommendations 1 to 7. Those recommendations will be applicable in the simplified insolvency context. In addition, each cluster of recommendations in the *Guide* is

[8] A/CN.9/966, para. 131.

preceded by the statement of the purpose of those recommendations. To the extent that those recommendations are applicable to the simplified insolvency regime, the stated purposes will be equally applicable. For example, the *Guide* states that the purpose of provisions on commencement of insolvency proceedings (recs. 14–29) is to facilitate access for debtors and creditors to the remedies provided by the law and to establish safeguards to protect both debtors and creditors from improper use of the application procedure. It may therefore be considered that the overarching goals of a simplified insolvency system described in paragraph 26 above are already reflected in the key objectives and the stated purposes of the *Guide*. There may however be a need for some simplification of means to achieve those key objectives and stated purposes as well as for some supplemental provisions. [9] Hence the following additional recommendation may be considered:

Recommendation

271. In addition to recommendations 1–7 of this *Guide* and stated purposes of other applicable recommendations, the following considerations should be taken into account in designing a simplified insolvency regime:

(a) To establish expeditious, simple and low-cost procedures to address financial difficulties of micro and small business debtors;

(b) To encourage, facilitate and incentivize early access by micro and small business debtors to those procedures;

(c) To establish appropriate criteria for access by micro and small business debtors to those procedures;

(d) To devise measures aimed at reducing the social stigma associated with business failure and the personal risk of individuals who create businesses; and

(e) To establish favourable conditions for early discharge and a fresh start.

II. Mechanisms for resolving micro and small business debtors' financial difficulties

A. Out-of-court debt restructuring negotiations

1. General characteristics

30. Out-of-court debt restructuring negotiations are held between the debtor and its creditors without any involvement of the court. Some such negotiations may be based or reliant upon the provisions of the insolvency law that may require debtors and their creditors to exhaust out-of-court debt restructuring negotiations before initiating in-court insolvency proceedings (see para. 72 below). The insolvency law may provide for an institutionalized debt negotiation and settlement framework. In some jurisdictions, there may be a State authority in charge of administering negotiations between the debtor and its creditors or authorized to appoint a mediator or conciliator for the process (e.g., a central bank, a commission for over-indebtedness or the debt enforcement authority). There may also be an arbitration facility to resolve disputes among the negotiating parties. In other systems, debtors may rely on counselling and negotiation support from semi-private or private-sector actors.

31. Requirements for creditor's participation in out-of-court debt restructuring negotiations may be built in other law, for example monthly targets may be imposed on banks to successfully restructure debts of micro and small business debtors, and tax and social security authorities may be required to participate in the negotiations. Sanctions may be imposed on parties acting in bad faith during those negotiations.

[9] A/CN.9/966, paras. 120–124.

32. Some jurisdictions allow debtors to proceed directly into the formal court-based insolvency system if they fulfil entry requirements. Recourse to out-of-court debt restructuring negotiations remain an option for parties to consider, and incentives are built to use them, in particular tax incentives for banks to hold voluntary debt restructuring negotiations with micro and small business debtors in financial difficulties (e.g., tax write-offs for bad or renegotiated debts). In-court insolvency proceedings are in turn made simpler for micro and small business debtors.

33. In yet other jurisdictions, the insolvency law does not provide for out-of-court debt restructuring negotiations leaving voluntary negotiations to contract law, company or commercial law or civil procedure law, or in some cases relevant banking regulations. Some jurisdictions do not allow debt restructuring agreements or arrangements to occur outside the court system or the insolvency law. Some laws would regard the steps associated with any voluntary debt restructuring negotiations as sufficient for the courts to make a declaration of insolvency.

2. Usual steps in out-of-court debt restructuring negotiations

34. The out-of-court debt restructuring negotiations may be initiated by either the debtor or its creditor(s). No eligibility or commencement standards, usually found in the context of formal insolvency proceedings, apply.

35. The negotiations usually proceed on a voluntary, confidential and consensual basis. Proposals that the debtor may make to its creditors for a rescue of business will depend on the circumstances and would reflect the applicable law. For example, a debtor may request a lender (e.g., a bank) to write down the debtor's financial obligations or may request a lessor to decrease the rental fee or waive or suspend unpaid clams. The other party can accept or reject the proposal or offer debt restructuring under different terms.

36. The debtor remains in possession and control of its business and is expected to pay its debts when they become due to all creditors that are not participating in the negotiations. A stay on creditor enforcement actions is often essential for a successful out-of-court workout.

37. Some laws may provide for an automatic statutory stay for the duration of the negotiations to allow the negotiations to progress without a threat that any party in interest, including secured creditors, will start insolvency proceedings or proceed with enforcement actions or the suspension, termination or modification of its rights under existing contracts with the debtor. Such a stay also suspends the obligation to file for insolvency.

38. In the absence of a statutory stay, the debtor and the creditors may negotiate a standstill agreement. A contract-based standstill has an advantage of avoiding the publicity usually associated with a formal statutory stay. Confidentiality agreements may be part of the standstill agreement or negotiated separately.

39. Under a standstill agreement, the participating creditors usually undertake not to enforce their rights against the debtor for any default during a specified period. The standstill agreement may also oblige the creditors to keep open any existing lines of credit or allow the debtor to temporarily suspend interest payments. The debtor in turn usually agrees not to take any action that might adversely affect relevant creditors. Examples of such actions would be borrowing from non-participating creditors and offering security to them, transferring assets away from business or selling assets to a third party at an undervalue. The debtor also usually agrees to use the standstill period to draft a restructuring plan and provide relevant creditors with reasonable and timely access to all information relevant to its assets, liabilities, business so that they can assess the viability of the plan. In the absence of court involvement, terms of the agreement, including the duration of the standstill period and conditions for its possible extension, are negotiated by parties under contract law.

40. The length of the contractually-negotiated standstill period varies from case to case. It would typically not exceed an initial period of a few weeks but could be

extended if all participating creditors agree. Although the period may be fixed for a certain period, the relevant creditors may terminate it earlier, either at their discretion, for example if it becomes obvious that no rescue is feasible, or following agreed events of default, for example where the debtor acted fraudulently.

41. In some jurisdictions an agreement by the debtor with all or some of its creditors that provides for a stay on the payment of debts may trigger formal insolvency. In such cases, creditors may agree between themselves rather than with the debtor to operate a stay on their claims against the debtor, and the debtor separately agrees not to take steps which might prejudice the relevant creditors during an agreed period.

42. If more than one creditor is involved, creditors may select one of them to act as a coordinator. The coordinator may assume an administrative burden or the role of the facilitator of negotiations but usually with no authority to commit other creditors to any particular course of action. Creditors, directly or through an appointed third-party, may play an active role in evaluating debtor's assets to ascertain whether the business is worth preserving. They usually compare what may be offered to them with what they might expect from a formal insolvency or from other options open to them (e.g., the sale of their debt), taking into account also claims and entitlements of other participating creditors.

43. Creditors may agree to alter the priority of their claims in order to facilitate a restructuring plan. They may also agree to provide new funding to a micro and small business debtor necessary for its rescue. That is usually done on the condition that priority status will be accorded to the new funding or additional security over the micro and small business debtor's assets will be given. Provisions of insolvency law on priority for post-commencement financing[10] may not necessarily extend to those arrangements. It would depend on provisions of insolvency law whether agreements related to creditor priority reached in the out-of-court procedures will be valid and apply in the event of a subsequent conversion of the out-of-court procedures to formal insolvency proceedings (e.g., to liquidation if the out-of-court workout attempts fail). (See further chaps. IV and VII.C below.)

44. Plans negotiated out-of-court are usually binding if approved by all affected creditors. Creditors that continue to be paid in the ordinary course of business (e.g., employees and trade creditors) are not considered affected and do not vote on the plan. Where, however, the rights of those creditors are to be modified by the plan, their agreement to the proposed modifications would be required.

45. The parties may choose to seek confirmation of the plan in the court or such confirmation may be required by law for any debt restructuring arrangements between the debtor and the creditors to become effective. In addition, the court may become involved if any aggrieved party in interest challenges the plan in the court. Expedited proceedings discussed in chapter III, section C, below may apply to the court confirmation of the plan negotiated out-of-court. The approval of the plan by a majority of affected creditors may be sufficient for the court to confirm the plan. Initiation of in-court plan confirmation proceedings might mean the loss of confidentiality – considered to be one of the main advantages of out-of-court procedures (see para. 47 below) – since at least the fact that the procedure took place and the essential terms of the agreed plan, such as new guarantees, new finance and priority ranking, may need to be disclosed.

46. The enforcement of the plan agreed upon by affected parties in out-of-court procedures is left to contract law. A representative of creditors may be appointed to guide the debtor through the implementation of the plan. In case of disputes, a mediator, may be appointed, unless such role is already assumed by a designated state authority. Where arbitration, mediation or conciliation is involved, the enforcement

[10] See the *UNCITRAL Legislative Guide on Insolvency Law*, part two, chap. II.D, paras. 94–107 and recs. 63–68.

of awards or settlement agreements would be subject to the rules applicable to those commercial dispute resolution mechanisms.

3. Factors that contribute to the success of out-of-court debt restructuring negotiations

47. Unlike in-court insolvency proceedings that involve all creditors and are public, out-of-court debt restructuring negotiations usually involve a limited number of creditors, which may accommodate the need for a prompt resolution that is not always possible in court-supervised proceedings, and allow parties to preserve confidentiality, which helps to avoid the social stigma attached to insolvency. [11] In addition, they may provide debtors with the benefits of resolving their financial difficulties without affecting their personal credit scores, which is important for obtaining new finance and a fresh start. At the same time, because out-of-court debt restructuring negotiations are held without court supervision and remain confidential, abuses are possible. For example, debtors may prolong negotiations to delay the liquidation of their business to the detriment of other parties in interest, or creditors may use their bargaining power to refuse to agree to any modifications of their claims or pressure debtors into accepting onerous plans that are not viable and would not be acceptable in court proceedings. In addition, creditors demanding enforcement of their claims may make negotiations impossible: just one participating creditor may veto a settlement, and unless the law stipulates that passive creditors are bound by a settlement, they often feel free to disregard attempts to participate in negotiations.

48. Experience with out-of-court debt restructuring negotiations suggests that the success of the negotiations often depends on a number of factors. In particular, those negotiations often succeed where debtors are experiencing mild or temporary financial difficulties rather than severe insolvency. The involvement of an effective intermediary (a central bank or a central debt-counselling agency) that can persuade parties that participation in debt restructuring negotiations is in their best interests may also be necessary. Such an intermediary may offer professional, low-cost or cost-free impartial assistance with debt restructuring negotiations, facilitate debt restructuring through its existing arrangements with such key institutional creditors as tax authorities and banks, and provide supervision to prevent abuses. Furthermore, out-of-court debt restructuring negotiations have proved to be efficient when they include features of in-court processes, such as a stay to stop enforcement of claims and filing for insolvency while the negotiations are ongoing and procedures to make the plan binding on the dissenting minority and on all creditors who have been notified and did not object.

49. It is for policymakers to decide whether their insolvency regime should be devised in a way that would encourage parties to avoid filing for formal insolvency proceedings by commencing out-of-court debt restructuring negotiations. A policy decision to promote out-of-court debt restructuring would need to be underpinned by a number of actions, including amendments of existing legislation to ensure that no legal obstacles for out-of-court debt restructuring negotiations exist. Policymakers should in particular consider the extent to which existing competition, state aid, data protection and labour laws may create obstacles to the use of options that are usually considered in out-of-court debt restructuring negotiations such as asset sales, discounted debt sales, debt write-offs, debt rescheduling, debt-to-debt and other exchange offerings and in-kind payments.

50. In addition, the law concerning third party guarantees may disincentive creditors to settle with debtors; tax relief may be available to parties only when debt restructuring takes place in formal court-supervised proceedings; and with a prohibition to write down the principal, the law may eliminate any incentives for public and other creditors to participate in debt restructuring. In some jurisdictions, the tax regime may make it excessively difficult for creditors to obtain tax relief from debt write-offs. Other systems may allow creditors to claim losses and tax deductions

[11] A/CN.9/966, para. 131.

from debt write-offs but impose income tax on debtors whose debts are written off. In addition, an obligation to file for formal insolvency within a certain period after the occurrence of certain events found in insolvency legislation of many countries creates obstacles to holding out-of-court debt restructuring negotiations (see para. 33 above). While certain jurisdictions provide for a statutory stay that suspends that obligation as well as enforcement of creditors' claims during out-of-court debt restricting negotiations (see para. 37 above), in many jurisdictions a statutory stay may only be available in the context of a formal insolvency process.

51. As noted in paragraph 1 above, the *Guide* does not address out-of-court debt restructuring negotiations in detail. Hence the following additional recommendations may be considered:

Recommendations

272. Where the early rescue of micro and small business debtors is to be encouraged, the law relating to insolvency should remove disincentives for the use of preventive out-of-court debt restructuring negotiations and facilitate the participation of all creditors, including public authorities, in those negotiations on equitable terms. The following measures may contribute to the success of out-of-court debt restructuring negotiations:

(a) Government support in the form of an agency that takes the lead in facilitating negotiations between creditors and debtors and between creditors;

(b) Mediation and arbitration for resolution of debtor-creditor and inter-creditor disputes;

(c) Allowing parties to preserve confidentiality of out-of-court debt restructuring negotiations; [12] and

(d) Allowing parties to accord priority status to interim finance subject to appropriate safeguards (see rec. 285 and the accompanying commentary below).

273. Where alternatives to formal in-court insolvency proceedings for micro and small business debtors are made available, the insolvency law should stipulate conditions for their use and specify whether they should be exhausted before commencement of in-court proceedings.[13]

B. In-court simplified proceedings

1. General characteristics

52. Simplified insolvency proceedings are a variation of the formal insolvency proceedings. They may be made mandatory or optional for use by eligible debtors. Unlike out-of-court procedures discussed in section A above, they are collective proceedings and would trigger more formalities, such as requirements for publicity, notifications and protection of dissenting creditors. Nevertheless, they are characterized by fewer and simpler procedural formalities than those existing in standard business insolvency proceedings, as described in the *Guide*. In particular, elaborate rules on public notices, creditors' committees and meetings and claims verification are disabled or adjusted, especially where little or no value is available for distribution, and creditors may therefore be expected not to be involved in the proceedings.

53. Unlike what is stated in recommendation 169, creditors may not be required to file their claims with the court. Instead, a micro or small business debtor submits a list of claims to the court at the time of commencement; any claims not included are not subject to the proceeding. The law may include a presumption of accuracy of the claims on the debtor's list; any claims that have been intentionally omitted by the

[12] Ibid.
[13] Ibid.

debtor may be excluded from a discharge. This approach is closer to what is provided in recommendation 170 as regards undisputed claims, which states that the insolvency law may permit claims that are undisputed to be admitted by reference to the list of creditors and claims prepared by the debtor in cooperation with the insolvency representative or the court or the insolvency representative may require a creditor to provide evidence of its claim.

54. Several steps can be taken to lower creditors' participation costs through online, postal and proxy consultation and voting, which is line with recommendations 145 and 169. Where the law requires creditors to submit claims, it may simplify submission of the supporting evidence, for example by reducing evidentiary requirements for proof of claims, dispensing with the requirement that the claims must be certified and by allowing presentation of evidence online,[14] which will be in line with recommendation 170 that states that the insolvency law should not require that in all cases a creditor must appear in person to prove its claim. The law may limit the claims that need to be verified to those that are likely to be paid.

55. At the same time, the costs of non-participation may be raised to address the passivity of creditors, which is a common feature in the insolvency of micro and small business debtors, as noted in paragraphs 16 and 17 above. This is achieved through rules that presuppose that the creditors will contribute to decision-making through objections. Under those rules, creditors after due notification will be bound by the outcome of the proceedings if they failed to object on time: failure to vote is regarded as a vote in favour and the absence of timely objection is regarded as a waiver of the right to judicial review. This is unlike the *Guide* that envisages more formal participation of creditors in insolvency proceedings (recs. 126–136 and 145–151).

56. In addition, recognizing that micro and small business debtors tend to have less complicated operations and financial arrangements, simplified insolvency proceedings tend to be fast-track proceedings. Shorter statutory timelines than those applicable in standard business insolvency proceedings may apply and only narrow grounds for possible extensions of the default timelines within the maximum permissible number of requests for extensions (usually once or twice) may be specified in the law. Non-compliance with the established statutory deadlines may lead to deviations from default procedures, such as debtor-led and debtor-in-possession approaches, or conversion of one type of proceeding to another (see chap. IV below). Decisions may be taken by the court in summary rather than plenary proceedings and court hearings may be held only when necessary (e.g., upon request of dissenting creditors).

57. The *Guide* emphasizes the need for prompt actions (e.g., recs. 18, 19, 21, 43, 163 and 193) and provides for fast-track procedures in recommendations 160–168 addressing expedited reorganization proceedings. Specific timelines are expected to be established in domestic insolvency law; the *Guide* only notes in some cases considerations that need to be taken into account for fixing such timelines (e.g., that an adequate time should be provided to creditors for submission of their claims (rec. 174)).

58. To save costs and time, many simplified insolvency proceedings envisage the involvement of insolvency professionals only in exceptional cases. A third party (an experienced court clerk, an accounting firm or an insolvency professional) may be involved by the court for limited procedural steps, such as for examination of the debtor's business and property and supervision of notification, proper valuation and distribution of claims and compliance with other legal requirements. That person may operate pro bono or be reimbursed from public funds. An additional recommendation was included in this document to address the fact that the debtor-in-possession regime is often the norm in the simplified insolvency context although other options listed in recommendation 112 are not excluded, including limited displacement (i.e., the debtor retains the role in the day-to-day operation of the business subject to supervision by

[14] A/CN.9/966, para. 143(h).

a third party) or total displacement of the debtor from the operation of the business (see para. 104 below). Other additional recommendations were included to address the need for simplified procedures and shorter timelines in the context of a simplified insolvency regime.

2. Eligibility

59. Unlike what is stated in recommendation 14, many jurisdictions permit debtors, but not their creditors, to apply for simplified insolvency proceedings, with or without the right of creditors and other parties in interest to raise objections with the court. Creditor application is usually permitted only in exceptional cases, e.g., as a safeguard against the debtor's incompetence or abuse. In particular, unviable debtors may try to misuse a simplified reorganization to delay inevitable liquidation or viable debtors may avoid taking action, impeding rescues.

60. Practices for determining a debtor's eligibility for access to simplified insolvency proceedings vary. It is common for States to use quantifiable criteria, such as thresholds, for such determination. The most common thresholds are the amount of total debt or liabilities, both secured and unsecured, which should be equal to or less than a specified maximum, and the maximum number of employees (e.g., less than or equal to 20 people).[15] Other quantifiable eligibility criteria may include the turnover not exceeding a certain threshold in a defined period (e.g., 12 months before the commencement of the proceedings), assets and income below a level prescribed by law or a maximum number of unsecured creditors (e.g., 20 creditors).

61. In addition to quantifiable criteria, an insolvency law may also establish qualitative eligibility criteria. In some jurisdictions, a simplified insolvency proceeding may only be available to individual micro and small business debtors engaged in self-employed activity (business income earners as opposed to wage earners), while in other jurisdictions, such a procedure is available only to proprietorships, partnerships and other entities without limited liability protection. The law may specify certain types of business activity that may be covered by the procedure, excluding others (such as involving real estate). The list may be open-ended, with a competent State authority being responsible for amending the list as required. Under other laws, applicants may also be required to demonstrate that there are no claims against them arising from employment contracts and that the person in charge of the business has not been convicted of tax evasion, trafficking or racketeering or any form of fraud. Additional conditions may apply depending on the type of simplified insolvency proceeding for which a micro and small business debtor applies (e.g., to be eligible for simplified liquidation proceedings, the applicant must not own any immovable property).

62. Recommendations 8 and 9 of the *Guide* state that the insolvency law should govern insolvency proceedings against all debtors that engage in economic activities (whether or not those economic activities are conducted for profit) and that exclusions from the application of the insolvency law should be limited and clearly identified in the insolvency law. Those recommendations do not prevent States from establishing specific eligibility criteria for access to simplified insolvency regimes or for conversion of a standard business insolvency proceeding to a simplified one. Additional recommendations were included in this document to address issues raised in this section (see in particular recs. 274 and 275 below).

3. Presumption of good faith

63. There is an emerging trend to waive the requirement for the debtor to demonstrate at the entry point "good faith", i.e., that the debts were caused by events beyond a micro and small business debtor's control or that they were not caused

[15] Although the number of employees may not be indicative of the financial complexity of business. In addition, a sole proprietorship may not employ anyone but rather hire contractors.

intentionally or through gross negligence. That approach is based on the understanding that the requirement for the debtor to prove good faith and for verification by third parties of good faith might be time and record-consuming; the administrative efficiency of simplified insolvency proceedings would thus not be achieved if demonstrating good faith is made a condition of access.

64. Rather, the debtor's cooperation with creditors, the insolvency professional (if appointed) and the court will be considered relevant in the choice of options that may be employed during the insolvency proceedings and, in particular, to the availability of discharge and conditions upon which it might be provided. Standard debtor's obligations as reflected in recommendation 110 of the *Guide* include: (a) assisting the insolvency professional (if appointed) to perform its duties including by enabling the insolvency professional to take effective control of the estate and facilitating or cooperating in the recovery of assets; (b) providing accurate, reliable and complete information regarding the debtor's financial position and business affairs to the insolvency professional (if appointed), the court and creditors; and (c) notifying the court about any pending change of the debtor's habitual residence or headquarters. In a simplified reorganization discussed in chapter III below, the debtor's obligations of transparency, good faith and full disclosure of information about debtor's business and affairs will continue throughout the reorganization and implementation of the reorganization plan. Nevertheless, bad record keeping and consequently the failure to provide accurate, reliable and complete information regarding the debtor's financial position and business affairs does not give rise alone to a presumption of bad faith, considering the difficulties that micro and small business debtors face with comprehensive record keeping, as noted in paragraphs 18 and 25 above.

65. Good faith is also presumed during the proceedings and at the exit point in the absence of substantiated assertions to the contrary. Investigation into the debtor's affairs may nevertheless be warranted where there is a reasonable basis to suspect fraud, tax evasion or other abuses. In such cases, the creditors and other parties in interest should have the opportunity to request the court to set aside default features of simplified insolvency proceedings, such as debtor in possession and the full discharge (see chaps. III.D and VI below). Additional recommendations were included in this document to address issues raised in this section (see in particular rec. 283 below).

4. Commencement standards

66. Recommendation 15 of the *Guide* presents two alternative standards for commencement of insolvency proceedings: the debtor is or will be generally unable to pay its debts as they mature (the cessation of payments test); or the debtor's liabilities exceed the value of its assets (the balance sheet test). Where a single test is adopted, the *Guide* recommends that the cessation of payments test and not the balance sheet test should be used.

67. The balance sheet test may be impractical for micro and small business debtors because they may not maintain proper records as noted in paragraph 18 above. Moreover, their personal assets and liabilities may be mingled with business assets and liabilities, as noted in paragraphs 15 and 21 above. Given the prevalence of personal guarantees used for borrowing by micro and small business debtors, as noted in paragraph 15 above, the balance sheet analysis could be under-inclusive if it failed to reflect the liabilities of the individuals behind the debtor.

68. The cessation of payments test may be more workable in comparison. As discussed in the *Guide*, the law may accept a declaration from the debtor that it is unable or does not intend to pay its debts; specify the indicators of the debtor's inability to pay its debts; or establish a presumption to that effect when the debtor suspends payment of its debts.[16] However, the cessation of payments test may be inadequate for accurately assessing the state of solvency of a micro or small business

[16] The *UNCITRAL Legislative Guide on Insolvency Law*, part two, chap. I.A, paras. 23–24 and 33.

debtor if it fails to capture personal debts that may be intertwined with business debts. In addition, focusing on the debtor's current inability to meet present debts may not adequately reflect the debtor's future financial situation, while predicting the debtor's future financial situation introduces uncertainty, especially in the rapidly fluctuating business environment.

69. Recognizing the shortcomings of both tests in the context of micro and small business debtors, an insolvency law may adopt a different approach. There may be no requirement in the law for micro and small business debtors to declare or demonstrate insolvency, an approach that may be seen as an incentive to take advantage of the simplified insolvency regime by removing the social stigma associated with insolvency. Some laws may require the micro and small business debtor to attest that it is unable to pay debts that fall due without significantly hindering the continuation of its business.

70. Simplified filing requirements may apply, thus removing another commonly cited disincentive for micro and small business debtors to seek timely commencement of insolvency – the inconvenience of filing extensive financial documents. To mitigate risks of abuse of the system, some jurisdictions require a micro and small business debtor seeking to access a simplified insolvency regime to provide, at a minimum, a statement of the assets they own, without having to provide details such as the value of those assets. They might also be required to disclose information relating to any transfers they might have made to related persons[17] within a prescribed time period before the application and include a sworn statement indicating that the conditions for simplified insolvency proceedings are met.

71. Balance sheet records, where they exist, may be used to determine the appropriate process for distribution of assets of the micro and small business debtor or, in no-asset cases, for discharge. In some jurisdictions, they may be relevant to considerations of good faith although the prevailing trend, as noted in paragraph 64 above, is not to attribute the fact of bad record keeping to bad faith. In other jurisdictions, although documents relating to the financial situation of a micro or small business debtor may have to be submitted (e.g., the most recently prepared balance sheet, statement of operations, cash flow statement and tax returns), those documents do not need to be audited and there is no requirement for comprehensive financial or cash flow disclosure statements, unlike in the standard business insolvency proceedings.

72. Under some laws, other formal requirements might be applicable for commencement of simplified insolvency proceedings. Some laws may require an attempt of an out-of-court procedure (see sect. A above) before applying for the commencement of formal insolvency proceedings. In such cases, a micro and small business debtor may be required to submit a certificate issued by a competent person or authority attesting that an unsuccessful attempt has been made to settle out-of-court with creditors and explaining the reasons for failure. Additional recommendations were included in this document to address issues raised in this section (see, in particular, recs. 272, 273 and 276).

5. Fees

73. The *Guide* notes that many debtors that would satisfy the criteria for commencement of insolvency proceedings are never formally liquidated, either because creditors are reluctant to initiate proceedings where it appears that the debtor has no, or insufficient, assets to fund the administration of insolvency proceedings or because debtors in such a position will rarely take steps to commence proceedings. In practice, micro and small business debtors are more likely than other debtors to have

[17] The *Guide* explains the term "related person" for a debtor that is a legal entity as (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, the *Guide* considers a related person as persons who are related to the debtor by consanguinity or affinity (see Introduction, Glossary, 12 (jj)).

insufficient or no assets to fund the administration of proceedings. Responses to address "no-asset cases" have differed among States. Some insolvency laws provide that where an application for commencement is made in these circumstances, it will be denied on the basis of an assessment of insufficiency of assets by the court,[18] while other laws provide a mechanism for appointment and remuneration of an insolvency representative. Some other laws provide for a surcharge on creditors to pay for the administration of estates.[19]

74. In some jurisdictions, access to simplified insolvency proceedings does not depend on the micro and small business debtor's ability to cover the administrative costs of the proceedings. Micro and small business debtors that do not have enough assets to fund a proceeding in those jurisdictions can commence a proceeding to address their financial difficulties and obtain a discharge (so called "zero-asset proceedings" discussed in chap. III, sect. A, below). Other jurisdictions provide for various types of insolvency proceedings and establish a scale of fees that depends on the complexity of proceedings. The level of assets available will determine the type of proceedings: the ability to pay the prescribed minimum may lead to a small administration proceeding while the ability to pay within a higher threshold range may trigger a standard business insolvency proceeding. Alternative mechanisms for financing simple insolvency proceedings may be in place for those debtors that cannot pay even the minimum. In some jurisdictions, following verification, the court or another competent authority may decide to reduce or waive the amount to be prepaid by the debtor to cover the costs of the proceeding or allow payment of administrative expenses in instalments.

75. Some insolvency laws require creditors making an application to guarantee the payment of the costs of the proceedings up to a certain fixed amount, to pay a certain percentage of the total of claims or to pay a fixed amount as a guarantee for costs. In some laws where a payment as security for costs is required, that amount may be refunded from the estate if assets of the debtor turn out to be sufficient to cover costs of the proceedings.

76. Recommendation 26 states that the "insolvency law should specify the treatment of debtors whose assets and sources of revenue are insufficient to meet the costs of administering the insolvency proceedings. Different approaches may be taken, including: (a) Denial of the application, except where the debtor is an individual who would be entitled to a discharge; or (b) Commencement of the proceedings, where different mechanisms for appointment and remuneration of the insolvency representative may be available."

77. In the context of a micro and small business debtor's insolvency, appointment of the insolvency representative is not the norm and therefore the question of the remuneration of the insolvency representative should not arise. Denial of the application may not be the optimal solution since the micro and small business debtor's financial situation would remain unresolved. In addition, the *Guide* refers to other reasons, in particular of a public interest nature, for devising a mechanism to enable the administration of a debtor with apparently few or no assets under a formal proceeding. Where an insolvency law does not provide for a possibility to investigate the financial situation of insolvent companies with few or no assets, it does little to ensure the observance of fair commercial conduct or to further standards of good governance of commercial entities. Assets can be moved out of companies or into related companies prior to liquidation with no fear of investigation or the application of avoidance provisions or other civil or criminal provisions of the law.[20] The *Guide*

[18] Some systems in this group may allow the proceedings to progress only if debtors can cover administrative costs as well as a minimum percentage of proceeds to creditors. Other laws may allow the proceedings to progress for debtors stricken by specific, compelling, exceptional circumstances (hardship relief).

[19] The *UNCITRAL Legislative Guide on Insolvency Law*, part two, chap. I.B, para. 72.

[20] Ibid., para. 73.

discusses possible mechanisms such as using public funds or establishing a fund out of which the costs may be met.[21]

78. In the light of those considerations, the insolvency law may provide for a special treatment of micro and small business debtors whose assets and sources of revenue are insufficient to meet the costs of administering the insolvency proceedings, in particular by allowing the proceedings to progress and putting in place different mechanisms to cover administrative expenses (see an additional recommendation to that effect below (rec. 274 (d)).

6. Stay

79. In some jurisdictions, the opening of a simplified insolvency proceeding may trigger an automatic stay as in a standard business insolvency proceeding. Some laws may provide for an automatic stay but not for the entire duration of proceedings, rather for a short period that may be extended in exceptional cases up to the maximum limit defined by law.

80. In jurisdictions where no automatic stay is envisaged, the micro or small business debtor may be allowed to apply to the court for a temporary stay of individual enforcement actions, e.g., if a creditor applies to the court for commencement of insolvency proceedings against the debtor, initiates a civil law procedure for recovery of debt from the debtor or gives the debtor a formal notice to pay. The debtor may be required to demonstrate to the court that the individual enforcement action in question may adversely affect ongoing restructuring efforts and hamper the prospects of a successful outcome. Before ordering any stay against a specific creditor or group of creditors, the court may require an in-depth non-discrimination test, which would ascertain whether the stay is necessary to support the restructuring efforts or whether the debtor is acting in bad faith and the stay may thus unfairly prejudice creditors and have an adverse effect on the value of the insolvency estate. The duration of a temporary stay of individual enforcement actions is usually short but extensions by the court are possible upon submission by the debtor of evidence that restructuring is progressing, that there is a strong likelihood of success and that creditors will not be unfairly prejudiced. The law may establish the maximum duration of a stay.

81. Any stay may be lifted at the request of creditors when it becomes apparent that there is no support from the required majority of creditors for ongoing restructuring efforts. Any creditor could also challenge the order of a stay on the grounds that the conditions for a stay were not met, e.g., that the stay unfairly prejudices them compared to other creditors. The court could limit the scope of the stay by lifting it partially for the negatively-affected creditor or group of creditors.

82. Any approaches to a stay usually need to balance interests of the debtor with those of creditors. Some creditors of micro and small business debtors could themselves be micro or small businesses relying on payments of their clients for survival of their businesses, as noted in chapter VII, section A, below.[22] Any restrictions on the right to enforce claims may thus cause insolvencies in the supply chain.

83. Recommendations 46–51 address various measures available on commencement, including an automatic stay, their duration, exceptions to the application of the stay and relief available to a secured creditor from measures applicable on commencement. Those recommendations would be generally applicable in the context of micro and small business debtors.

[21] Ibid., para. 75.
[22] A/CN.9/966, para. 143.

Recommendations

274. For simplified insolvency proceedings the insolvency law should provide:

(a) Shorter timelines, narrow grounds for their extension and the maximum number of permitted extensions;[23]

(b) Simplified commencement standards;

(c) Simplified procedures, including for submission, verification and admission or denial of creditor claims and distribution of proceeds;[24] and

(d) Mechanisms for commencement of insolvency proceedings for micro and small business debtors whose assets and sources of revenue are insufficient to meet the costs of administering the insolvency proceedings.[25]

275. The insolvency law should specify instances where only the debtor, as a general rule, could initiate a simplified insolvency proceeding and exceptional circumstances that would justify the commencement of the simplified insolvency proceeding by any other party in interest. The insolvency law may provide for sanctions if parties in interest abuse their right to commence a simplified insolvency proceeding.[26]

276. The insolvency law could provide exceptions to the cessation of payment and balance sheet tests referred to in recommendation 15 of the *Guide* for the commencement of simplified insolvency proceedings.

III. Types of in-court simplified insolvency proceedings

A. Zero-asset proceedings

84. To make discharge of debts available to debtors that cannot afford covering administrative costs of proceedings, some jurisdictions introduced “zero-plan” or “zero-asset” procedures. Other jurisdictions adjusted standard business insolvency proceedings by allowing the summary procedure for zero-asset debtors or special rules on the closure of the proceeding due to the lack of assets. Such a procedure may be made available only once and special eligibility criteria in addition to insufficiency of assets to cover the costs of proceedings may apply (e.g., the debtor does not own real estate). Other jurisdictions do not provide for zero-asset procedures and do not accept or approve zero-asset plans.

85. Some systems that envisage “zero-asset” or “zero-plan” procedures require an eligible debtor to submit an application to the court requesting to be discharged from all debts and a statement of financial situation proving that it is eligible for zero-asset procedures. The application is accepted when the court serves a written notice to that effect to the debtor. The court notifies the creditors about the zero-asset procedure with a summary of the debtor’s assets and liabilities, makes a public notice and includes an entry in the business registry. If creditors do not object to the plan, it will be deemed approved and binding upon the parties. If the majority of the creditors object to the plan, the standard or simplified business insolvency proceeding may start. In some jurisdictions, a single creditor may ask that the liquidation follow the ordinary procedure and in such a case the creditor has to furnish sufficient security for the expenses to be covered. Upon acceptance of a “zero-plan” by the court, the debtor can be immediately discharged or the law may specify a period (e.g., 6–12 months) during which a debtor has to fulfil certain obligations (e.g., undertaking mandatory training on business management) and the discharge is conditioned upon

[23] A/CN.9/966, para. 133.

[24] See recommendations 169, 174, 177, 179 and 182 of the *Guide* for comparison and assessment of the need for simplification.

[25] See recommendation 26 of the *Guide* for comparison and assessment of the need for a different regime.

[26] A/CN.9/966, para. 134.

fulfilment of those obligations. In other systems, a declaratory statement that the insolvency estate has zero assets may alone produce automatic legal consequences (e.g., discharge) with the proceedings immediately closed.[27]

86. Those systems that provide for this type of procedure may include mechanisms to assess whether the debtor is indeed with no or insufficient assets and therefore eligible for zero-asset proceedings. Services of an impartial evaluator for such a purpose may be engaged, financed by public funds. Conversion of zero-asset proceedings to the standard business insolvency proceedings is envisaged if it is proven that sufficient assets to repay debts do exist.

87. Some laws include a procedure for cases in which assets or unexpected income are discovered post-discharge. Several systems include a mechanism for allowing creditors and other parties in interest to request reopening of such cases and collecting and retroactively distributing the new value to creditors. In other systems, finality is regarded as more important than allowing creditors to claim payment from debtor's later discovered resources. Exceptions to the finality is usually justified in bad faith cases, for example where the debtor strategically timed the filing of application to allow to escape from debt obligations while benefitting later from post-discharge income.

88. The *Guide* does not address zero-asset proceedings specifically. Considerations raised in chapter II above with respect to fees and a recommendation that was added in that context (rec. 274(d)) apply to zero-asset proceedings.

B. Simplified liquidation

89. Many systems that provide for a simplified insolvency regime recognize that speedy liquidation of non-viable debtors or debtors that could not agree on a reorganization plan may be personally, societally and economically more desirable than rehabilitation of non-viable business with no prospects for recovery. They therefore aim at fast-track simple liquidation procedures.

90. Some jurisdictions that provide for simplified liquidation require the appointed liquidator, within a short period after the appointment (e.g., 30 days), to prepare and file a report with the competent court, on the basis of which the court can commence a simplified liquidation procedure, after having heard or summoned the debtor. In other jurisdictions, once insolvency proceedings commence, the court appoints an insolvency representative who liquidates the debtor's estate and distributes the proceeds among the creditors. In some jurisdictions, simplified liquidation proceedings could be completed after the micro and small business debtor has handed over its assets for liquidation.

91. Private sales, in addition to public auctions, may be permitted to provide a choice for best realizing the value of assets owned by micro and small business debtors. A simplified distribution of proceeds is common, particularly where the assets available are below a certain statutory limit. The law may reduce notice requirements; permit the court to make a final decision in lieu of the creditors; or establish one-time distribution as the norm, provided that additional dividends may be distributed on a discretionary basis. If all creditors agree on the amounts and priorities of claims, together with the timing and method of distribution, the court may order distribution on a consensual basis.

92. Where a single disputed or unpaid claim is the main asset of the debtor, which is typically the case in insolvency of micro and small business debtors, some jurisdictions allow the court, another institution or an insolvency representative to perform a summary determination of the disputed claim, with the possibility of a full review on appeal to the court. Some jurisdictions allow the sale of the disputed claim

[27] A/CN.9/966, para. 143(f).

at a discount or assignment of the claim to the insolvency representative or a public office, which will be responsible for litigating and collecting the claim.

93. The *Guide* does not address simplified liquidation proceedings specifically. Considerations raised above with respect to simplified commencement standards and simplified procedures for verification and admission of claims and distribution of proceeds and recommendations that were added in that context (recs. 274–276) apply to simplified liquidation.

C. Expedited proceedings

94. Some jurisdictions provide for expedited proceedings to give effect by the court to a plan negotiated and agreed by a micro and small business debtor with relevant creditors in out-of-court debt restructuring negotiations discussed in chapter II above. Those proceedings are essentially the same as expedited reorganization proceedings discussed in part II, chapter IV.B, and addressed in recommendations 160–168 of the *Guide*. Since the considerations raised in that part of the *Guide* are generally applicable in the simplified insolvency context, they are not repeated in this document. Those provisions are however subject to further simplification discussed in this document (in particular as regards the disclosure statement (see para. 100 below)). [28]

D. Simplified reorganization

95. Reorganization in micro and small business debtor cases will likely translate into debt forgiveness or debt rescheduling for which complex reorganization steps usually envisaged for larger businesses will not be necessary. For those reasons, some jurisdictions envisage simplified reorganization proceedings for micro and small business debtors.

96. The *Guide* addresses full reorganization proceedings in recommendations 139–159. Those recommendations are generally applicable in the context of simplified reorganization proceedings, subject to further simplification discussed in this document.

1. Commencement: a reorganization plan and viability test

97. The application for commencement of reorganization proceedings may be subject to requirements in addition to those listed in chapter II.B above. They may include requirements to file a reorganization plan and to prove viability of business. [29]

98. As the micro or small business debtor may not be able to draw up a feasible reorganization plan at an early stage, some laws allow the submission of such a plan within a specified period after commencement, which is in line with recommendation 139 of the *Guide*. The micro and small business debtor may be given an opportunity to propose a reorganization plan without the involvement of creditors within that period, failing which other parties in interest may become involved or the court may appoint a representative to assist with the negotiation and preparation of a plan, supervise that stage, compel the parties to settle and report to the court about the progress of negotiations. Such representatives may work pro bono or be compensated from public funds.

99. The pool of other parties in interest will largely depend on the size and structure of the micro and small business debtor. Secured creditors holding a significant portion of the debt or that are entitled to satisfy their claims from encumbered assets that are critical to the reorganization of the business would have an important role to play in the preparation of the plan, as would also persons who have given personal guarantees

[28] A/CN.9/966, paras. 127–128.
[29] Ibid., para. 136.

or provided their personal assets as security for business debts. They may be allowed to propose a standalone plan or appoint a professional to support the debtor in preparing the plan. The law may impose a duty on all parties in interest to cooperate in negotiating and proposing a plan.

100. Requirements concerning a disclosure statement to accompany the reorganization plan, found in recommendation 143, are usually relaxed in the simplified reorganization context. Provided that the plan contains sufficient information to enable its viability to be assessed, the debtor may not be required to submit a disclosure statement, financial information or audited documents.[30] It may however be particularly difficult for micro and small business debtors to prove viability of the proposed plan. Some laws leave the assessment of viability to be made by creditors or the court; various ratios, e.g., debt to capital or the projected liquidation value to the value of the going concern, may apply. To provide the court with an independent assessment of viability, the law may require the appointment of a competent person to investigate the debtor's affairs and stipulate terms of remuneration for those services.

2. Debtor in possession

101. Use of the debtor-in-possession approach as the norm in simplified reorganization proceedings pursues the goal of rehabilitation of micro and small business debtors. Such an approach is usually justified by reference to the characteristics of micro and small business debtors discussed in chapter I above. They include that owners and managers of micro and small business debtors often have unique knowledge about their business, as well as ongoing relationships with creditors, suppliers and customers. In addition, the insolvency estate can be insufficient to fund the appointment of an insolvency representative. Furthermore, the risk of being displaced from the helm can create a powerful disincentive for micro and small business debtors to seek timely intervention.

102. The debtor-in-possession approach may not be appropriate in some cases, for example where the debtor or the debtor's representative(s) was responsible for misappropriation or concealment of property or poor management that caused the debtor's financial distress. It may also be inappropriate in involuntary commencement where the debtor could be expected to be hostile to creditors or where the plan was imposed on the debtor by creditors. In such cases, the court may appoint an insolvency representative to take on a supervisory role or even displace the debtor or make an interim stay order preventing the debtor from taking certain actions (such as disposing of assets or incurring liabilities capped by a specific value).[31]

103. In some jurisdictions, an insolvency professional may be a mandatory participant in insolvency proceedings and, although a debtor-in-possession approach may still be possible, it may need to be coupled with the involvement of an insolvency professional who will closely supervise the process and keep the court continuously informed. Supervision of the debtor by the court, by a court-appointed supervisor, by the insolvency representative or by a creditor-appointed supervisor may be necessary in other cases. Mechanisms should be put in place to achieve such supervision in a manner that minimizes costs, including by subsidization of third-party services by public funds.[32]

104. Although the *Guide* presupposes an active involvement of an insolvency representative throughout the insolvency proceeding (as stated in paragraph 3 above), deviations are possible. Recommendation 112 in particular envisages the debtor-in-possession approach, and recommendation 113 states that the insolvency law should specify those functions of the insolvency representative that may be performed by the debtor in possession. Recommendation 157 envisages that the law may establish a mechanism for supervising implementation of the plan, which may include

[30] Ibid.
[31] Ibid.
[32] Ibid.

supervision by the court, by a court-appointed supervisor, by the insolvency representative or by a creditor-appointed supervisor, noting that where the proceedings involve a debtor in possession, or where the proceedings conclude on approval of the plan, it may not be necessary to appoint a supervisor. An additional recommendation is proposed below (rec. 278) that makes the debtor-in-possession approach the norm in simplified reorganization proceedings.

3. Approval of the plan by creditors

105. Requirements for creditor approval are usually lower in simplified reorganization proceedings than in full reorganization proceedings addressed in recommendations 145–151. For example, it may be unnecessary to establish a creditor committee and create classes of creditors if the creditor base is limited, which is usually the case with micro and small business debtors. Convening a creditor meeting may also be unnecessary if the micro and small business debtor keeps all creditors informed and they raise no objections. When such meetings are convened, the quorum, voting and other requirements for adopting decisions that otherwise apply under the insolvency law may be reduced. Decisions may be taken online or by post or proxy but some jurisdictions may require formal meetings with the supervisor appointed by the court and the affirmative acceptance of the plan by a required majority of creditors. Tacit or implied approval mechanisms such as discussed in paragraph 55 above, may be introduced to overcome creditor passivity.

106. In some jurisdictions, creditor approval may not be required: the court may be authorized directly to approve the plan submitted by the debtor. Any objecting party in interest would be able to challenge the approval in court. The opposite could also be true: the law may waive the requirement for the court to approve the plan agreed by the creditors, allowing it to take effect automatically if no dissenting creditors' interests are involved, as envisaged in recommendation 153. The parties may nevertheless prefer obtaining court acknowledgement, confirmation, approval or other form of validation of the plan even in those cases. In other jurisdictions, the formal court approval of the plan may be required in all cases before the plan becomes effective and binding upon all parties in interest.

4. Approval of the plan by the court

107. The debtor may be required to demonstrate to the court that the plan has received the requisite support by providing the written consent of the affected creditors or, where a creditor meeting has been held, a report of the creditors' votes.

108. The court may acknowledge the existence of the plan and that sufficient support among creditors exists for that plan without judging its economic and financial merits, or the court may need to ascertain the fairness of the plan and that the plan ensures the survival of the business.

109. Generally, the plan is approved by the court when a few conditions are satisfied. Those conditions are listed in recommendation 152, including that creditors will receive at least as much under the plan as they would have received in liquidation, unless specifically agreeing to lesser treatment. In micro and small business debtor cases, the court should be able to determine the outcome of an alternative liquidation scenario without the involvement of expert opinion. Alternatively, a more general test of fairness may apply, e.g., the ascertainment that the interests of all creditors are sufficiently protected under the plan, the minority creditors were fairly represented at the meeting, the majority creditors acted in good faith, and the plan would be approved by a reasonable and honest party in interest. That would alleviate the need for the court to compare alternative scenarios and to examine the substance of the commercial terms to which the majority of creditors has agreed.

110. If parties in interest do not bring a challenge to the court, they are deemed to accept the compromise reached in the plan as approved by the court. To discourage frivolous complaints and minimize delays in simplified reorganization, some laws have narrowed the scope for objections to be made on procedural grounds. In some

jurisdictions, the court may approve a plan notwithstanding an objection that the process of preparation and approval of the plan by creditors was not properly conducted, by taking into account the extent of the irregularity, the state of the debtor and other circumstances.

111. The law may envisage mechanisms for the court to bind dissenting parties. In some jurisdictions, the court may modify the plan submitted for approval to protect the rights of dissenting parties. Once the plan is approved by the court, it would be bound on all parties in interest in the same manner as in standard reorganization proceedings.

5. Challenges to an approved plan

112. Some jurisdictions do not provide a right of appeal against a court decision approving a plan. In other jurisdictions, such a right may be limited to factors such as the importance of the issue (e.g., fraud; see rec. 154) and prejudice to the parties.

113. The appeal, where permitted, would not necessarily suspend implementation of the plan. Should the appeal succeed while the plan is being implemented, the interests of all parties involved are taken into account in deciding whether the plan should be suspended or annulled. As an alternative, the court may order the payment of compensation to the party whose appeal succeeded.

114. Such an approach is in line with the *Guide*, which specifies that, although any party in interest may appeal from any order of the court, the insolvency law should provide that appeals in insolvency proceedings should not have suspensive effect unless otherwise determined by the court, in order to ensure that insolvency can be addressed and resolved in an orderly, quick and efficient manner without undue disruption. Time limits for appeal should be in accordance with generally applicable law, but in insolvency need to be shorter than otherwise to avoid interrupting insolvency proceedings (rec. 138 and footnote 64).

6. Amendments of the reorganization plan

115. In simplified reorganization, the need to make amendments to the plan would rarely arise. Nevertheless, the law should not exclude the possibility of any party in interest from proposing an amendment. Such possibility is envisaged in recommendation 155, and recommendation 156 addresses mechanisms for approval of amendments. Amendments may be allowed only in truly exceptional circumstances, subject to the general conditions that the amendment will be in the best interest of all parties in interest and will need to be approved in the same way as the original version of the plan.

116. Some plans could be self-modifying, e.g., those that call for fluctuating payments based on the debtor's actual income. The implementation of such plans may require monitoring. Alternatively, debt repayments may be based on projected income and expenses. The law usually allows parties to modify plans to reflect the debtor's actual situation as compared to the projections embodied in the plan. There could be systems that permit reductions but not increase in payments.

117. Some systems allow retroactive adjustment of the plan to take into account late claims. Other systems consider that such modifications to the plan may make the debtor unable to fulfil new demands and for that reason deny any distribution to creditors filing claims beyond a deadline. An exception could be made in situations where late filing was caused through no fault of those creditors, e.g., the debtor omitted those debts.

Recommendations

277. The insolvency law may require the debtor to demonstrate the value of continuation of business for a simplified reorganization proceeding to commence or to proceed. [33]

278. Notwithstanding recommendations of the *Guide* that presuppose the active involvement of the insolvency representative,[34] the insolvency law may provide for the debtor-in-possession approach, with or without supervision, as the norm in simplified reorganization proceedings and specify instances when exceptions to that approach would be justified, provided that any alternatives are implemented in a manner that minimizes costs. Such alternatives may in particular include the appointment of an administrator subsidized by public funds to closely supervise the process and keep the court continuously informed. In line with recommendation 113, the insolvency law may explicitly specify those functions of the insolvency representative that may be performed by the debtor in possession.

279. The insolvency law may provide for exceptions to some procedural requirements involved in reorganization proceedings with the goal of providing less formal requirements, including as regards: (a) a disclosure statement to accompany the reorganization plan and its contents and the contents of the reorganization plans referred to in recommendations 141–144; and (b) the approval of the plan by creditors referred to in recommendations 145–151.

IV. Conversion of proceedings

118. There may be a need for conversion of one type of proceedings to another, including from a simplified insolvency proceeding to a full insolvency proceeding or vice versa. Some jurisdictions allow a creditor to request conversion of a simplified reorganization proceeding to a simplified liquidation on the ground that the debtor's plan has little chance of succeeding.

119. In addition, a simplified reorganization proceeding may fail if the micro and small business debtor is unable to implement the reorganization plan. As a default, the law may, in such cases, permit automatic conversion to simplified liquidation proceedings, avoiding the delay and expense of a separate application by the micro and small business debtor or other parties in interest. The law may also allow parties in interest to challenge such an automatic conversion. In some cases, even where a plan's failure is attributable to a breach of obligation or the lack of a debtor's cooperation, creditors may prefer reorganization to liquidation to extract more value from business. Instead of conversion to liquidation, they may opt for replacement of the debtor-in-possession approach with available alternatives. It may also be preferable to leave creditors to pursue their rights at law, without necessarily liquidating the debtor, in particular where the debtor commenced a simplified reorganization proceeding to address financial difficulties at an early stage and was not necessarily eligible for liquidation proceedings. In cases where a micro or small business debtor is a natural person, liquidation will not be an option.[35]

120. There could also be cases when a simplified insolvency proceeding may need to be converted to standard business insolvency proceeding, for example at the request of creditors where they can demonstrate the complexity of an individual case and the need for more scrutiny. Such a need, in the context of micro and small business debtor

[33] Ibid.

[34] See e.g., recommendations 54, 58, 59 and 62 that address the use and disposal of assets, recommendations 72–86 that address the treatment of contracts, recommendation 93 that allocates the principal responsibility to commence avoidance proceedings on the insolvency representative and recommendations 115–125 that describe the terms of participation of the insolvency representative in the insolvency proceedings.

[35] A/CN.9/966, para. 137

insolvency, may arise in particular because of allegations of fraudulent transfers of assets of the debtor to related persons or other fraudulent behaviour by the debtor (see also para. 87 above). A request for such a conversion would require an assessment by the court. In some cases, failure to abide by the fast-track deadlines imposed by law for simplified insolvency proceedings may lead to conversion to standard business insolvency proceedings, as noted in paragraph 56 above.

121. Some jurisdictions envisage the conversion of a standard business insolvency proceeding to a simplified insolvency proceeding at the decision of the court, usually upon advice of the insolvency representative. In at least one jurisdiction, such conversion is possible when a committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor. In such cases, a simplified reorganization proceeding may follow that provides for simplified voting requirements and shorter deadlines but more stringent oversight by a competent government body and reporting obligations of the debtor to the court.

122. Recommendation 158 states that the court may convert reorganization proceedings to liquidation where: (a) a plan is not proposed within any time limit specified by the law and the court does not grant an extension of time; (b) a proposed plan is not approved; (c) an approved plan is not confirmed (where the insolvency law requires confirmation); (d) an approved or a confirmed plan is successfully challenged; or (e) there is substantial breach by the debtor of the terms of the plan or an inability to implement. The *Guide* also envisages conversion of liquidation to reorganization proceedings (see e.g., rec. 140) although no specific grounds for such conversion are mentioned. An additional recommendation below recognizes that there could be possible additional grounds for conversion of one proceeding to another, in particular of standard business insolvency proceedings to simplified insolvency proceedings and vice versa.[36]

Recommendation

280. In addition to what is provided in recommendation 158, the insolvency law may stipulate other grounds for converting one type of proceeding to another, including that avoidance proceedings referred to in recommendations 87-99 may justify the conversion of a simplified insolvency proceeding to a standard business insolvency proceeding.

V. Assets constituting the insolvency estate of micro and small business debtors

123. In most legal systems, the scope of assets excluded from the insolvency estate has been expanded over time in line with the goal of affording debtors a fresh start. The exclusion of two particular categories of assets, the family home and tools of the trade, is especially relevant for reducing the social stigma of insolvency and its impact on the entire household and the prospects of a fresh start of a micro and small business debtor.

124. Three approaches to asset exclusion can be found in legislation providing for simplified insolvency regimes:

(a) *Requests by the debtor for exclusion of some assets up to a specified value limit*. Under this approach, the law may set aside a range of assets with a total value up to a specified limit, which the debtor may seek to have excluded from the estate. That approach would mean that all of the debtor's qualified assets automatically become part of the estate, and the burden is on the debtor to apply to the court for exclusion. The range of assets available for exclusion may include, for example, furniture, household equipment, bedding, clothing and tools of trade. The limits on the range and value of assets that a micro and small business debtor may retain will

[36] A/CN.9/966, paras. 136 and 137.

reflect the policy choice made in each jurisdiction. Special treatment may be accorded to the right or interest of the debtor in the family home, including the right to continue residing in the family home after commencement of insolvency proceedings;

(b) *Exclusion of some categories of assets subject to specific ceilings*. The second option is for the law to establish different categories of excluded assets, respectively capped at certain values, which may be a more flexible approach than the first one. The categories of assets that are relevant may differ according to the individual situation of the debtor. Where the law places emphasis on rehabilitating the micro and small business debtor, it might grant the court discretion to increase the scope of excluded assets beyond the default limits to meet the needs of debtors. Where there is evidence of bad faith or unfair conduct by the debtor, however, the law may allow the court to include assets in the insolvency estate that would otherwise be excluded. In some systems, if the debtor does not use up to the exclusion limit in one category of assets (e.g., the family home), the law may allow application of the unused amount to other categories of assets. Other systems allow the debtor to sell off some assets to buy excluded assets. As noted in paragraph 91 above, private sales may be permitted, and the law may also permit business assets to be sold before personal assets. In some situations where the value of an asset is only partially exempt, leaving some value available for creditors, the insolvency representative may sell such an asset and pay the debtor up to the amount of the exemption that the debtor has in the asset. To avoid costs associated with a forced sale, the debtor may be allowed to pay the insolvency representative the amount above the exemption and keep the asset;

(c) *Across-the-board exclusion subject to challenge by creditors*. Lastly, the law may exclude the micro and small business debtor's assets from the estate by default and place the burden on the creditors to object to the exclusion of particular assets. The court may order those assets to be reclaimed for the estate. Because the creditors would intervene if the debtor had certain assets that could be of value to creditors, this approach may be more efficient in cases where there are few assets available for distribution. In other cases, however, it may require the creditors to investigate the micro and small business debtor's assets, especially where personal and business assets are intertwined or assets have been hidden or transferred in close proximity to insolvency.

125. The adoption of one approach over the other has significant ramifications for efficiency and costs of administration of insolvency proceedings. The approach based on the exemption of particular assets by the debtor can be more costly than where the insolvency representative or a creditor seeks to reclaim items of excessive value.

126. The *Guide* addresses assets constituting the insolvency estate in part two, chapter II, section A and recommendations 35–38. Considerations raised in that part of the *Guide*, in particular with reference to assets excluded from the insolvency estate where the debtor is a natural person,[37] are generally applicable in the simplified insolvency context. Recommendation 38 in particular envisages that the insolvency law would specify the assets that are excluded from the estate where the debtor is a natural person. It is supplemented by recommendation 109 that entitles the debtor who is a natural person to retain the assets excluded from the estate by the law.

127. In order to facilitate a fresh start for all types of micro and small business debtors, an additional recommendation below invites States to consider expanding measures envisaged in recommendations 38 and 109 to micro and small business debtors that are legal persons, recognizing that regardless of the form in which micro and small businesses operate, and whether limited liability protection is offered to them,[38] business and personal assets may be comingled in micro and small business

[37] The *UNCITRAL Legislative Guide on Insolvency Law*, part two, chap. II.A, paras. 18–21.

[38] Approaches to making limited liability available to micro and small businesses vary across jurisdictions. Mechanisms for asset partitioning and limited liability with or without a legal personality are currently being discussed in Working Group I (MSMEs), particularly in the context of an UNCITRAL Limited Liability Organization (UNLLO).

debtors to such extent that creditors might still claim personal assets of owners of business and other related persons. [39]

Recommendation

281. The insolvency law might stipulate conditions for expanding measures envisaged in recommendations 38 and 109 to micro and small business debtors that are not natural persons and enlarging the pool of assets that are excluded from the insolvency estate of a micro or small business debtor, in particular where business and personal assets are closely intertwined.

VI. Discharge

128. In the context of discharge following liquidation, the *Guide* explains that "when the debtor is a limited liability company, the question of discharge following liquidation does not arise; generally the law provides for the disappearance of the legal entity or, alternatively, that it will continue to exist as a shell with no assets. The equity holders will not be liable for the residual claims and the issue of their discharge does not arise. If the debtor's business takes a different form, such as a sole proprietorship, a group of individuals (a partnership) or an entity whose owners have unlimited liability, the question arises as to whether those debtors as individuals will still be personally liable for unsatisfied claims following liquidation."[40]

129. In the context of discharge of debts and claims in reorganization, the *Guide* states that "[t]o ensure that the reorganized debtor has the best chance of succeeding, an insolvency law can provide for a discharge or alteration of debts and claims that have been discharged or otherwise altered under the plan. This approach supports the goal of commercial certainty by giving binding effect to the forgiveness, cancellation or alteration of debts in accordance with the approved plan. The principle is particularly important to ensure that the provisions of the plan will be complied with by creditors that rejected the plan and by creditors that did not participate in the proceedings. It also gives certainty to other lenders and investors that they will not be involved in unanticipated liquidation or have to compete with hidden or undisclosed claims. Thus the discharge establishes unequivocally that the plan fully addresses the legal rights of creditors."[41]

130. The *Guide* thus addresses both discharge of the debtor that is a natural person, and debt forgiveness, cancellation or alteration for debtors that are legal entities. Considerations raised in that part of the *Guide* are generally applicable to micro and small business debtors with some exceptions.

131. The first consideration is that the owners of an insolvent micro or small business, whether that business takes the form of a limited liability company or not, may need a discharge if the failure of the business led to their personal insolvency because they were directly liable for business debt (e.g., based on personal guarantees or company law rules). They could benefit from a quick discharge unless reasons precluding discharge are present (e.g., owners might have managed the business in person and as managers violated obligations usually imposed on directors of companies in the period approaching insolvency (see chap. IX below)). When this is not the case, liquidation of a business or its reorganization may need to run in parallel with rehabilitation of the once owner of a failed business (see chap. VIII below).

132. Rehabilitation includes three elements: (a) the debtor has to be freed from excessive debt; (b) the debtor should be treated on an equal basis with non-debtors after receiving discharge (the principle of non-discrimination; in some jurisdictions, data protection regulations prohibiting the registration and use of information on completed payment plans enforces that principle); and (c) the debtor should be able

[39] A/CN.9/966, para. 138.
[40] The *UNCITRAL Legislative Guide on Insolvency Law*, part two, chap. VI.A, para. 3.
[41] Ibid., para. 14.

to avoid becoming excessively indebted again and for such purposes measures are taken to change debtor's behaviour (including through debt counselling or imposed training on business management).

133. As noted in the *Guide*, there are various approaches to debt discharge: in some jurisdictions, a debtor cannot be discharged until all its debts are paid; in other jurisdictions, a debtor remains liable for debts subject to a limitation period during which the debtor is expected to make a good faith effort to repay its debts, after which a discharge may be given; yet in other jurisdictions, a complete discharge of an honest, non-fraudulent debtor may be available immediately following distribution in liquidation.[42] In some jurisdictions that provide for zero-asset proceedings (see chap. III, sect. A, above), a debtor's application for commencement of those proceedings may be treated as an application for discharge while risks of abuse are mitigated by verification procedures. Following those verification procedures and the court's determination that no distribution to creditors can reasonably be expected, an immediate discharge is granted.

134. In simplified reorganization, a straight discharge or a fresh start (i.e., the possibility to be freed from debt without a payment plan) is uncommon. Most systems require at least a partial payment of debt (e.g., 75 per cent of debt) from future income during a certain period running from the time the reorganization plan becomes effective under the insolvency law. In other jurisdictions, discharge is possible only after the plan is fully implemented. In the event that the plan is not fully implemented, the discharge can be set aside.

135. The length of the debt repayment period may vary from jurisdiction to jurisdiction and even within the same jurisdiction it may vary depending on circumstances. As noted in the *Guide*, under some laws, that period might be long, e.g., 10 years.[43] The emerging trend is to shorten that period to incentivize timely commencement of the insolvency proceeding, to encourage a fresh start and to reduce stigma. Another approach is to provide incentives to the debtor to comply with debt repayment and other obligations imposed on the debtor in the reorganization plan by making the length of the discharge period dependent on the rate of return to creditors and debtor's compliance with other obligations.

136. The discharge generally affects only debts arising before the commencement of a formal insolvency proceeding. A special regime may be established for debts incurred during the insolvency proceedings and the implementation of the reorganization plan (see chap. VII below). Following discharge, claims that have not been satisfied would be rendered unenforceable.[44]

137. The *Guide* notes that all laws restrict the availability of a discharge for the debtor that has acted fraudulently (although it is often difficult to draw a line between irresponsible risk taking and fraud); engaged in criminal activity; failed to provide or actively withheld or concealed information; and concealed or destroyed assets or records after the application for commencement.[45] The *Guide* also notes that a discharge can be given at an early stage of the proceedings but be suspended if for example fraud was involved.

138. The effectiveness of a discharge regime in achieving the micro and small business debtor's rehabilitation depends on the scope of debts covered by the discharge. Recommendation 195 of the *Guide* states that the exclusion of debts from a discharge should be kept to a minimum in order to facilitate the debtor's fresh start. In the context of micro and small business debtors, there might also be the need to leave enough income in order to meet domestic needs for the debtors and their families. A predictable and consistent method of assessing disposable income may need to be provided in the reorganization plan.

[42] Ibid., paras. 4 and 5.
[43] Ibid., para. 4.
[44] Ibid., paras. 11 and 15.
[45] Ibid., para. 6.

139. As noted in the *Guide*, certain types of debt, such as debts based on tort claims, family support obligations, fraud, criminal penalties, and taxes, tend to be excluded from discharge.[46] Some countries have eliminated exclusions for taxes and other public dues, except for egregious cases of tax evasion and fraud, recognizing in particular that priorities for tax and social security claims in insolvency may not only cause weak tax enforcement but also remove any incentives for debt restructuring by other creditors. Such measure may be particularly important for micro and small business debtors whose tax and other public debts may constitute a substantial portion of their overall debts. More flexibility may also be envisaged in the reorganization plan for repayment of such debt (e.g., instalment payments within a specified period). Some jurisdictions may allow agreements between the debtor and individual creditors to exempt individual debts from the operation of the discharge, subject to court's discretion. In other jurisdictions, such agreements may be forbidden and even constitute a criminal act as violations of the principle of equality of creditors.

140. The *Guide* notes that a discharge of debt may be accompanied by conditions and restrictions relating to professional, commercial and personal activities, for example to start a new business or carry on the old business, to obtain new credit, to leave a country, to practise in a profession, to hold public office or to act as a company director or manager. They may take effect automatically or upon a court order.[47] The period of effectiveness of those conditions and restrictions may be linked to the discharge period and may be extended. It may be longer or even indefinite where the debtor is a member of a profession to which specific ethical rules apply or where disqualifications were ordered by a court in criminal proceedings.

141. An emerging trend is to assess carefully the impact of those restrictions on the objectives of simplified insolvency regime (see chap. I above). Especially for sole traders or entrepreneurs who manage their own businesses or who became insolvent because of giving personal guarantees, some of those restrictions and conditions may have serious consequences, effectively prohibiting them from being involved in future business. Recommendation 196 states in that respect that where the insolvency law provides that conditions may be attached to a debtor's discharge, those conditions should be kept to a minimum in order to facilitate the debtor's fresh start and should be clearly set forth in the insolvency law.

142. Recommendations on discharge found in the *Guide* (recs. 194–196) are applicable only to a discharge of a natural person debtor in liquidation. An additional recommendation below invites States to consider expanding measures envisaged in those recommendations to micro and small business debtors that are not natural persons. That recommendation is proposed to be accompanied by safeguards against abuse of the discharge regime.[48]

Recommendations

282. The insolvency law might stipulate conditions for expanding measures envisaged in recommendations 194–196 to micro and small business debtors that are not natural persons.

283. The insolvency law should provide sanctions for abuses of a discharge regime.

VII. Special treatment of certain claims and persons

A. Small claim creditors

143. In simplified insolvency regimes, special treatment may need to be accorded to interest of vulnerable creditors, such as small claim creditors, which themselves could

[46] Ibid., para. 7.
[47] Ibid., paras. 4 and 8.
[48] A/CN.9/966, para.140.

be micro and small businesses.[49] They may not have the skills or resources to actively participate in negotiations of a reorganization plan or challenge the proposed plan in court but may be disproportionately affected by the plan if a reduction or suspension of their claims is envisaged.

144. The successful reorganization of a micro and small business debtor may depend on those creditors continuing their provision of works, services and goods for the debtor, expecting to be paid within a relatively short period of time. Keeping that line of credit open may be a precondition for the rescue of a viable micro or small business debtor. At the same time, the very existence of those creditors may depend on the payments by their clients with the result that the insolvency of one client may cause insolvencies in supply chain.

145. For those reasons, the law may specify situations where small creditor claims may enjoy priority in the distribution of proceeds for works, services and goods supplied to the debtor within a specified period before the commencement of the insolvency proceeding and, where applicable, during the implementation of the reorganization plan.

146. Recommendations 185–193 addressing priorities and distribution of proceeds are generally applicable in the simplified insolvency context and would accommodate special treatment of small claim creditors where such treatment is required. Recommendations 187 and 188, while stating that the insolvency law should minimize the priorities accorded to unsecured claims and claims superior in priority to secured claims, recommends specifying in the insolvency law limited circumstances in which a special priority regime in distribution may be permitted. The notion that similarly situated creditors should be treated and satisfied proportionately to their claim out of the assets of the estate available for distribution to creditors of their rank ("pari passu" principle[50]) is mentioned as the general principle in recommendation 191, without excluding the possibility of setting out exceptions to that principle in the insolvency law.

B. Secured creditors

147. Any perspectives of successful reorganization of viable micro or small business debtors may depend on secured creditors' stance as regards the enforcement of their security interest. For that reason, some jurisdictions allow a stay on the enforcement of security interests during out-of-court debt restructuring negotiations (see para. 37 above) and in-court simplified insolvency proceedings. The *Guide* envisages such a stay upon commencement of insolvency proceedings (rec. 46) and as a provisional measure between the time an application to commence insolvency proceedings is made and commencement of the proceedings (rec. 39). It is intended that the stay should apply to secured creditors only for a short period of time, such as between 30 and 60 days, and that the insolvency law should clearly state the period of application. At the same time, the *Guide* envisages appropriate measures of protection of a secured creditor from diminution of the value of the encumbered assets (rec. 50) and allows a secured creditor to request the court to grant relief from a stay (rec. 51). Various grounds may justify such request, such as the fact that the encumbered asset is not necessary for reorganization (which however will be rarely the case in the insolvency of a micro and small business debtor); that the value of the encumbered asset is diminishing as a result of the commencement of insolvency proceedings and the secured creditor is not protected against that diminution of value; or that the organization plan is not approved within applicable time limits (rec. 51).

148. Some jurisdictions impose alternative dispute resolution mechanisms independently or jointly with a stay as procedural devices to slow down the enforcement of the security interest. In addition, the law may allow the reorganization

[49] Ibid., para. 143(g).

[50] The *UNCITRAL Legislative Guide on Insolvency Law*, Introduction, Glossary, 12 (cc).

plan to envisage an extension of secured debt repayment period, to accommodate micro and small business debtors that cannot meet their current repayment obligations but will likely be able to meet modified smaller monthly financial obligations. Alternatively, the plan could contemplate only interest payment during the first years of the plan, with normal payment being resumed afterwards; or full payment of a secured portion and pro rata payment of an unsecured portion along with other unsecured claims, which would be in accordance with recommendation 188. The reduction of the principal amount with the right to collect some of the written-off claim if the value has increased may also be allowed in exceptional cases. As the plan clearly affects their rights, secured creditors should not be bound without a chance to be heard in the court, in line with recommendations 67 and 137–138 of the *Guide*.

C. Interim and post-commencement finance

149. The success of a reorganization plan may depend on whether there are financial resources in place to support the operation of the business during negotiation of the plan (interim finance) and during the implementation of the plan (post-commencement finance). As opposed to post-commencement finance, which is approved as part of a reorganization plan, interim finance is extended when the parties do not know whether the plan will be approved.

150. The *Guide* addresses only post-commencement finance (recs. 63–68), stating that the insolvency law should facilitate and provide incentives for post-commencement finance (rec. 63) and should establish the priority that may be accorded to post-commencement finance, at least ahead of ordinary unsecured creditors (rec. 64). By extension, under recommendation 68, any priority accorded in one proceeding would continue upon conversion of that proceeding to a different type. Those recommendations will be generally applicable in the simplified insolvency context with some adjustments. In particular, references to the insolvency representative in those recommendations may be read as encompassing also references to the debtor in possession taking into account that the debtor-in-possession approach is the norm in simplified reorganization as stated in paragraphs 101–104 above and additional recommendation 278. In line with recommendation 113, the insolvency law may explicitly specify those functions of the insolvency representative that may be performed by the debtor in possession, including as regards post-commencement finance. In addition, as a general rule, creditors' consent would not be required for obtaining the post-commencement finance in the simplified insolvency context.[51]

151. Limiting the protection of finance to cases where the plan is approved may discourage the provision of interim finance. Encouraging new financiers to take the risk of investing in a viable micro and small business debtor in financial difficulties may require protection from avoidance actions and personal liability as well as incentives, such as giving such finance priority at least over unsecured claims. To avoid potential abuses, protection from avoidance actions and personal liability may be made available only for interim finance provided in good faith that is immediately necessary for the rescue of the business and its continued operation or the preservation or enhancement of the value of that business, pending the approval of that plan.

152. Additional recommendations below invite States to consider expanding the protection accorded to post-commencement finance to interim finance[52] and provide for an exception to the requirement of creditors' consent for obtaining the post-commencement finance in the simplified insolvency context, where such requirement is imposed in all cases.

[51] A/CN.9/966, para. 139.
[52] Ibid., para. 142.

Recommendations

284. With reference to recommendation 63, the insolvency law may provide for an exception in the simplified insolvency context to a requirement to seek creditors' consent to the provision of post-commencement finance where such a requirement exists.[53]

285. The insolvency law may extend recommendations 63–68 to interim finance needed for reorganization of viable micro and small business debtors, subject to conditions specified in the law.

D. Personal guarantors

153. Lenders of micro and small businesses often require guarantees to secure business loans. Such guarantees are commonly provided by owners or managers of the micro and small business or individuals related to them, such as family members, or close friends. Personal guarantors will face payment claims on the eve or after the opening of an insolvency proceeding.

154. Generally, the insolvency proceedings and discharge have no alleviating effect on the liability of the guarantor. That approach is reflected in a number of insolvency laws that explicitly exclude the guarantor from the scope of application of a stay and provide that the discharge does not affect the liability of third-party guarantor. The *Guide* similarly states in the context of discharge of a natural person debtor that "it should be noted that discharge of a natural person debtor does not generally affect the liability of a third party that has guaranteed the obligations of that debtor."[54]

155. Nevertheless, some jurisdictions allow adjusting the treatment of guarantees in simplified insolvency proceedings in the light of the expected impact of the enforcement of the guarantee on guarantors as well as on the debtor. For example, a stay may be imposed on the enforcement against a guarantor for a limited duration on a case-by-case basis, where that action would be necessary for the successful reorganization of the micro and small business debtor or would alleviate a disproportionate hardship on the guarantor. When approving or confirming a reorganization plan, the court may accord special treatment to a guarantor's claim against the micro and small business debtor vis-a-vis other claims in the plan. It may also permit the guarantor to pay in instalments for an extended period. Some jurisdictions permit micro and small business debtors' guarantors to petition for a reduction or discharge of their obligations under the guarantee if those obligations are disproportionate to the guarantor's revenue. The court may be allowed to exercise discretion in favour of the guarantor's discharge or the reduction of the obligation to the part of the debt not covered by debtor's debt repayment obligations under the reorganization plan.

156. Special measures of protection in those jurisdictions may be envisaged for especially vulnerable guarantors, e.g., those who are found to have provided guarantees under duress or those who are dependent on or have strong emotional ties with the debtor. A special treatment has been accorded to such guarantors for example when the guarantee was found unreasonable or because, at the time of signing the contract, the financiers did not explain consequences of giving a personal guarantee, in particular "all money" clauses. Some jurisdictions impose explicit restrictions on what kinds of guarantee a spouse, child or other dependent person can validly give.

157. Competing policies have to be weighed in the treatment of guarantors. On the one hand, the purpose of requiring a personal guarantee is to protect against the principal debtor's insolvency by ensuring that the creditor will be paid. Adjusting the guarantor's liability in the insolvency proceeding would reduce the protection for the creditor. This could, in the long run, restrict access to credit for micro and small

[53] A/CN.9/966, para. 139.

[54] The *UNCITRAL Legislative Guide on Insolvency Law*, part two, chap.VI, para. 13.

business debtors, many of which may not be able to obtain financing in other ways. On the other hand, allowing unrestricted enforcement of guarantees could lead to the insolvency of the guarantor and, where that guarantor is a family member (e.g., a spouse, parent or sibling), could leave an entire family destitute.

158. Since the *Guide* does not address the treatment of guarantors, an additional recommendation below invites States to consider according special treatment to the micro and small business debtors' guarantors.[55] Conditions for making such treatment available may be specified in the law. Where abuses of the special treatment occur (e.g., if the guarantor hides the property), the court can give the creditor the right of enforcement under usual terms.

Recommendation

286. The law may provide for a special treatment of guarantors in the context of insolvency of micro and small business debtors, specifying conditions for according such a treatment.

E. Related persons

159. The *Guide* discusses transactions directly with a related person or via a third party to a related person in some detail in the context of avoidable transactions and treatment of creditor claims, listing them among the types of transaction where bad faith is deemed or may be presumed to exist (i.e., transactions with the intention to defeat, hinder or delay creditors, transactions at an undervalue and transactions with certain creditors that could be regarded as preferential). At the same time, the *Guide* acknowledges that the mere fact of a special relationship with the debtor may not be sufficient in all cases to justify special treatment of related persons. In some cases, their claims for example will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons. In other cases, they may give rise to suspicion and will deserve special attention.[56]

160. Since the involvement of related persons tends to be more common among micro and small businesses than in larger enterprises, risks of inappropriate dealings with related persons, especially in the period approaching insolvency and during insolvency, might be higher. Many systems build various safeguards to mitigate those risks. Those safeguards are similar to the measures suggested in the *Guide*. They may include requiring careful scrutiny of any intended disposal of an asset to a related person before it is allowed to proceed (rec. 61); providing a longer suspect period for avoidable transactions involving related persons (rec. 90); restricting the voting rights of related persons; and subjecting claims by related persons to scrutiny, subordinating those claims or reducing their amount (rec. 184). Those measures will be generally applicable in the simplified insolvency context and are therefore not repeated in this document.

VIII. Coordination of related proceedings

161. In the context of micro and small business debtors, it may not be feasible to apply different rules to business debts as opposed to personal or consumer debts. Since the entire micro and small business debtor household may be involved in the business (family members may use consumer credits to buy business assets), as noted in chapter I above, business insolvency may lead to personal or consumer insolvency once a business fails even if the business is a separate legal entity. Separate procedures with different access conditions and discharge periods for discharge of different types

[55] A/CN.9/966, para. 142.

[56] The *UNCITRAL Legislative Guide on Insolvency Law*, part two, chap. II, paras. 170–184, and chap. V, para. 48.

of debts involved in micro and small business debtor's insolvency may thus not be an optimal solution.

162. The *Guide* notes in this respect: "One issue that may need to be taken into account in considering discharge of natural persons engaged in a business undertaking is the intersection of business indebtedness with consumer indebtedness. Recognizing that different approaches are taken to the insolvency of natural persons (in some States a natural person cannot be declared bankrupt at all, while in others there is a requirement for the person to have acted in the capacity of a "merchant") and that many States do not have a developed consumer insolvency system, a number of States have insolvency laws that seek to distinguish between those who are simply consumer debtors and those whose liabilities arise from small businesses. Since consumer credit is often used to finance small business either as start-up capital or for operating funds, it may not always be possible to separate the debts into clear categories. For that reason, where a legal system recognizes both consumer and business debt, it may not be feasible to have rules on the business debts of natural persons that differ from the rules applicable to consumer debts."[57]

163. In addition, as discussed in chapters I and VII above, family members or other related persons and third parties may guarantee business loans of micro or small business debtor with personal assets. The enforcement of their guarantee may lead to insolvency of those individuals who would need to apply for relief under the personal insolvency law. Another approach could be to provide the guarantor a standing to apply for relief in the insolvency proceeding concerning the micro and small business debtor, which could assist to assess the potentially undesirable consequences of enforcing the guarantee.

164. Many insolvency regimes do not address the overlap of business and household assets and liabilities, home mortgages or personal guarantees to cover business debts. At the very minimum, coordination of the linked procedures to address the cross-over of commercial and personal insolvency, consumer over-indebtedness and intertwined debts of related persons may be desirable. Such coordination may involve for example: cooperation between the courts, including coordination of hearings; joint provision of notice; coordination of procedures for submission and verification of claims; and coordination of avoidance proceedings. The scope and extent of coordination of linked procedures could be specified by the court.

165. The civil procedure law of many States may already adequately provide for the possibility to coordinate linked proceedings, consider joint applications and use other means to take into account interests of various parties in interest in a single proceeding.[58] Some requirements found in insolvency laws may however hinder such coordination. Among them are the requirements that an applicant to a simplified insolvency proceeding must not be subject to any procedure under the law relating to the restructuring of debts of natural persons, must be active in business and not subject to any formal insolvency procedure. An additional recommendation is therefore included below that invites States to consider encouraging coordination of linked proceedings in the simplified insolvency context, in order to address insolvency of micro and small business debtors and persons affected by it (e.g., personal guarantors, owners and managers) comprehensively.[59] That recommendation draws on the discussion in the *Guide* of joint applications for commencement and procedural coordination in the context of the treatment of enterprise group insolvency and recommendations 199–210.

Recommendation

287. The insolvency law may require close coordination of linked business, consumer and personal insolvency proceedings in order to address comprehensively intertwined business, consumer and personal debts of the micro and small business debtor and

[57] The *UNCITRAL Legislative Guide on Insolvency Law*, part two, chap. VI, paras. 12 and 13.
[58] Ibid., para. 126.
[59] A/CN.9/966, paras. 115 and 142.

related persons, including those providing personal guarantees. The law may specify that in such cases the court may order coordination of linked proceedings at its own motion or upon request of any party in interest, which may be made at the same time as an application for commencement of insolvency proceedings or at any subsequent time. Recommendations 208 and 210 of this *Guide* will be applicable to modification or termination of an order for coordination of linked procedures and to notice with respect to such coordination.

IX. Obligations of managers of micro and small businesses in the period approaching insolvency

166. The *Guide* addresses obligations of directors of a debtor company and of a natural person debtor in the period approaching insolvency in part IV. It notes in that respect that civil and criminal liability may be imposed on managers for causing insolvency or failing to take appropriate actions in the vicinity of insolvency. The managers may be required to compensate creditors for losses and may face sanctions, including disqualification from assuming managerial roles in the future. The owners may remain undischarged for a longer period of time.

167. The *Guide* identifies parties who owe those obligations, noting that there is no universally accepted definition of a "director". They may be owners of the business, formally appointed directors and any other person exercising factual control over the business and performing the functions of a director (rec. 258). The *Guide* also notes the increased risk of unexpected liability for banks and others who might be deemed to be directors by reason of their involvement with the company particularly at the time of insolvency. [60] In the period approaching insolvency, all parties exercising factual control over the business may be under the general obligation to act in the best interest of creditors and other stakeholders and take reasonable steps to avoid insolvency or to minimize its extent (rec. 255).

168. As noted in paragraph 19 above, in the micro and small business debtor context, there is often no clear separation between ownership and management (owners are often managers regardless of whether they have been formally appointed as managers). Managers of micro and small businesses at the time of financial distress may be inclined to collaborate with related persons or powerful creditors (e.g., by repaying the debt to only one bank or transferring business assets to related persons at an undervalue) or to obtain goods or services on credit without any prospect of payment. These transactions would be considered fraudulent or otherwise improper and can thus be avoided and lead to personal liability of persons who agreed to the transaction, regardless of whether the business operates as a separate legal entity with limited liability. In addition, high influence of main creditors on micro and small business debtors during the time of financial distress may make such creditors the de facto managers of the micro or small business in the period approaching insolvency. As such, those creditors may face liability under insolvency law if their self-serving behaviour prejudiced the position of other creditors.

169. The *Guide* illustrates steps that the management may take at times approaching insolvency to discharge the obligation to act in the best interest of creditors and other stakeholders and take reasonable steps to avoid insolvency or to minimize its extent (rec. 256). Some of those steps will be less relevant or too expensive for micro and small business debtors, such as holding regular board meetings to monitor situations, calling a shareholder meeting or seeking professional advice of insolvency professionals, lawyers or auditors. Other steps listed in recommendation 256 will be equally applicable to micro and small business debtors. For example, factors such as the loss of a key customer or supplier, departure of a key employee or adverse changes in rental, supply or loan terms may signal the need to examine viability of the business and modify expenditure, business and management practices. Appropriate steps may

[60] The *UNCITRAL Legislative Guide on Insolvency Law*, part four, section one, chap. I, para. 10.

also include an early recourse to mediation or debt counselling services, if available, and timely engaging in out-of-court debt restructuring negotiations where those are permissible.

170. The recommendations and accompanying commentary of the *Guide* addressing directors' obligations in the period approaching insolvency are generally applicable in the context of micro and small business debtors with additional considerations discussed above.[61]

X. Relationship with other law and institutional framework

A. Relationship with other law

171. Not all measures aimed at mitigating the challenges facing micro and small business debtors in insolvency will fall under the insolvency law; other law may also be relevant. Tax regulations in particular may influence debt restructuring options, as noted in paragraph 50 above. They, as well as accounting regulations, may also include mechanisms for preventing insolvency, for example by requiring or incentivizing tax advisors and accountants of micro and small businesses to inform business owners and managers about financial problems. Those professionals may be in the position to identify signals of financial distress earlier than managers of micro and small businesses who would not necessarily possess required business and financial management skills while other third parties, such as tax or social security agencies and banks, may discover financial distress of the business only when payments are not made, which may be too late for its rescue.

172. In the light of a close interlink between the insolvency of micro and small business debtors, on the one hand, and consumer and personal insolvency, on the other hand (as discussed in chap. VIII above), other laws relevant in the context of micro and small business debtor insolvency include consumer protection law and regulations, family and matrimonial law, as well as human rights instruments addressing such rights as the right to property and the right to work and fair remuneration.[62] In addition, business registry regulations and company law that may provide for simplified incorporation of micro and small businesses will also be relevant,[63] including to efforts to generate and maintain information about micro and small businesses throughout their lifecycle. In that latter context, data protection and banking laws and regulations would be relevant as well.

173. Banking laws and regulations may also be relevant for credit histories, treatment of guarantees and incentivising responsible lending and value-maximizing participation by creditors in a simplified insolvency regime. Property and contract law will be relevant to the treatment of secured creditors and personal guarantors in insolvency, as discussed in chapter VII above.

B. Supporting institutional framework

174. Many insolvency reforms aimed at lowering barriers for access to insolvency by micro and small business debtors are complemented by institutional reforms, in particular the creation of debt counselling services and information registries that compile information on financial status of micro and small businesses throughout their life cycle from different sources. In addition, government support may be provided for a fresh start through specialized government agencies or associations of micro and small businesses and microfinance institutions.[64]

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[61] A/CN.9/966, para. 125.

[62] A/CN.9/966, para. 143 (c).

[63] See in that respect the *UNCITRAL Legislative Guide on Key Principles of a Business Registry.* [UNCITRAL Working Group I (MSMEs) is currently working on simplified incorporation aspects.].

[64] A/CN.9/966, para. 141.

175. Insufficient knowledge of business management and financial transactions is cited as a common cause of business failure among micro and small business debtors, especially first-time starters. Some jurisdictions consider therefore mandatory training on those issues for micro or small businesses owners and managers a tool to prevent insolvency and to facilitate a fresh start. Such training usually addresses pre-insolvency aspects, including available means for addressing the situation of financial distress, obligations of managers in the period approaching insolvency and consequences of not taking appropriate actions at an early stage of financial distress.

176. State support during insolvency usually includes provision of financial and other assistance to micro and small business debtors in relation to insolvency proceedings, government support or subsidization of effective dispute resolution mechanisms (such as mediation and arbitration) and enforcement of settlement agreements. Introducing automated and standardized processes and documentation, for example model reorganization plans, and enabling electronic means of communications for certain procedural steps in insolvency proceedings, such as filing claims or serving notifications, also helps to reduce the costs and the length of procedures.

177. Some governments also provide training to the judiciary and insolvency practitioners with the aim of building the capacity in the public and private sectors necessary to handle specificities of micro and small business debtor insolvencies.[65]"

[65] A/CN.9/966, para. 130.

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UNCITRAL
Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment

Part one

UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

Preamble

1. The purpose of this Law is:

(a) To create greater certainty in regard to rights and remedies for recognition and enforcement of insolvency-related judgments;

(b) To avoid the duplication of insolvency proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of insolvency estates; and

(f) Where legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. This Law is not intended:

(a) To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment;

(b) To replace legislation enacting the UNCITRAL Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceeding.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement is sought.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(b) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding;

(c) "Judgment" means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related judgment":

(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding.

Article 3. International obligations of this State

1. To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments, and that treaty applies to the judgment.

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance under other laws of this State.

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Article 9. Effect and enforceability of an insolvency-related judgment

An insolvency-related judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

Article 10. Effect of review in the originating State on recognition and enforcement

1. Recognition or enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 11. Procedure for seeking recognition and enforcement of an insolvency-related judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question.

2. When recognition and enforcement of an insolvency-related judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related judgment; and

(b) Any documents necessary to establish that the insolvency-related judgment has effect and, where applicable, is enforceable in the originating State, including information on any pending review of the judgment; or

(c) In the absence of evidence referred to in subparagraphs *(a)* and *(b)*, any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. Any party against whom recognition and enforcement is sought has the right to be heard.

Article 12. Provisional relief

1. From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 11, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article.*]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgment is made.

Article 13. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 14, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9 with respect to effect and enforceability are met;

(b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2,

subparagraph *(b)*, or another person entitled to seek recognition and enforcement of the judgment under article 11, paragraph 1;

(c) The application meets the requirements of article 11, paragraph 2; and

(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

Article 14. Grounds to refuse recognition and enforcement of an insolvency-related judgment

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified in this State of the institution of that proceeding in a manner that is incompatible with the rules of this State concerning service of documents;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State;

(f) The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed,

a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that that party argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State;

[*States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact subparagraph (h).*]

(h) The judgment originates from a State whose insolvency proceeding is not or would not be recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.

Article 15. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] or [would have had if it had been issued by a court of this State].[1]

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 16. Severability

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is sought, or where only that part of the judgment is capable of being recognized and enforced under this Law.

[*States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of that Model Law. States may therefore wish to consider enacting the following provision*:]

Article X. Recognition of an insolvency-related judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

[1] The enacting State may wish to note that it should choose between the two alternatives provided in square brackets. An explanation of this provision is provided in the Guide to Enactment in the notes to article 15.

Part two

Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

1. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, adopted in 2018, is designed to assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings and complement the UNCITRAL Model Law on Cross-Border Insolvency (the MLCBI).

B. Origin of the Model Law

2. The work on this topic had its origin, in part, in certain judicial decisions[1] that led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under the MLCBI, to recognize and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceedings, on the basis that neither article 7 nor 21 of the MLCBI explicitly provided the necessary authority. Moreover, there was a concern that decisions by foreign courts determining the lack of such explicit authority in the MLCBI for recognition and enforcement of insolvency-related judgments might

[1] For example, *Rubin & Anor. v. Eurofinance SA*, [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971); CLOUT case No. 1270. See also decision of the Supreme Court of Korea of 25 March 2010 (case No.: 2009Ma1600).

have been regarded as persuasive authority in those States with legislation based upon article 8, MLCBI, which relates to international effect.

3. Those concerns about the application and interpretation of the MLCBI together with the general absence of an applicable international convention or other regime to address the recognition and enforcement of insolvency-related judgments[2] and the exclusion of judgments relating to insolvency matters from the instruments that do exist,[3] led to the proposal to UNCITRAL in 2014 to develop a model law or model legislative provisions on the recognition and enforcement of insolvency-related judgments.

4. The law of recognition and enforcement of judgments is arguably becoming more and more important in a world in which movement across borders, of both persons and assets, is increasingly easy. Although there is a general tendency towards more liberal recognition of foreign judgments, it is reflected in treaties requiring such recognition in specific subject areas (e.g., conventions relating to family matters, transportation and nuclear accidents) and in a narrower interpretation of the exceptions to recognition in treaties and domestic laws. Under applicable national regimes, some States will only enforce foreign judgments pursuant to a treaty regime, while others will enforce foreign judgments more or less to the same extent as local judgments. Between those two positions there are many different national approaches.

5. With respect to an international regime dealing more generally with recognition and enforcement of judgments, in 1992, the Hague Conference on Private International Law (the Hague Conference) commenced work on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of judgments abroad (the Judgments Project). The focus of that work was to replace the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. It led to the Convention of 30 June 2005 on Choice of Court Agreements (2005 Choice of Court Convention), which entered into force on 1 October 2015. Further work to develop a global judgments convention commenced in 2015.[4]

6. Insolvency decisions are typically excluded from the Hague Conference instruments, on the grounds, for example, that those matters may be seen as very

[2] Existing regimes are largely regional in focus, e.g., Latin America, the European Union and the Middle East. See UNCITRAL document A/CN.9/WG.V/WP.126, para. 6.

[3] The 1971 Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters and the Convention of 30 June 2005 on Choice of Court Agreements, both of which were developed by the Hague Conference on Private International Law.

[4] Information on the work of the Hague Conference can be found at: https://www.hcch.net.

specialized and best dealt with by specific international arrangements, or as closely intertwined with issues of public law. Article 1, subparagraph 5, of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, for example, provides that the convention does not apply to "questions of bankruptcy, compositions or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor." Article 2, subparagraph 2 *(e)*, of the 2005 Choice of Court Convention provides that it does not apply to "insolvency, composition and analogous matters". That approach is followed in the work to develop a global judgments convention, with the additional exclusion of "resolution of financial institutions".[5]

7. In the context of the Hague Conference texts,[6] the term "insolvency" is intended to cover both the bankruptcy of individual persons and the winding up or liquidation of corporate entities which are insolvent. It does not cover the winding up or liquidation of corporations for reasons other than insolvency, which is addressed in other provisions. It does not matter whether the process is initiated or carried out by creditors or by the insolvent person or entity itself with or without the involvement of a court. The term "composition" refers to procedures in which the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term "analogous proceedings" covers a broad range of other methods in which insolvent persons or entities can be assisted to regain solvency while continuing to trade.[7]

8. Very few States have recognition and enforcement regimes that specifically address insolvency-related judgments. Even in States that do have such regimes, they may not cover all orders that might broadly be considered to relate to insolvency proceedings.[8] In one State, for example, judgments against a creditor or third party determining rights to property claimed by the insolvency estate, awarding damages against a third party, or avoiding a transfer of property can be considered insolvency-related judgments as they are the result of an adversarial process and have required service of the documents originating the action. In that same State, orders confirming a plan of reorganization, granting a bankruptcy discharge or allowing or rejecting a claim against the insolvency estate are not considered insolvency-related judgments, even if those orders may have some of the attributes of a judgment.

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[5] See art. 2, subpara. 1*(e)* of the draft convention of May 2018. This additional exclusion refers to the new legal framework enacted in various jurisdictions under the auspices of the Financial Stability Board to prevent the failure of financial institutions.

[6] Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report by Trevor Hartley and Masato Dogauchi, para. 56.

[7] For example, chapter 11 of the United States Federal Bankruptcy Code and Part II of the United Kingdom Insolvency Act 1986.

[8] See UNCITRAL document A/CN.9/WG.V/WP.126, para. 16.

9. One regional regime provides for the recognition and enforcement of judgments that "derive directly from and are closely linked to the insolvency proceedings". Judgments held to fall into that category have included those concerning:[9] avoidance actions, insolvency law-related lawsuits on the personal liability of directors and officers; lawsuits concerning the priority of a claim; disputes between an insolvency representative and debtor on inclusion of an asset in the insolvency estate; approval of a reorganization plan; discharge of residual debt; actions on the insolvency representative's liability for damages, if exclusively based on the carrying out of the insolvency proceedings; action by a creditor aiming at the nullification of an insolvency representative's decision to recognize another creditor's claim; and claims by an insolvency representative based on specific insolvency law privilege. Judgments held not to fall into that category have included:[10] actions by and against an insolvency representative which would also have been possible without the insolvency proceedings; criminal proceedings in connection with insolvency; an action to recover property in the possession of the debtor; an action to determine the legal validity or amount of a claim pursuant to general laws; claims by creditors with a right for segregation of assets; claims by creditors with a right for separate satisfaction (secured creditors); and an avoidance action filed not by an insolvency representative but by a legal successor or assignee.

10. Examples of judgments to be covered by the Model Law are discussed further below in the notes on article 2 (para. 60).

C. Preparatory work and adoption

11. In 2014, the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments.[11] The Model Law was negotiated between December 2014 and May 2018, the Working Group having devoted a part of each of the eight sessions (forty-sixth to fifty-third) to work on the project.

12. The final negotiations on the draft text took place during the fifty-first session of UNCITRAL, held in Vienna from 25 June to 13 July 2018. UNCITRAL adopted the Model Law by consensus on 2 July 2018 (see annex II).[12] In addition to the 60 States members of UNCITRAL, representatives of 31 observer States and 34 inter-governmental and non-governmental organizations participated in the

[9] These judgments relate to decisions under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings. See UNCITRAL document A/CN.9/WG.V/WP.126, para. 21 for case citations.

[10] Ibid., para. 22.

[11] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

[12] Ibid., *Seventy-third session, Supplement No. 17* (A/73/17), para. 131.

deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution 73/200 of 20 December 2018 (see annex I), in which it expressed its appreciation for UNCITRAL finalizing and adopting the Model Law.

II. Purpose of the Guide to Enactment

13. The Guide to Enactment is designed to provide background and explanatory information on the Model Law. That information is primarily directed to executive branches of Government and legislators preparing the necessary legislative revisions, but may also provide useful insight for those charged with interpretation and application of the Model Law, such as judges, and other users of the text, such as practitioners and academics. That information might also assist States in considering which, if any, of the provisions might need to be adapted to address particular national circumstances.

14. The present Guide was considered by Working Group V at its fifty-second (December 2017) and fifty-third (May 2018) sessions. It is based on the Working Group's deliberations and decisions on the Model Law at those sessions and of the Commission in finalizing and adopting the Model Law at its fifty-first session.

III. A model law as a vehicle for harmonization of laws

15. A model law is a legislative text recommended to States for incorporation into their national law. Unlike an international convention, a model law does not require the State enacting it to notify the United Nations or other States that may have also enacted it. However, the General Assembly resolution endorsing the Model Law invites States that have used the Model Law to advise the Commission accordingly (see annex I).

A. Fitting the Model Law into existing national law

16. With its scope limited to recognition and enforcement of insolvency-related judgments, the Model Law is intended to operate as an integral part of the existing law of the enacting State.

17. In incorporating the text of a model law into its legal system, a State may modify or elect not to incorporate some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "reservations") is much more restricted; in particular, trade law conventions usually either totally prohibit reservations or allow only specified ones. The flexibility inherent in a model law, on the other hand, is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected, in particular, when the uniform text is closely related to the national court and procedural system.

18. The flexibility that enables the Model Law to be adapted to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see notes on article 8 below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency-related matters. Modification means that the degree of, and certainty about, harmonization achieved through a model law may be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, States may wish to make as few changes as possible when incorporating the Model Law into their legal systems. That approach will not only assist in making national law as transparent and predictable as possible for foreign users. It will also

contribute to fostering cooperation between insolvency proceedings, as the laws of different States will be the same or very similar; reducing the costs of proceedings because of greater efficiency in the recognition of judgments; and improving consistency and fairness of treatment of insolvency judgments in the cross-border context.

19. While the Model Law indicates specific grounds upon which a judgment may be refused recognition and enforcement, it also preserves the possibility of excluding or limiting any action that may be taken under the Model Law on the basis of overriding public policy considerations (article 7), although it is expected that the public policy exception would be rarely used.

B. Use of terminology

20. Rather than using terminology familiar to only some jurisdictions and legal traditions and thus to avoid confusion, the Model Law follows the approach of other UNCITRAL texts of developing new terms with defined meanings. Accordingly, the Model Law introduces the term "insolvency-related judgment" and relies upon other terms, such as "insolvency representative" and "insolvency proceeding" that were developed in other UNCITRAL insolvency texts. Where the expression used is likely to vary from country to country, the Model Law, instead of using a particular term, indicates the meaning of the term in italics within square brackets and calls upon the drafters of the national law to use the appropriate term.

21. The use of the term "insolvency-related judgment" is intended to avoid confusion as to the application to the Model Law of jurisprudence that may relate to particular terms or phrases used in specific States or regions. The phrase "arises as a consequence of or is materially associated with" is used to describe the connection between the judgment and an insolvency proceeding, rather than the phrase referred to in paragraph 9 above, which is key terminology in a particular regional law and has been given a specific interpretation by relevant courts.

"Insolvency"

22. Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, "insolvency proceeding" refers to various types of collective proceedings commenced with respect to a debtor that is in severe financial distress or insolvent, with the goal of liquidating or reorganizing that debtor as a commercial entity. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2, subparagraph *(a)* are not

insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph *(a)* of the Model Law only if the debtor is insolvent or in severe financial distress. The use of the term "insolvency" in the Model Law is consistent with its use in other UNCITRAL insolvency texts, specifically the MLCBI and the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide).[13]

23. It should be noted that in some jurisdictions the expression "insolvency proceedings" has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Law, since the Model Law is designed to be applicable to foreign judgments related to proceedings addressing the insolvency of both natural and legal persons as the debtor. If, in the enacting State, the word "insolvency" may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.

"State"/"originating State"

24. The words "this State" are used throughout the Model Law to refer to the entity that enacts the Model Law (i.e., the enacting State). The term should be understood as referring to a State in the international sense and not, for example, to a territorial unit in a State with a federal system. The words "originating State" are also used throughout the Model Law to refer to the State in which the insolvency-related judgment was issued.

"Recognition and enforcement"[14]

25. The Model Law generally refers to "recognition and enforcement" of an insolvency-related judgment as a single concept, although there are some articles where a distinction is made between recognition on the one hand and enforcement on the other. Use of the phrase "recognition and enforcement" should not be regarded as requiring enforcement of all recognized judgments where it is not required.

26. Under some national laws, recognition and enforcement are two separate processes and may be covered by different laws. In some federal jurisdictions, for example, recognition may be subject to national law, while enforcement is subject to the law of

[13] MLCBI, Guide to Enactment and Interpretation, paras. 48–49; Legislative Guide, Introd., glossary, para. 12*(s)*: "'Insolvency': when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets."

[14] See paras. 78-79 below for further explanation of the meaning of the term "recognition and enforcement".

a territorial or sub-federal unit. Recognition may have the effect of making the foreign judgment a local judgment that can then be enforced under local law. Thus while enforcement may presuppose recognition of a foreign judgment, it goes beyond recognition. Confusion may be caused in some States as to whether both can be achieved through a single application or whether two separate applications are required. The Model Law does not specifically address that procedural requirement, but provisions that might be of specific relevance to the issue of enforcement should be noted, for example, article 10 which refers to conditional recognition or enforcement.

27. In the case of some judgments, recognition might be sufficient and enforcement may not be needed, for example, for declarations of rights or some non-monetary judgments, such as the discharge of a debtor or a judgment determining that the defendant did not owe any money to the plaintiff. The receiving court may simply recognize that finding and, if the plaintiff were to sue the defendant again on the same claim before that court, the recognition already accorded would be enough to dispose of the case. Thus, while enforcement must be preceded by recognition, recognition need not always be accompanied or followed by enforcement.

"Competent court or authority"

28. As indicated in article 2, subparagraph *(c)*, the Model Law envisages that a judgment can be issued by a court or an administrative authority in the originating State, provided that a decision issued by an administrative authority has the same effect as a court decision. This usage is consistent with the first part of the definition of "court" in the MLCBI (art. 2, subpara. *(e)* referring to "a judicial or other authority"),[15] and the Legislative Guide (glossary, para. 8).

29. Moreover, article 4 contemplates that the body competent to perform the functions of the Model Law with respect to recognition and enforcement in the receiving State may be either a court or administrative authority, as designated by that State. For ease of reference, the Model Law uses the word "court" to refer to that authority. In the event that the body designated under article 4 is an administrative authority, the enacting State may wish to consider replacing the word "court", where it refers to the receiving State, with the word "authority".

[15] It might be noted that the use of the term "court" in the Model Law is not limited by the second part of the definition in the MLCBI i.e., the words "competent to control or supervise a foreign proceeding", for the reasons given in para. 52 below.

Documents referred to in this Guide

30. *(a)* "MLCBI": UNCITRAL Model Law on Cross-Border Insolvency (1997);

(b) "Guide to Enactment and Interpretation": Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, as revised and adopted by the Commission on 18 July 2013;

(c) "Practice Guide": UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(d) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including part three: treatment of enterprise groups in insolvency (2010) and part four: obligations of directors in the period approaching insolvency (2013);

(e) "Judicial Perspective": UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (updated 2013);

(f) 2005 Choice of Court Convention: Hague Conference on Private International Law Convention of 30 June 2005 on Choice of Court Agreements; and

(g) Hartley/Dogauchi report: Explanatory Report on the 2005 Choice of Court Convention by Trevor Hartley and Masato Dogauchi.

IV. Main features of the Model Law

A. Scope of application

31. The Model Law applies to an insolvency-related judgment that was issued in a proceeding taking place in a State other than the enacting State in which recognition and enforcement is sought. That scope would include the situation where both the proceeding giving rise to the judgment and the insolvency proceeding to which it relates are taking place in another State. It would also include the situation in which the judgment was issued in another State, but the insolvency proceeding to which the judgment relates is taking place in the enacting State in which recognition and enforcement is sought. In other words, while the judgment must be issued in a State other than the enacting State, the location of the insolvency proceeding to which the judgment relates is not material, and it can be either a foreign proceeding or a local proceeding taking place in the enacting State.

B. Types of judgment covered

32. To fall within the scope of the Model Law, a foreign judgment needs to possess certain attributes. These are, firstly, that it arises as a consequence of or is materially associated with an insolvency proceeding (as defined in art. 2, subpara. *(a)*) and, second, that it was issued on or after the commencement of that insolvency proceeding (art. 2, subpara. *(d)*). The definition does not include the judgment commencing an insolvency proceeding, as noted in the preamble, subparagraph 2*(d)* (see para. 45 below) and in article 2, subparagraph *(d)*(ii) (see para. 62 below). An interim measure of protection is not to be considered a judgment for the purposes of the Model Law (see paras. 54-55 below).

33. The cause of action giving rise to an "insolvency-related judgment" may have been pursued by various parties, including a creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action or, if the cause of action was assigned by the insolvency representative in accordance with the applicable law, by the party to whom it was assigned. In both instances, the judgment must be otherwise enforceable under the Model Law.

34. For the information of enacting States, a number of examples of the types of judgment that might fall within the definition of "insolvency-related judgment" are provided below; the list is not intended to be exhaustive (see para. 60 below).

C. Relationship between the Model Law and the MLCBI

35. The subject matter of the Model Law is related to that of the MLCBI. Both texts use similar terminology and definitions (e.g., the definition of "insolvency proceeding" draws upon the definition of "foreign proceeding" in the MLCBI); a number of the general articles of the MLCBI are repeated in the Model Law;[16] and the Preamble[17] refers specifically to the relationship between the Model Law and the MLCBI. The Preamble, as noted below (para. 45), clarifies that the Model Law is not intended to replace legislation enacting the MLCBI. States that have enacted or are considering enacting the MLCBI may wish to note the following guidance on the complementary nature of the two texts.

36. The MLCBI applies to the recognition of specified foreign insolvency proceedings (that is, those that are a type of proceeding covered by the definition of "foreign proceeding" and can be considered to be either a foreign main or a foreign non-main proceeding under article 2). Other types of insolvency proceeding, such as those commenced on the basis of presence of assets or those that are not a collective proceeding (as explained in paras. 69–72 of the Guide to Enactment and Interpretation) do not fall within the types of proceeding eligible for recognition under the MLCBI.

37. The Model Law, in comparison, has a narrower scope, addressing the recognition and enforcement of insolvency-related judgments, that is, judgments that bear the necessary relationship (as defined in art. 2, subpara. *(d)*), to an insolvency proceeding (as defined in art. 2, subpara. *(a)*). If the insolvency proceeding to which the specific judgment relates does not satisfy that definition, the judgment would not be an insolvency-related judgment capable of recognition and enforcement under the Model Law. The decision commencing the insolvency proceeding, which is the subject of the MLCBI's recognition regime, is specifically excluded from the definition of "insolvency-related judgment" for the purposes of the Model Law.[18] However, it should be noted that, in view of the severability provision in article 16, there

[16] MLCBI, arts. 3 (para. 1) to 8.

[17] Preamble, subpara. 2*(b)*), as well as article 14, subparagraph *(h)* and article X (discussed below, see paras. 126-127).

[18] Preamble, subpara. 2*(d)* and art. 2, para. *(d)*(ii) (see paras. 45 and 62 below).

may be other orders included in a judgment commencing an insolvency proceeding that could be subject to recognition and enforcement under the Model Law (see para. 58 below).

38. Like the MLCBI, the Model Law establishes a framework for seeking cross-border recognition, but in this case of an insolvency-related judgment. That framework seeks to establish a clear, simple procedure that avoids unnecessary complexity, such as requirements for legalization.[19] Like the analogous article in the MLCBI (art. 19), the Model Law also permits orders for provisional relief to preserve the possibility of recognizing and enforcing an insolvency-related judgment between the time recognition and enforcement are sought and the time the court issues its decision. Like the MLCBI, the Model Law also seeks to establish certainty with respect to the outcome of the recognition and enforcement procedure, so that if the relevant documents are provided, the judgment satisfies the definitional requirements and those for effectiveness and enforceability in the originating State, the person seeking recognition and enforcement is the appropriate person and there are insufficient or no grounds for refusing recognition and enforcement, the judgment should be recognized and enforced.

39. As discussed in more detail in the article-by-article remarks below, the Model Law includes an optional provision that permits recognition of an insolvency-related judgment to be refused when the judgment originates from a State whose insolvency proceeding (being an insolvency proceeding that met the definition of that term as used in the Model Law) is not or would not be susceptible of recognition under the MLCBI. Under the terms of the MLCBI, the insolvency proceeding may not be recognizable because that State is neither the location of the insolvency debtor's centre of main interests (COMI) nor of an establishment of the debtor (i.e., it is neither a main nor a non-main proceeding). That principle of non-recognition of insolvency proceedings under the MLCBI is acknowledged in article 14, subparagraph *(h)* of the Model Law, which is an optional provision for consideration by States that have enacted (or are considering enacting) the MLCBI. The substance of subparagraph *(h)* also provides an exception to that general principle. The exception permits recognition of a judgment, notwithstanding its origin in a State whose insolvency proceeding is not or would not be recognizable under the MLCBI, provided: (i) the judgment relates only to assets that were located in the originating State; and (ii) certain conditions are met. The exception could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. Such an exception with respect to the recognition of insolvency proceedings is not available under the MLCBI (discussed further below, paras. 117-120).

[19] See the discussion on legalization in paras. 88-91 below.

40. A requirement for protection of the interests of creditors and other interested persons, including the debtor, is included in both the Model Law and the MLCBI, but in different situations. The MLCBI requires the recognizing court to ensure that those interests are considered when granting, modifying or terminating provisional or discretionary relief under the MLCBI (art. 22). As the Guide to Enactment and Interpretation explains, the idea underlying that requirement is that there should be a balance between relief that might be granted to the foreign representative and the interests of the persons that may be affected by that relief.[20] The Model Law is more narrowly focused; the issue of such protection is relevant only in so far as article 14, subparagraph *(f)* gives rise to a ground for refusing recognition and enforcement where those interests were not adequately protected in the proceeding giving rise to certain types of judgment. Those include, for example, a judgment confirming a plan of reorganization. As discussed further below (see paras. 108–109), the rationale is that the types of judgment specified in article 14, subparagraph *(f)* directly affect the rights of creditors and other stakeholders collectively. Although other types of insolvency-related judgment resolving bilateral disputes between parties may also affect creditors and other stakeholders, those effects are typically indirect (e.g., via the judgment's effect on the size of the insolvency estate). In those circumstances, a separate analysis of the adequate protection of third-party interests is not considered to be necessary and could lead to unnecessary litigation and delay.

41. Another element of the relationship between the Model Law and the MLCBI concerns article X, which addresses the interpretation of MLCBI, article 21. Article X is a further optional provision that States that have enacted (or are considering enacting) the MLCBI may wish to consider. Pursuant to the clarification provided by article X, the discretionary relief available under MLCBI, article 21 to support a recognized foreign proceeding (covering both main and non-main proceedings) should be interpreted as including the recognition and enforcement of a judgment, notwithstanding any interpretation to the contrary.

[20] See Guide to Enactment and Interpretation, paras. 196–199.

V. Article-by-article remarks

Title

"Model Law"

42. If the enacting State decides to incorporate the provisions of the Model Law into an existing national statute, the title of the enacted provisions would have to be adjusted accordingly, and the word "Law", which appears in various articles, would have to be replaced by the appropriate phrase.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.151, paras. 35–36
A/CN.9/WG.V/WP.157, paras. 40–41
A/CN.9/956

Preamble

1. The purpose of this Law is:

(a) To create greater certainty in regard to rights and remedies for recognition and enforcement of insolvency-related judgments;

(b) To avoid the duplication of insolvency proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of insolvency estates; and

(f) Where legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. This Law is not intended:

(a) To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment;

(b) To replace legislation enacting the UNCITRAL Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceeding.

43. Paragraph 1 of the Preamble is drafted to provide a succinct statement of the basic policy objectives of the Model Law. It is not intended to create substantive rights, but rather to provide a general orientation for users of the Model Law and to assist with its interpretation.

44. In States where it is not customary to include in legislation an introductory statement of the policy on which the legislation is based, consideration might nevertheless be given to including a statement of the objectives contained in the Preamble to the Model Law either in the body of the statute or in a separate document, in order to provide a useful reference for interpretation of the law.

45. Paragraph 2 of the Preamble is intended to clarify certain issues concerning the relationship of the Model Law to other national legislation dealing with the recognition of insolvency proceedings that might also address the recognition of insolvency-related judgments, including, for example, the MLCBI where it has been enacted (see also art. 14, subpara. *(h)* and article X). Subparagraph 1*(f)* of the Preamble emphasizes that the Model Law is intended to complement the MLCBI, while subparagraph 2*(a)* builds upon that complementarity, confirming that nothing in the Model Law is intended to restrict the application of those other laws and subparagraph 2*(b)* clarifies that the Model Law is not intended to replace legislation enacting the MLCBI or to limit the application of that legislation. Subparagraph 2*(c)* relates to article 1 of the Model Law and clarifies that the text does not cover recognition and enforcement of an insolvency-related judgment issued in the enacting State. Subparagraph 2*(d)* of the Preamble confirms that the Model Law is not intended to apply to a judgment commencing an insolvency proceeding.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 48

A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 58, 76
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 37–39
A/CN.9/931, paras. 14–15
A/CN.9/WG.V/WP.157, paras. 42–44
A/CN.9/937, paras. 15–16
A/CN.9/955, para. 10
A/CN.9/956 and A/CN.9/956/Add.2

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement is sought.

2. This Law does not apply to [...].

Paragraph 1

46. Article 1, paragraph 1, confirms that the Model Law is intended to address the recognition and enforcement in one State (i.e., the State enacting the Model Law) of an insolvency-related judgment issued in a different State i.e., in a cross-border context. While the judgment to which the Model Law applies must be issued in a State other than the State in which recognition and enforcement is sought, it should be noted that the insolvency proceeding to which that judgment is related could be taking place in the State in which recognition and enforcement are sought; there is no requirement that that proceeding be taking place in another State. The judgment could also be related to a number of insolvency proceedings concerning the same debtor that are taking place in more than one State concurrently.

Paragraph 2

47. Article 1, paragraph 2, indicates that the enacting State might decide to exclude certain types of judgment, such as those raising public policy considerations or where other specifically designated legal regimes are applicable. Those might include, for example, judgments concerning foreign revenue claims, extradition for insolvency-related matters, family law matters or judgments relating to entities excluded from the Model Law, such as banks and insurance companies. With a view to making

the national law based on this Model Law more transparent for the benefit of foreign users, exclusions from the scope of the law might usefully be mentioned in paragraph 2.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 49–53
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 55–60
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 32
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [1]
A/CN.9/898, para. 11
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 59–63
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 40–41
A/CN.9/931, para. 16
A/CN.9/WG.V/WP.157, paras. 45–46
A/CN.9/937, para. 17
A/CN.9/955, para. 11
A/CN.9/956 and A/CN.9/956/Add.2

Article 2. Definitions

For the purposes of this Law:

(a) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(b) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding;

(c) "Judgment" means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related judgment":

(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding.

Subparagraph *(a)* "Insolvency proceeding"

48. This definition draws upon the definition of "foreign proceeding" in the MLCBI.[21] A judgment will fall within the scope of the Model Law if it is related to an insolvency proceeding that meets the definition in article 2, subparagraph *(a)*. The attributes required for that proceeding to fall within the definition include the following: judicial or administrative proceeding of a collective nature; basis in insolvency-related law of the originating State; opportunity for involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. For a proceeding to be considered an "insolvency proceeding" it must possess all of these elements. The definition refers to assets that "are or were subject to control" to address situations such as where the insolvency proceeding has closed at the time recognition of the insolvency-related judgment is sought or where all assets were transferred at the start of a proceeding pursuant to a pre-packaged reorganization plan and while the assets are no longer subject to control, the proceeding remains open (see also notes with respect to the definition of "insolvency-related judgment" below).

[21] MLCBI, art. 2*(a)*: *(a)* "'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

49. A detailed explanation of the elements required for a proceeding to be considered an "insolvency proceeding" is provided in the Guide to Enactment and Interpretation.[22]

Subparagraph *(b)* "Insolvency representative"

50. This definition draws upon the definition of "foreign representative" in MLCBI[23] and "insolvency representative" in the Legislative Guide.[24] As noted in the Legislative Guide,[25] insolvency laws refer to the person responsible for administering insolvency proceedings by a number of different titles, including "administrators", "trustees", "liquidators", "supervisors", "receivers", "curators", "official" or "judicial managers" or "commissioners". The term "insolvency representative" is used in the Model Law to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing between those different functions in different types of proceeding. The insolvency representative may be an individual or, in some jurisdictions, a corporation or other separate legal entity. Article 2, subparagraph *(b)* recognizes that the insolvency representative may be a person authorized in insolvency proceedings to administer those proceedings and, in the case of proceedings taking place in a State other than the enacting State, the "insolvency representative" may also include a person authorized specifically for the purposes of representing those proceedings.

51. The Model Law does not specify that the insolvency representative must be authorized by a court and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointments made on an interim basis. Such appointments are included to reflect the practice in many countries of often, or even usually, commencing insolvency proceedings on an "interim" or "provisional" basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition of "insolvency proceeding" in article 2, subparagraph *(a)*. Such proceedings are often conducted for weeks or months as "interim" proceedings under the administration of persons appointed on an "interim" basis, and only at some later time would the court issue an order confirming the continuation of the proceedings on a

[22] Guide to Enactment and Interpretation, paras. 69–80.

[23] MLCBI, art. 2*(d)*: "'Foreign representative' means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

[24] Legislative Guide, Introd., subpara. 12(v): "'Insolvency representative': a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate."

[25] Ibid., part two, chap. III, para. 35.

non-interim basis. The definition in subparagraph *(b)* is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph *(c)* "Judgment"

52. The Model Law adopts a broad definition of what constitutes a judgment, explaining what the term might include in the second sentence of article 2, subparagraph *(c)*. The focus is upon judgments issued by a court, which might generally be described as an authority exercising judicial functions or by an administrative authority, provided a decision of the latter has the same effect as a court decision. Administrative authorities are included in the Model Law, as they are in the MLCBI, on the basis that some insolvency regimes are administered by specialized authorities and decisions issued by those authorities in the course of insolvency proceedings merit recognition on the same basis as judicial decisions. The Model Law does not require an insolvency-related judgment to have been issued by a specialized court with insolvency jurisdiction, since not all States have such specialized courts and there are many instances in which a judgment covered by the Model Law could be issued by a court that did not have such competence. This is also supported by the focus upon "insolvency-related" judgments. For those reasons, the use of the word "court" is intentionally broader than the use of that word in both the MLCBI and the Legislative Guide.[26]

53. The reference to costs and expenses of the court has been added to restrict the enforcement of costs orders to those given in relation to judgments that can be recognized and enforced under the Model Law.

54. Interim measures of protection should not be considered to be judgments for the purposes of the Law. The Model Law does not define what is intended by the term "interim measures". In the international context, few definitions of what constitute interim, provisional, protective or precautionary measures exist and legal systems differ on how those measures should be characterized.

55. Interim measures may serve two principal purposes: to maintain the status quo pending determination of the issues at trial and to provide a preliminary means of securing assets out of which an ultimate judgment may be satisfied. In addition,

[26] Ibid., Introd., para. 8: For purposes of simplicity, the Legislative Guide uses the word "court" in the same way as art. 2, subpara. *(e)*, of MLCBI to refer to "a judicial or other authority competent to control or supervise" insolvency proceedings. An authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term "court" as that term is used in the Guide. MLCBI, art. 2 subpara. *(e)*, provides: "*(e)* 'Foreign court' means a judicial or other authority competent to control or supervise a foreign proceeding."

they may share certain characteristics; for example, they are temporary in nature, they may be sought on an urgent basis, or they may be issued on an ex parte basis. However, if an order for such measures is confirmed after the respondent has been served with the order and had the opportunity to appear and seek the discharge of the order, it may cease to be regarded as a provisional or interim measure.

56. Legal effects that might apply by operation of law, such as a stay applicable automatically on commencement of insolvency proceedings pursuant to the relevant law relating to insolvency, may not, without additional court orders, be considered a judgment for the purposes of the Model Law.

Subparagraph *(d)* "Insolvency-related judgment"

57. The types of judgment to be covered by the Model Law are those that can be considered to arise as a consequence of or that are materially associated with an insolvency proceeding (as defined in art. 2, subpara. *(a)*) and that are issued by a court or relevant administrative authority on or after the commencement of that insolvency proceeding. An insolvency-related judgment would include any equitable relief, including the establishment of a constructive trust, provided in that judgment or required for its enforcement, but would not include any element of a judgment imposing a criminal penalty (although article 16 may enable the criminal penalty to be severed from other elements of the judgment).

58. The decision commencing an insolvency proceeding is specifically the subject of recognition under the MLCBI and is not covered by the Model Law, as confirmed by subparagraph *(d)*(ii) of the definition. It might be noted that should recognition of the commencement decision be required, it is most likely to be in circumstances where the relief available under the MLCBI is also required. The Model Law does, however, cover judgments issued at the time of commencement of insolvency proceedings, such as appointment of an insolvency representative, judgments or orders addressing payment of employee claims and continuation of employee entitlements, retention and payment of professionals, acceptance or rejection of executory contracts, and use of cash collateral and post-commencement finance. They would be considered insolvency-related judgments on the basis that they arise as a consequence of the commencement of the insolvency proceedings and are judgments that fall within the definition of that term.

59. The words at the end of the definition of "insolvency-related judgment" in article 2, subparagraph *(d)*(i) a, "whether or not that insolvency proceeding has closed", clarify that an insolvency-related judgment issued after the proceeding to which it relates has closed, can still be considered an insolvency-related judgment for the purposes of the Model Law. In some jurisdictions, for example, actions for

avoidance may be pursued after a reorganization plan has been approved and confirmed by the court, where that confirmation is considered to be the conclusion of the proceedings. Insolvency laws take different approaches to conclusion of insolvency proceedings, as discussed in the Legislative Guide, part two, chapter VI, paragraphs 16–19.

60. The following list, which is not intended to be exhaustive, provides some examples of the types of judgment that might be considered insolvency-related judgments:

(a) A judgment dealing with constitution and disposal of assets of the insolvency estate, such as whether an asset is part of, should be turned over to, or was properly (or improperly) disposed of by the insolvency estate;

(b) A judgment determining whether a transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors (preferential transactions) or improperly reduced the value of the estate (transactions at an undervalue);

(c) A judgment determining that a representative or director of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate under the law relating to insolvency, in line with part four of the Legislative Guide;

(d) A judgment determining whether the debtor owes or is owed a sum or any other performance not covered by subparagraph *(a)* or *(b)*. Enacting States will need to determine whether this category should extend to all such judgments regardless of when the cause of action arose. While it might be considered that a cause of action that arose prior to the commencement of the insolvency proceedings was sufficiently linked to the insolvency proceeding, as it was being pursued in the context of, and could have an impact on, that proceeding, it might also be considered that a judgment on such a cause of action could have been obtained by or against the debtor prior to the commencement of the insolvency proceeding and, thus, lacked a sufficiently material association with the insolvency proceedings. Enacting States may also wish to have regard to the treatment of such judgments under other international instruments;

(e) A judgment (i) confirming or varying a plan of reorganization or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement. The types of agreement referred to in subparagraph (iii) are typically not regulated by the insolvency law and may be reached through informal negotiation to address a consensual modification of the claims of all participating creditors. In the Model Law, the reference is to such agreements that

are ultimately referred to the court for approval in formal proceedings, such as an expedited proceeding of the type addressed in the Legislative Guide;[27] and

(f) A judgment for the examination of a director of the debtor, where that director is located in a third jurisdiction.

61. The cause of action leading to the judgment need not necessarily be pursued by the debtor or its insolvency representative. "Cause of action" should be interpreted broadly to refer to the subject matter of the litigation. The insolvency representative may have decided not to pursue the action, but rather to assign it to a third party or to permit it to be pursued by creditors with the approval of the court. The fact that the cause of action was pursued by another party will not affect the recognizability or enforceability of any resulting judgment, provided it is of a type otherwise enforceable under the Model Law.

62. Subparagraph *(d)*(ii), as noted above, confirms that the definition does not include the decision commencing an insolvency proceeding on the basis that it is the subject of a recognition regime under the MLCBI. However, other decisions made at the time of commencement of an insolvency proceeding, as noted above, such as the decision appointing the insolvency representative, are not excluded from the Model Law. Recognition of that appointment, for example, is often a critical factor in demonstrating that the insolvency representative has standing to apply for recognition and enforcement of the judgment (art. 11) or for relief associated with such recognition and enforcement (art. 12).

Discussion in UNCITRAL and the Working Group

A/73/17, paras. 116 and 125–126
A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 54–60
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 61–70
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 3–5
A/CN.9/870, paras. 53–60
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [2]–[13]
A/CN.9/898, paras. 48–60
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 16, 64–73, 77 (para. 68 is relevant to the history and evolution of the definition of the term "insolvency-related judgment")

[27] Legislative Guide, part two, chap. IV, section B.

A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 42–56
A/CN.9/931, paras. 17–18
A/CN.9/WG.V/WP.157, paras. 47–61
A/CN.9/937, paras. 18–20
A/CN.9/955, paras. 12–15
A/CN.9/956, Add.1 and A/CN.9/956/Add.2

Article 3. International obligations of this State

1. To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments, and that treaty applies to the judgment.

63. Article 3, paragraph 1, expressing the principle of supremacy of international obligations of the enacting State over domestic law, has been modelled on similar provisions in other model laws prepared by UNCITRAL, including the MLCBI.[28]

64. Article 3, paragraph 2, provides that where there is a treaty in force for the enacting State and that treaty applies to the recognition and enforcement of civil and commercial judgments, if the judgment in question falls within the terms of the treaty, then the treaty should cover its recognition and enforcement, rather than the Model Law. The article confirms that the treaty will prevail only when it has entered into force for the enacting State and applies to the judgment in question. Binding legal obligations issued by regional economic integration organizations that are applicable to members of that organization might be treated as obligations arising from an international treaty. This provision can also be adapted in national law to refer to binding international instruments with non-State entities, where such instruments could apply to the recognition and enforcement of insolvency-related judgments.

65. In some States binding international treaties are self-executing. In other States, however, those treaties, with certain exceptions, are not self-executing as they require domestic legislation in order to become enforceable law. In view of the

[28] See for example, Guide to Enactment and Interpretation, paras. 91–93.

normal practice of the latter group of States with respect to international treaties and agreements, it might be inappropriate or unnecessary to enact article 3 or it might be appropriate to enact it in a modified form.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 61–63
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [14]–[15]
A/CN.9/898, paras. 13–17
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 17–20, 78
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 57–59
A/CN.9/931, para. 19
A/CN.9/WG.V/WP.157, paras. 62–64
A/CN.9/937, para. 21
A/CN.9/955, para. 16
A/CN.9/956 and A/CN.9/956/Add.2

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question.

66. The competence for the judicial functions dealt with in the Model Law may lie with different courts and authorities in the enacting State and the enacting State would tailor the text of the article to its own system of such competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the legislation for the benefit of, in particular, foreign insolvency representatives and others authorized under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment. If, in the enacting

State, any of the functions relating to recognition and enforcement of an insolvency-related judgment are performed by an authority other than a court, the State would insert in article 4, and in other appropriate places in the enacting legislation, the name of the competent authority.

67. In defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State. In particular, as the article makes clear, the issue of recognition may be raised by way of defence or as an incidental question in a proceeding in which the main issue for determination is not that of recognition and enforcement of such a judgment. In those cases, that issue may be raised in a court or authority other than the body specified in accordance with the first part of article 4.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 64
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [16]–[17]
A/CN.9/898, paras. 18–20
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, para. 21
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 60–61
A/CN.9/931, para. 20
A/CN.9/WG.V/WP.156
A/CN.9/WG.V/WP.157, paras. 65–66
A/CN.9/937, para. 22
A/CN.9/956

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

68. The intent of article 5 is to ensure insolvency representatives or other authorities appointed in insolvency proceedings commenced in the enacting State are authorized to act abroad with respect to an insolvency-related judgment. An enacting State in which insolvency representatives are already equipped to act in that regard may decide to forgo inclusion of article 5, although retaining that article would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.

69. Article 5 is formulated to make it clear that the scope of the power exercised abroad by the insolvency representative would depend upon the foreign law and courts. Action that the insolvency representative appointed in the enacting State may wish to take in a foreign State will be action of the type dealt with in the Model Law, such as seeking recognition or enforcement of an insolvency-related judgment or associated relief. The authority to act in that foreign State will not depend on whether it has enacted legislation based on the Model Law.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 65
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 22
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 62–63

A/CN.9/931, para. 20
A/CN.9/WG.V/WP.157, paras. 67–68
A/CN.9/937, para. 23
A/CN.9/956 and A/CN.9/956/Add.2

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance under other laws of this State.

70. The purpose of the Model Law is to increase and harmonize the cross-border assistance available in the enacting State with respect to the recognition and enforcement of an insolvency-related judgment. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a foreign insolvency representative could obtain that assistance and since it is not the purpose of the Law to replace or displace those provisions to the extent they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether article 6 is needed to make that point clear. Article X is also relevant in this regard in so far as it provides clarification as to the scope of MLCBI, article 21 and the relief that should be available under that article. As article 6 does not specify to whom the relief is available, it follows from article 11 that any person entitled to apply for recognition and enforcement of an insolvency-related judgment could also seek additional assistance under article 6.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 66
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 23
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, para. 64

A/CN.9/931, para. 21
A/CN.9/WG.V/WP.157, para. 69
A/CN.9/937, para. 23
A/CN.9/956

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

71. The notion of public policy is grounded in national law and may differ from State to State. No uniform definition of that notion is attempted in article 7.

72. In some States, the expression "public policy" may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do so would contravene those fundamental principles.[29]

73. The purpose of the expression "manifestly", which is also used in many other international legal texts as a qualifier of the expression "public policy" (including the MLCBI), is to emphasize that the public policy exception should be interpreted restrictively and that article 7 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. In some States, that may include situations where the security or sovereignty of the State has been infringed.

74. The second part of the provision referring to procedural fairness is intended to focus attention on serious procedural failings. It was drafted to accommodate those States with a relatively narrow concept of public policy (and which treat procedural fairness and natural justice as being distinct from public policy) that may wish to include language about procedural fairness in legislation enacting the Model Law. The addition of this language is not intended to suggest that the approach to public policy in the Model Law differs in any way from that of the MLCBI or that the idea of procedural fairness would not be included under the public policy exception in MLCBI, article 6.

[29] For relevant cases under the MLCBI see, for example, the Judicial Perspective, section III.B.5 "The 'public policy' exception".

Discussion in UNCITRAL and the Working Group

A/73/17, paras. 116 and 127–128
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 67
A/CN.9/WG.V/WP.143
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.143/Add.1, notes [18]–[19]
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, para. 24
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 65–69
A/CN.9/931, para. 22
A/CN.9/WG.V/WP.157, paras. 70–74
A/CN.9/937, para. 23
A/CN.9/955, para. 17
A/CN.9/956 and A/CN.9/956/Add.2

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

75. A provision similar to the one contained in article 8 appears in a number of private law treaties (e.g., art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)).[30] It has been recognized that such a provision would also be useful in a non-treaty text, such as a model law, on the basis that a State enacting a model law would have an interest in its harmonized interpretation. Article 8 is modelled on the corresponding article of the MLCBI.

76. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL (for further information about the system, see para. 129 below).

[30] United Nations, *Treaty Series*, vol. 1498, No. 25567.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 68
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 22
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, para. 25
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 70–71
A/CN.9/931, para. 23
A/CN.9/WG.V/WP.157, paras. 75–76
A/CN.9/937, para. 24
A/CN.9/956/Add.2

Article 9. Effect and enforceability of an insolvency-related judgment

An insolvency-related judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

77. Article 9 provides that a judgment will only be recognized if it has effect in the originating State, and will only be enforced if it is enforceable in the originating State. Having effect generally means that the judgment is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. It is possible that a judgment is effective in the originating State without being enforceable because, for example, it has been suspended pending the outcome of an appeal (this is addressed in article 10). If a judgment does not have effect or is not enforceable in the originating State or if it ceases to have effect or be enforceable in the originating State, it should not be recognized or enforced (or continue to be recognized or enforced) in another State under the Model Law. The question of effect and enforceability must thus be determined by reference to the law of the originating State, recognizing that different States have different rules on finality and conclusiveness of judgments.

78. This discussion raises the distinction between recognition of a judgment and its enforcement. As noted above (see paras. 25–27), recognition means that the receiving court will give effect to the originating court's determination of legal rights and obligations reflected in the judgment. For example, if the originating court held that the plaintiff had, or did not have, a certain right, the receiving court would accept and recognize that determination. Enforcement, on the other hand, means the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court. A decision to enforce the judgment must, for the purposes of the Model Law, be preceded or accompanied by recognition of the judgment.

79. In contrast, recognition need not be accompanied or followed by enforcement. For example, if the originating court held that one party had an obligation to pay money to another party or that one party had a certain right, the receiving court may simply recognize that finding of fact, without any issue of enforcement arising. If the cause of action giving rise to that judgment was pursued again in the receiving State, recognition of the foreign judgment would be sufficient to dispose of the application.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 69, 72
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [20]–[21]
A/CN.9/898, paras. 23–24
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 26–27
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 72–75
A/CN.9/931, paras. 24–26
A/CN.9/WG.V/WP.157, paras. 77-79
A/CN.9/937, para. 25
A/CN.9/955, para. 18
A/CN.9/956 and A/CN.9/956/Add.2

Article 10. Effect of review in the originating State on recognition and enforcement

1. Recognition or enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition or enforcement of the judgment.

80. The use of the word "review" in article 10 might have different meanings depending on national law; in some jurisdictions, it might initially include both the possibility of a review by the issuing court, as well as review by way of an appeal to an appellate court. For example, an originating court may have a short period before an appeal is made to a higher court in which to review its own judgment; once the appeal is made, the originating court no longer has that ability. Both situations would be covered by the use of the word "review". "Ordinary review" describes, in some legal systems, a review that is subject to a time limit and conceived as an appeal with a full review (of facts and law). It differentiates those cases from "extraordinary" reviews, such as an appeal to a court of human rights or internal appeals for violation of fundamental rights.

81. Article 10, paragraph 1, provides that if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review has not expired, the receiving court has the discretion to adopt various approaches to the judgment. For example, it can refuse to recognize the judgment; postpone recognition and enforcement until it is clear whether the judgment is to be affirmed, set aside or amended in the originating State; proceed to recognize the judgment, but postpone enforcement; or recognize and enforce the judgment. This flexibility allows the court to deal with a variety of different situations, including, for example, where the judgment debtor pursues an appeal in order to delay enforcement, where the appeal may otherwise be considered frivolous or the judgment may be provisionally enforced in the originating State. If the court decides to recognize and enforce the judgment notwithstanding the review or to recognize the judgment but postpone enforcement, the court can require the provision of some form of security to ensure that the relevant party is not prejudiced pending the outcome of the review. If the judgment is subsequently set aside or amended or ceases to become effective or enforceable in the originating State, the receiving State should rescind or amend any recognition or enforcement granted in accordance with relevant procedures established under domestic law.

82. If the court decided to refuse recognition and enforcement because of the pending review, that decision should not prevent a new request for recognition and enforcement once that review had been determined. Refusal in that situation would mean dismissal without prejudice. This is addressed by article 10, paragraph 2.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 69, 72
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [20]–[21]
A/CN.9/898, paras. 23–24
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 26-27
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 76–77
A/CN.9/931, paras. 24–26
A/CN.9/WG.V/WP.157, paras. 80–82
A/CN.9/937, para. 25
A/CN.9/955, para. 19
A/CN.9/956

Article 11. Procedure for seeking recognition and enforcement of an insolvency-related judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question.

2. When recognition and enforcement of an insolvency-related judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related judgment; and

(b) Any documents necessary to establish that the insolvency-related judgment has effect and, where applicable, is enforceable in the originating State, including information on any pending review of the judgment; or

(c) In the absence of evidence referred to in subparagraphs *(a)* and *(b)*, any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. Any party against whom recognition and enforcement is sought has the right to be heard.

83. Article 11 establishes the conditions for applying for recognition and enforcement of an insolvency-related judgment in the enacting State, as set out in paragraph 2, and the core procedural requirements. Article 11 provides a simple, expeditious structure to be used for obtaining recognition and enforcement. Accordingly, in incorporating the provision into national law, it is desirable that the process not be encumbered with requirements additional to those already included.

Paragraph 1

84. Recognition and enforcement of an insolvency-related judgment can be sought by either an insolvency representative or a person authorized to act on behalf of an insolvency proceeding within the meaning of article 2, subparagraph *(b)*. It may also be sought by any person entitled under the law of the originating State to seek such recognition and enforcement. Such a person might include a creditor whose interests are affected by the judgment. The second sentence of paragraph 1 repeats article 4, noting that the question of recognition may also be raised by way of defence or as an incidental question in the course of a proceeding. In such cases, enforcement may not be required. Where the issue arises in those circumstances, the requirements of article 11 should be met in order to obtain recognition of the judgment. Moreover, the person raising the question in that manner should be a person referred to in the first sentence of article 11, paragraph 1.

Paragraph 2

85. Article 11, paragraph 2, lists the documents or evidence that must be produced by the party seeking recognition and enforcement of an insolvency-related judgment. Subparagraph 2*(a)* requires the production of a certified copy of the judgment. What constitutes a "certified copy" should be determined by reference to the law of the State in which the judgment was issued. Subparagraph 2*(b)* requires the

provision of any documents necessary to satisfy the condition that the judgment is effective and enforceable in the originating State, including information as to any pending review of the judgment (see para. 81), which could include information concerning the time limits for review. While the Model Law does not provide for recognition of the decision commencing the insolvency proceeding to which the judgment is related, it is desirable that a copy of that judgment be provided to the recognizing court as evidence of the existence of the insolvency proceeding to which the judgment is related. It is not intended, however, that where a copy of that judgment is provided in support of the application for recognition and enforcement, a receiving court should evaluate the merits of the foreign court's decision commencing that proceeding.

86. In order to avoid refusal of recognition because of non-compliance with a mere technicality (e.g., where the applicant is unable to submit documents that in all details meet the requirements of art. 11, subparas. 2*(a)* and *(b)*), subparagraph *(c)* allows evidence other than that specified in subparagraphs 2*(a)* and *(b)* to be taken into account. That provision, however, does not compromise the court's power to insist on the presentation of evidence acceptable to it. It is advisable to maintain that flexibility in enacting the Model Law.

Paragraph 3

87. Paragraph 3 entitles, but does not compel, the court to require a translation of some or all of the documents submitted under paragraph 2. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time if the court is in a position to consider the request without the need for translation of the documents.

Paragraph 4

88. The Model Law presumes that documents submitted in support of recognition and enforcement need not be authenticated in any special way, in particular by legalization: according to article 11, paragraph 4, the court is entitled to presume that those documents are authentic whether or not they have been legalized. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

89. It follows from article 11, paragraph 4, (according to which the court "is entitled to presume" the authenticity of documents submitted pursuant to paragraph 2)

that the court retains discretion to decline to rely on the presumption of authenticity in the event of any doubt arising as to that authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, in particular when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g., because in some States they involve various authorities at different levels). Nevertheless, a State requiring legalization of documents such as those provided under article 11 is not prevented by the terms of the article from extending that requirement to the Model Law.

90. In respect of the provision relaxing any requirement of legalization, the question may arise whether it is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 1961[31] adopted under the auspices of the Hague Conference on Private International Law and providing specific, simplified procedures for the legalization of documents originating from signatory States. In many instances, however, the treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore, a conflict is unlikely to arise. For example, as stated in article 3, paragraph 2, of the abovementioned convention:

> "However, [legalisation] cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation."

91. According to article 3, paragraph 1, of the Model Law, if there is still a conflict between domestic law enacting the Model Law and a treaty or other formal, binding agreement, the treaty or other agreement will prevail.

Paragraph 5

92. Article 11, paragraph 5, establishes the right of the party against whom the relief provided in the judgment is sought to be heard on the application for recognition and enforcement. To ensure that the right is meaningful and can be enforced,

[31]United Nations, *Treaty Series*, vol. 527, No. 7625.

the party against whom that relief is sought will require notice of the application for recognition and enforcement and of the details of the hearing. The Model Law leaves it up to the law of the enacting State to determine how that notice should be provided.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 62–63
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 72–75
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 70–71
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [22]–[25]
A/CN.9/898, paras. 25–26
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 28–32
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 78–86
A/CN.9/931, paras. 27–29
A/CN.9/WG.V/WP.157, paras. 83–92
A/CN.9/937, para. 26
A/CN.9/955, para. 20
A/CN.9/956 and A/CN.9/956/Add.2

Article 12. Provisional relief

1. From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 11, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article.*]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgment is made.

93. Article 12 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available from the moment recognition is sought, until a decision on recognition and, if appropriate, enforcement is made. The rationale for making such relief available is to preserve the possibility that if the judgment is recognized and enforced, assets will be available to satisfy it, whether they are assets of the debtor in the insolvency proceeding to which the judgment relates or of the judgment debtor. The urgency of the measures is alluded to in the opening words of paragraph 1. Subparagraph 1*(a)* restricts the stay to the disposition of assets of any party against whom the judgment was issued. Subparagraph 1*(b)* provides for other relief, both legal and equitable, to be granted provided it is within the scope of the judgment for which recognition is sought. As drafted, paragraph 1 should be flexible enough to encompass an ex parte application for relief, where the law of the enacting State permits a request to be made on that basis. This deferral to the law of the enacting State is also reflected in the notice provisions contained in paragraph 2.

Paragraph 2

94. The laws of many States contain requirements for notice to be given (either by the insolvency representative upon the order of the court or by the court itself) when relief of the type mentioned in article 12 is granted, except where it is sought on an ex parte basis (if that is permitted in the enacting State). Paragraph 2 is the appropriate place for the enacting State to make provision for such notice where it is required.

Paragraph 3

95. Relief available under article 12 is provisional in that, as provided in paragraph 3, it terminates when the issue of recognition and, where appropriate enforcement, is decided, unless extended by the court. The court might wish to do so, for example, to avoid a hiatus between any provisional measure issued before recognition and any measure that might be issued on or after recognition.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 82–83
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [40]
A/CN.9/898, para. 45
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 52–53
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 87–89
A/CN.9/931, para. 30
A/CN.9/WG.V/WP.157, paras. 93–95
A/CN.9/937, para. 27
A/CN.9/956 and A/CN.9/956/Add.2

Article 13. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 14, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9 with respect to effectiveness and enforceability are met;

(b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2, subparagraph *(b)*, or another person entitled to seek recognition and enforcement of the judgment under article 11, paragraph 1;

(c) The application meets the requirements of article 11, paragraph 2; and

(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

96. The purpose of article 13 is to establish clear and predictable criteria for recognition and enforcement of an insolvency-related judgment. If *(a)* the judgment is an

"insolvency-related judgment" (as defined in art. 2, subpara. *(d)*); *(b)* the requirements for recognition and enforcement have been met (i.e., the judgment is effective and enforceable in the originating State under art. 9); *(c)* recognition is sought by a person referred to in article 11, paragraph 1, from a court or authority referred to in article 4 or the question of recognition arises by way of defence or as an incidental question before such a court or authority; *(d)* the documents or evidence required under article 11, paragraph 2, have been provided; *(e)* recognition is not contrary to public policy (art. 7); and *(f)* the judgment is not subject to any of the grounds for refusal (art. 14), recognition should be granted.

97. In deciding whether an insolvency-related judgment should be recognized and enforced, the receiving court is limited to the preconditions set out in the Model Law. No provision is made for the receiving court to embark on a consideration of the merits of the foreign court's decision to issue the insolvency-related judgment or issues related to the commencement of the insolvency proceeding to which the judgment is related. Nevertheless, in reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any information that may have been presented to the originating court. Those orders or decisions are not binding on the receiving court in the enacting State, which is only required to satisfy itself independently that the insolvency-related judgment meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumption in article 11, paragraph 4, on the information in the certificates and documents provided in support of the request for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 64
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76–77
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 73
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [26]–[27]
A/CN.9/898, paras. 27–29
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 33
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 90–91

A/CN.9/931, para. 31
A/CN.9/WG.V/WP.156
A/CN.9/WG.V/WP.157, paras. 96–97
A/CN.9/937, paras. 28–29
A/CN.9/956

Article 14. Grounds to refuse recognition and enforcement of an insolvency-related judgment

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified in this State of the institution of that proceeding in a manner that is incompatible with the rules of this State concerning service of documents;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State;

(f) The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that that party argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State;

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment originates from a State whose insolvency proceeding is not or would not be recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.

98. Article 14 sets out the specific grounds, in addition to the public policy ground under article 7, on which recognition and enforcement of an insolvency-related judgment might be refused. The list of grounds is intended to be exhaustive, so that grounds not mentioned would not apply. As noted above, provided the judgment meets the conditions of article 13, recognition is not prohibited under article 7,

and the grounds set forth in article 14 do not apply, recognition of the judgment should follow. By indicating that recognition and enforcement "may" be refused, article 14 makes it clear that, even if one of the provisions of article 14 is applicable, the court is not obliged to refuse recognition and enforcement. However, it might be noted that in some legal traditions, once one of the grounds enumerated in article 14 is found to exist, the court would not have that discretion and would have to refuse recognition and enforcement of the judgment. In principle, the onus of establishing one or more of the grounds set out under article 14 rests upon the party opposing recognition or enforcement of the judgment.

Subparagraph *(a)* — notification of proceedings giving rise to the insolvency-related judgment

99. Article 14, subparagraph *(a)* permits the court to refuse recognition and enforcement if the defendant in the proceeding giving rise to the insolvency-related judgment was not properly notified of that proceeding. Two rules are involved: the first, in subparagraph *(a)*(i), is concerned with the interests of the defendant; the second, in subparagraph *(a)*(ii), is concerned with the interests of the receiving State.

100. Subparagraph *(a)*(i) addresses failure to notify the defendant in sufficient time and in such a manner as to enable a defence to be arranged. This provision encompasses notification not only of the fact of the institution of the proceedings, but also of the essential elements of the claims made against the defendant in order to enable a defence to be arranged. The use of the word "notified" has no technical legal meaning, and simply requires the defendant to be placed in a position to inform her or himself of the claim and the content of the documentation relating to the institution of the proceedings. The test of whether notification has been given in sufficient time is purely a question of fact which depends on the circumstances of each case. The procedural rules of the originating court may afford guidance as to what might be required to satisfy the requirement, but would not be conclusive. Unfamiliarity with the local law and language and problems in finding a suitable lawyer may require a longer period than is prescribed under the law and practice of the originating court. The notification should also be effected "in such a manner" as to enable the defendant to arrange a defence, which may require documents written in a language that the defendant is unlikely to understand to be accompanied by an accurate translation. The defendant would have to show not merely that notice was insufficient, but that the fact of insufficiency deprived them of a substantial defence or evidence which, as a matter of certainty and not merely of speculation, would have made a material difference to the outcome of the originating litigation. If that is not the case, it cannot be argued that the defendant was not enabled to arrange a defence.

101. The rule in subparagraph *(a)*(i) does not apply if the defendant entered an appearance and presented their case without contesting notification, even if they had insufficient time to prepare their case properly. The purpose of this rule is to prevent the defendant raising issues at the enforcement stage that they could have raised in the original proceeding. In such a situation, the obvious remedy would have been for the defendant to seek an adjournment of that proceeding. If they failed to do so, they should not be entitled to put forward the lack of proper notification as a ground for non-recognition of the ensuing judgment. This rule does not apply if it was not possible to contest notification in the court of origin.

102. Subparagraph *(a)*(ii) addresses notification given in a manner that was incompatible with rules of the receiving State concerning service of documents, but only applies where the receiving State is the State in which that notification was given. Some States have no objection to the service of a foreign writ on their territory without any participation by their authorities, as it is seen as a matter of conveying information. A foreign person can serve a writ in those jurisdictions simply by going there and handing it to the relevant person. Other States, however, take a different view, considering that the service of a writ is a sovereign or official act and thus service on their territory without permission is an infringement of sovereignty. Permission would normally be given through an international agreement laying down the procedure to be followed. Such States would be unwilling to recognize a foreign judgment if the writ was served in a way that was regarded as an infringement of their sovereignty. Subparagraph *(a)*(ii) takes account of this point of view by providing that the court addressed may refuse to recognize and enforce the judgment if the writ was notified to the defendant in the receiving State in a manner that was incompatible with the rules of that State concerning service of documents. Procedural irregularities that are capable of being cured retrospectively by the court in the receiving State would not be sufficient to justify refusal under this ground.

Subparagraph *(b)* — fraud

103. Article 14, subparagraph *(b)*, sets out the ground of refusal that the judgment was obtained by fraud, which refers to a fraud committed in the course of the proceedings giving rise to the judgment. It can be a fraud, which is sometimes collusive, as to the jurisdiction of the court. More often, it is a fraud practised by one party to the proceedings on the court or on the other party by producing false evidence or deliberately suppressing material evidence. Fraud involves a deliberate act; mere negligence does not suffice. Examples might include where the plaintiff deliberately served the writ, or caused it to be served, on the wrong address; where the requesting party (typically the plaintiff) deliberately gave the party to be notified (typically the defendant) incorrect information as to the time and place of the hearing; or where either party sought to corrupt or mislead a judge, juror or witness,

or deliberately conceal key evidence. While in some legal systems fraud may be considered as falling within the scope of the public policy provision, this is not true for all legal systems. Accordingly, this provision is included as a form of clarification.

Subparagraphs *(c)–(d)* — inconsistency with another judgment

104. Article 14, subparagraphs *(c)* and *(d)*, concern the situation in which there is a conflict between the judgment for which recognition and enforcement is sought and another judgment given in a dispute between the same parties. Both subparagraphs are satisfied where the two judgments are inconsistent, but they operate in different ways.

105. Article 14, subparagraph *(c)*, is concerned with the case where the foreign judgment is inconsistent with a judgment issued by a court in the receiving State. In such a situation, the receiving court is permitted to give preference to a judgment issued in its own State, even if that judgment was issued after the issue of the inconsistent judgment in the originating court. For this provision to be satisfied, the parties must be the same, but it is not necessary for the cause of action or subject matter to be the same; the subparagraph is therefore broader than subparagraph *(d)*. The requirement that the parties must be the same will be satisfied if the parties bound by the judgments are the same, even if the parties to the proceedings giving rise to the judgment are different, for example, where one judgment is against a particular person and the other judgment is against the successor to that person. Under subparagraph *(c)*, inconsistencies between the judgments occur when findings of fact or conclusions of law, which are based on the same issues, are different.

106. Article 14, subparagraph *(d)*, concerns foreign judgments, where the judgment for which recognition and enforcement is sought is inconsistent with an earlier judgment issued in another State. In that situation, a judgment may be refused recognition and enforcement only if: *(a)* it was issued after the conflicting judgment, so that priority in time is a relevant consideration; *(b)* the parties to the dispute are the same; *(c)* the subject matter is the same, so that the inconsistency goes to the central issue of the cause of action; and *(d)* the earlier conflicting judgment fulfils the conditions necessary for recognition in the enacting State, whether under this Law, other national law or a convention regime.

Subparagraph *(e)* — interference with insolvency proceedings

107. Subparagraph *(e)* addresses the desirability of avoiding interference with the conduct and administration of the debtor's insolvency proceedings. Those proceedings could be the proceeding to which the judgment is related or other insolvency proceedings (i.e., concurrent proceedings) concerning the same insolvency debtor. While the concept of interference is somewhat broad, the provision gives examples of what might constitute such interference. Inconsistency with a stay, for example, would typically arise where the stay permitted the commencement or continuation of individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition and enforcement of any ensuing judgment. It could also arise where the stay did not permit the commencement or continuation of such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay (and was thus potentially in violation of the stay). Interference may also cover instances where recognition of the insolvency-related judgment could upset cooperation between multiple insolvency proceedings or result in giving effect to a judgment on a matter or cause of action that should have been pursued in the jurisdiction of the insolvency proceeding (e.g., because the insolvency proceeding is the main proceeding or is taking place in the State in which the assets that are the subject of the judgment are located). However, this ground of interference should not be used as a basis for selective recognition of foreign judgments. It would not be justified as the sole reason for denying recognition and enforcement on the basis that, for example, it would deplete the value of the insolvency estate.

Subparagraph *(f)* — judgments implicating the interests of creditors and other stakeholders

108. Subparagraph *(f)* would only apply to judgments that materially affect the rights of creditors and other stakeholders, in the manner referred to in the subparagraph. The provision allows the receiving court to refuse recognition of such judgments where the interests of those parties were not taken into account and adequately protected in the proceeding giving rise to the judgment. The creditors and other stakeholders referred to would only be those whose interests might be affected by the foreign judgment. A creditor whose interests remain unaffected by, for example, a plan of reorganization or a voluntary restructuring agreement (e.g., because their claims are to be paid in full) would not have a right to oppose recognition and enforcement of a judgment under the provision.

109. Subparagraph *(f)* does not apply more generally to other types of insolvency-related judgment that resolve bilateral disputes between two parties. Even though such judgments may also affect creditors and other stakeholders, those effects are only indirect (e.g., via the judgment's effect on the size of the insolvency estate).

In those instances, permitting a judgment debtor to resist recognition and enforcement by citing third-party interests could unnecessarily generate opportunities for wasteful relitigation of the cause of action giving rise to the judgment. For example, if a court in State A determined that the debtor owned a particular asset and issued a judgment against a local creditor resolving that ownership dispute, and the insolvency representative then sought to enforce that judgment in State B, the creditor should not be able to resist enforcement in B by raising arguments about the interests of other creditors and stakeholders that are not relevant to that dispute.

Subparagraph *(g)* — basis of jurisdiction of the originating court

110. Article 14, subparagraph *(g)*, permits refusal of recognition and enforcement if the originating court did not satisfy one of the conditions listed in subparagraphs (i) to (iv); in other words, if the originating court exercised jurisdiction solely on a ground ***other*** than the ones listed, recognition and enforcement may be refused. As such, subparagraph *(g)* works differently to the other subparagraphs of article 14, each of which create a freestanding discretionary ground on which the court may refuse recognition and enforcement of a judgment; under subparagraph *(g)*, one of the grounds ***must*** be met or recognition and enforcement of the judgment can be refused.

111. Subparagraph *(g)* can thus be seen as a broad exception, permitting refusal on grounds of inadequate jurisdiction in the originating court (as determined by the receiving court) with "safe harbours" that render the provision inapplicable if the originating court satisfies any one of them. The originating court does not need to have explicitly relied on or made findings regarding the relevant basis for jurisdiction, so long as that basis for jurisdiction existed at the relevant time. The originating court's reliance on additional or different jurisdictional grounds does not prevent one of the "safe harbours" from applying.

112. Subparagraph *(g)*(i) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor explicitly consented to that exercise of jurisdiction, whether orally or in writing. The consent could be addressed to the court (e.g., the judgment debtor informed the court that no objections to jurisdiction would be raised) or to the other party (e.g., the judgment debtor agreed with the other party that the proceeding should be brought in the originating court). The existence of explicit consent is a question of fact to be determined by the receiving court.

113. Subparagraph *(g)*(ii) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor submitted to the jurisdiction of the originating court by presenting their case without objecting to jurisdiction

or the exercise of jurisdiction within any time frame applicable to such an objection, unless it was evident that such an objection would not have succeeded under the law of the originating State. In the above circumstances, the judgment debtor cannot resist recognition and enforcement by claiming that the originating court did not have jurisdiction. The method of raising the objection to jurisdiction is a matter for the law of the originating State. A receiving court, in an appropriate case, may make inquiries where matters giving rise to concern become apparent.

114. Subparagraph *(g)*(iii) provides that the originating court's exercise of jurisdiction must be seen as adequate if exercised on a basis on which the receiving court could have exercised jurisdiction if an analogous dispute had taken place in the receiving State. If the law of the receiving State would have permitted a court to exercise jurisdiction in parallel circumstances, the receiving court cannot refuse recognition and enforcement on the basis that the originating court did not properly exercise jurisdiction.

115. Subparagraph *(g)*(iv) is similar to subparagraph *(g)*(iii), but broader. While subparagraph *(g)*(iii) is limited to jurisdictional grounds explicitly permitted under the law of the receiving State, subparagraph *(g)*(iv) applies to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the law of the receiving State. The purpose of subparagraph *(g)*(iv) is to discourage courts from refusing recognition and enforcement of a judgment in cases in which the originating court's exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State, provided that exercise was not incompatible with the central tenets of procedural fairness in the receiving State.

Subparagraph *(h)* — judgments originating in certain States

116. This subparagraph is an optional provision. States that have or are considering enacting the MLCBI might wish to consider adopting this provision. Nothing in the provision would prevent a State that has not enacted (and does not plan to enact) the MLCBI from adopting the approach of that subparagraph.

117. The chapeau of article 14, subparagraph *(h)*, establishes the key principle that recognition of an insolvency-related judgment can be refused when the judgment originates from a State whose insolvency proceeding is not or would not be susceptible of recognition under the MLCBI (e.g., because that State is neither the location of the insolvency debtor's COMI nor of an establishment). The language of the chapeau does not require an insolvency proceeding to have actually commenced in the originating State, only that, were such a proceeding to commence

in that State, recognition and enforcement could be refused if the proceeding would not be susceptible of recognition. For example, an insolvency debtor has its COMI in State A and an establishment in State B, but only a main proceeding in A has commenced and no non-main insolvency proceeding has yet commenced in B. Some other litigation in B results in an insolvency-related judgment that is relevant to the insolvency estate. The insolvency representative from A wants to seek recognition or enforcement of the insolvency-related judgment from B in State C, which has enacted the Model Law and the MLCBI. The court in C would see that the judgment comes from a State whose insolvency proceeding would be recognizable under the MLCBI (i.e., the debtor has an establishment in B and a non-main proceeding could thus be commenced), even though no such recognizable proceeding has yet commenced in B. The receiving court thus cannot refuse recognition on the basis of article 14, subparagraph *(h)*.

118. Subparagraph *(h)* relies upon the MLCBI framework of recognition of specific types of foreign proceedings (i.e., main or non-main proceedings) and addresses the situation of a judgment issued in a State that is not the location of either the COMI or an establishment of the insolvency debtor, where the judgment relates only to assets that were located in that State at the time the proceeding giving rise to the judgment commenced. In those circumstances, it may be useful for that judgment to be recognized because, for example, it resolves issues of ownership that are relevant to the insolvency estate and that could only be resolved in that jurisdiction, rather than in the jurisdiction of the debtor's COMI or establishment. By facilitating the recognition and enforcement of such judgments, the Model Law could assist the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. The provision is nevertheless designed to help ensure that the Model Law framework is not undermined by the recognition and enforcement of judgments resolving issues that should have been resolved in the State where the debtor has or had its COMI or an establishment.

119. Subparagraphs *(h)*(i) and (ii) outline two conditions that must be met in order to establish an exception to the general principle of non-recognition. Subparagraph *(h)*(i) requires the insolvency representative of an insolvency proceeding that is or could have been recognized under the law giving effect to the MLCBI in the enacting State (i.e., the insolvency representative of a main or non-main proceeding) to have participated in the proceeding giving rise to the judgment, where that participation involved engaging with the substantive merits of the cause of action being pursued. For the purposes of this subparagraph, participation would mean that the insolvency representative was a party to the proceedings as a representative of the debtor's insolvency estate or had standing to intervene in those proceedings by appearing in court and making representations on the substantive merits of the case. The proceedings might have been instituted by the insolvency debtor against a third party or have been instituted against the debtor. Many national procedural

laws contemplate cases where a party who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings.

120. Subparagraph *(h)*(ii), which adds to the requirement in subparagraph *(h)*(i), requires the judgment in question to have related solely to assets that were located in the originating State at the time of commencement of the proceeding giving rise to the judgment. With regard to the reference to "assets", the broad definition of "assets of the debtor" (meaning the insolvency debtor) in the Legislative Guide[32] might be noted, even though it may not be applicable to all circumstances arising under the current text. It may be sufficiently broad to cover, for example, intellectual property registered in the originating State where it is neither the debtor's COMI nor a State in which the debtor has an establishment.

Discussion in UNCITRAL and the Working Group

A/73/17, paras. 117–122 and 129
A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 65–69
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76–77
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 6–9
A/CN.9/870, paras. 73, 76, 79
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [28]–[37]
A/CN.9/898, paras. 27–29
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 34–48, 79–82
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 92–114
A/CN.9/931, paras. 32–36
A/CN.9/WG.V/WP.157, paras. 98–120
A/CN.9/937, paras. 30–32
A/CN.9/955, paras. 21–25
A/CN.9/956, Add.2 and Add.3

[32] Legislative Guide, Introd., para. 12*(b)*: "'Assets of the debtor': property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets."

Article 15. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] or [would have had if it had been issued by a court of this State].[1]

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

[1] The enacting State may wish to note that it should choose between the two alternatives provided in square brackets. An explanation of this provision is provided in the Guide to Enactment in the notes to article 15.

121. Article 15, paragraph 1, provides that an insolvency-related judgment recognized and enforceable under the Model Law can be given one of two different effects in the enacting State. Since States adopt different approaches to this question, the Model Law provides that the enacting State can choose between giving the judgment the same effect in the receiving State as it had in the originating State (i.e., the effect in the originating State is exported to the receiving State) or the same effect as it would have had if it had been issued in the receiving State (i.e., the effect would be equivalent to that of such a judgment issued in the receiving State). The rationale of the first choice, that the effect in the originating State is extended to the receiving State, ensures that the judgment has, in principle, the same effects in all States; the effect does not differ depending on the receiving State. That effect is modified to some extent by paragraph 2, which does not oblige the receiving State to provide a form of relief that is not available under its own law. The rationale of the second choice is based upon maintaining equality, fairness and certainty as between domestic and foreign judgments, as well as the practical difficulties that a court in the enacting State may have in determining the precise "effects" (such as claim or issue preclusion) of a judgment under the law of the originating State.

122. Paragraph 2 provides that where the insolvency-related judgment provides for relief that is not available or not known in the receiving State, the court should provide a form of relief that has equivalent effects (as opposed to relief that is merely "formally" equivalent), and give effect to the judgment to the extent permissible under its national law. The receiving court is not required to provide a form of relief that is not available under its national law, but is authorized, as far as is possible, to adapt the form of relief granted by the originating court to a measure known in the receiving court, but not exceeding the effects the form of relief granted in the judgment would have under the law of the originating State. This provision enhances the practical effectiveness of judgments and aims at ensuring the successful party receives meaningful relief.

123. Two types of situations can trigger this provision: first, where the receiving State does not know the relief granted in the originating State; and secondly, where the receiving State knows a form of relief that is "formally", but not "substantively" equivalent. Although provisional measures are not to be considered insolvency-related judgments for the purposes of the Model Law (art. 2*(c)*), a stay preventing a defendant from disposing of his or her assets may provide an illustration of how this article operates, as such a stay can have *in personam* or *in rem* effects, depending on the jurisdiction. Where recognition of a stay issued by a State that characterizes stays as having *in rem* effects is sought in a State that only grants such orders *in personam* effects, article 15 would be satisfied by the receiving court enforcing the stay with *in personam* effects. If the originating court issued a stay with only *in personam* effects and recognition was sought in a State whose national law granted such a stay *in rem* effects, the receiving court would not comply with article 15 if it enforced the stay with *in rem* effects in accordance with national law, since that would go beyond the effects granted under the law of the originating State.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 78
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [38]
A/CN.9/898, para. 43
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 49, 83
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 115–118
A/CN.9/931, paras. 37–38
A/CN.9/WG.V/WP.156
A/CN.9/WG.V/WP.157, paras. 121–123
A/CN.9/937, paras. 33–35
A/CN.9/955, paras. 26–27
A/CN.9/956

Article 16. Severability

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is sought, or where only that part of the judgment is capable of being recognized and enforced under this Law.

124. Article 16 aims to increase the predictability of the Model Law and encourages reliance on the judgment in cases where recognition or enforcement of the judgment as a whole might not be possible. In those circumstances, the receiving court should not be able to refuse recognition and enforcement of one part of the judgment on the basis that another part is not recognizable and enforceable; the severable part of the judgment should be treated in the same manner as a judgment that is wholly recognizable and enforceable.

125. Recognition and enforcement of the judgment as a whole might not be possible where some of the orders included in the judgment fall outside the scope of the Model Law, are contrary to the public policy of the receiving State or, because they are interim orders, are not yet enforceable in the originating State. It may also be the case that only some parts of the judgment are relevant to the receiving State. In such cases, the severable part of a judgment could be recognized and enforced, provided that part is capable of standing alone. That would usually depend on whether recognizing and enforcing only that part of the judgment would significantly change the obligations of the parties. Where that question raises issues of law, they would be determined by the law of the receiving State.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 123
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 80–81
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [39]
A/CN.9/898, para. 44
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 50–51
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 119–120
A/CN.9/931, para. 39

A/CN.9/WG.V/WP.157, paras. 124–125
A/CN.9/937, para. 36
A/CN.9/956

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of that Model Law. States may therefore wish to consider enacting the following provision:

Article X. Recognition of an insolvency-related judgment under

[*insert a cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

126. As noted above (para. 2), an issue has arisen as to whether the relief available under the MLCBI includes the recognition and enforcement of an insolvency-related judgment. The MLCBI provisions on relief (principally art. 21) make no specific reference to recognition and enforcement of such a judgment. The purpose of article X is to make it clear to States enacting (or considering enactment of) the MLCBI that the relief available under article 21 of the MLCBI includes recognition and enforcement of an insolvency-related judgment and that such relief may therefore be sought under article 21. States enacting (or considering enactment of) the MLCBI may thus rely upon article X to achieve that purpose, irrespective of any prior interpretations of article 21 to the contrary. The enactment of this provision is not necessary in jurisdictions where the MLCBI is interpreted as covering the recognition and enforcement of insolvency-related judgments.

127. Since article X relates to interpretation of the MLCBI, it is not intended that it be included in legislation enacting this Model Law. To do so might lead to it being overlooked by parties seeking to make use of the MLCBI or by courts interpreting the MLCBI as enacted. States wishing to enact this article should determine the appropriate location. It might, for example, be enacted as an amendment to the legislation giving effect to the MLCBI.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/898, paras. 40–41
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 54–57, 84–85
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, para. 121
A/CN.9/931, paras. 40–41
A/CN.9/WG.V/WP.156
A/CN.9/WG.V/WP.157, paras. 126–127
A/CN.9/937, paras. 37–38
A/CN.9/955, para. 28

VI. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

128. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: uncitral@un.org; Internet home page: uncitral.un.org).

B. Information on the interpretation of legislation based on the Model Law

129. The Case Law on UNCITRAL Texts (CLOUT) information system is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL, including the Model Law. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The Secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide available on the above-mentioned Internet home page of UNCITRAL.

Annex I

General Assembly Resolution 73/200 of 20 December 2018

Model Law on Recognition and Enforcement of Insolvency-Related Judgments of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and preserving employment,

Convinced that the law of recognition and enforcement of judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals to have assets in more than one State and to move assets across borders,

Considering that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude insolvency-related judgments from their scope,

Concerned that inadequate coordination and cooperation in cases of cross-border insolvency, which lead to uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that debtors' assets would be concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors,

Convinced that fair and internationally standardized legislation on cross-border insolvency that respects national procedural and judicial systems, as expressed by the provisions of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments,[1] that is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

1. *Expresses* its appreciation to the United Nations Commission on International Trade Law for finalizing and adopting the Model Law on Recognition and Enforcement of Insolvency-Related Judgments[1] and its guide to enactment;

2. *Requests* the Secretary-General to transmit the text of the Model Law, together with its guide to enactment, to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to insolvency, bearing in mind the need for internationally harmonized legislation governing and facilitating instances of cross-border insolvency, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider implementation of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law.[2]

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), annex III.
[2] Resolution 52/158, annex.

Annex II

Decision of the United Nations Commission on International Trade Law

At its 1080th meeting, on 2 July 2018, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, in which the Assembly established the United Nations Commission on International Trade Law with the purpose of promoting the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment and of fostering entrepreneurial activity and preserving employment,

Convinced that the law of recognition and enforcement of judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals to have assets in more than one State and to move assets across borders,

Considering that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude insolvency-related judgments from their scope,

Concerned that inadequate coordination and cooperation in cases of cross-border insolvency, including uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that debtors' assets are concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors,

Convinced that fair and internationally harmonized legislation on cross-border insolvency that respects national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

Appreciating the support for and the participation of intergovernmental and invited non-governmental organizations active in the field of insolvency law reform in the development of a draft model law on recognition and enforcement of insolvency-related judgments and its guide to enactment,

Expressing its appreciation to Working Group V (Insolvency Law) for its work in developing the draft Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment,

1. *Adopts* the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, as it appears in annex III to the report of the United Nations Commission on International Trade Law on its fifty-first session,[1] and its guide to enactment, consisting of the text contained in A/CN.9/WG.V/WP.157, with the amendments listed in document A/CN.9/955 and the amendments adopted by the Commission at its fifty-first session;[2]

2. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments when revising or adopting legislation relevant to insolvency, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency (1997).[3]

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17).
[2] Ibid., chapter V, subsection A.3.
[3] General Assembly resolution 52/158, annex.

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