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Facilitating the cross-border insolvency of multinational enterprise groups: commentary and notes on the draft legislative provisions

Note by the Secretariat

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I. General drafting notes

1. The articles in the draft text set out in A/CN.9/WG.V/WP.142 have been renumbered. Numbers/letters appearing below in parentheses following the article number indicate the origin of the article in the previous draft of this text (A/CN.9/WG.V/WP.137/Add.1). With respect to the key principles included in the previous draft, where the Working Group was unable to decide how those principles should be treated, they have been retained at the end of these notes; others have been included as draft articles.

2. References to “development of a group insolvency solution” have been replaced with “development *and implementation* of a group insolvency solution”.

3. References to insolvency proceedings in the enacting State have been replaced throughout the text by the words “proceeding under [*identify laws of the enacting State relating to insolvency*]”, consistent with the drafting of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law).

4. The terms “foreign proceeding”, “foreign representative” and “main proceeding” are used in this text in accordance with the definitions of those terms in the Model Law.

5. The Working Group will recall that this draft text includes both core and supplemental provisions. Accordingly, it has, tentatively, been divided into parts A and B, with part A including the core provisions of articles 1-21 and part B including the supplemental provisions of articles 22 and 23.

6. As previously noted in A/CN.9/WG.V/WP.137, paragraphs 3-4, the supplemental provisions address the effect of the treatment of creditor claims in a foreign insolvency proceeding on the relief that may be ordered in a creditor’s home State, as well as an approach to approval of a group insolvency solution based on adequate protection of creditors. Those provisions, which would be optional for a State to enact, go a step further than the core provisions contained in part A. They would permit, in a planning proceeding, treatment of the claims of a group member whose centre of main interests (COMI) is located in a different jurisdiction in accordance with the law applicable to those claims. They would also allow a court to provide additional relief — staying or declining to commence insolvency proceedings, as well as approving the relevant portion of a group insolvency solution without submitting it to the applicable approval procedures under local law — if the court determined that creditors would be adequately protected.

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

(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 therefore there was an obvious benefit in treating group member claims in the planning proceeding in lieu of commencing main proceedings (conducted at the centre of the group member's main interests); and

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

II. Notes on draft articles

Part A.

Chapter 1. General provisions

Preamble

[1] 1. The draft preamble is proposed for consideration by the Working Group. It is largely based on the Preamble to the Model Law i.e. subparagraphs (a), (b), (d), (e) and (f), modified to reflect the enterprise group focus of this text. Subparagraph (c) has been added to refer specifically to the development and implementation of a group insolvency solution. The goal of the preamble is to make it clear that this model law is concerned with facilitating cooperation and coordination of insolvency proceedings affecting different members of an enterprise group in order to achieve a solution that might apply to the whole or part of that enterprise group, rather than focusing on multiple proceedings for a single debtor, as covered by the Model Law.

2. The Working Group may wish to consider whether additional paragraphs might be added to the preamble to address, for example, streamlining the procedures for treatment of cross-border enterprise group insolvencies to reflect articles 22-23 of part B of the draft text and the desirability of reducing the impact of multiple proceedings, or whether it might be preferable to address such issues in a preamble to part B (noting the comments in paras. 5-7 of the general drafting notes above with respect to the content of part B).

Article 1. Scope

[2] 1. This draft article is proposed for consideration by the Working Group. A key question to be considered is whether the draft text should apply only where there is to be a planning proceeding and a group insolvency solution or whether, in whole or in part, it might have broader application to group insolvencies in general. As currently drafted, the text attempts to take the broader approach and cover situations where a group insolvency solution cannot be developed, but cooperation and coordination between proceedings affecting group members might nevertheless be useful.

2. Paragraph 1 of draft article 1 draws from the scope article of the Model Law, modified for the enterprise group context. It attempts to cover the different situations in which the provisions of the draft text might be applied, particularly those articles that rely for their scope of application on this article (e.g., arts. 3, 7 and 7 bis). Since they might relate to one or more proceedings affecting members of an enterprise group, subparagraphs (a) and (b) of draft article 1 reflect the more

general cooperation elements of the preamble to the Model Law. Subparagraphs (c) and (d) relate specifically to the provisions of chapter 3 of this text concerning development and implementation of a group insolvency solution through a planning proceeding either in the enacting or a foreign State. Subparagraphs (e) and (f) expand upon subparagraphs (c) and (d) of article 1 of the Model Law.

3. With respect to subparagraph (f), it might be noted that although article 1 of the Model Law refers to creditors and other interested persons commencing or participating in local proceedings, the operative articles of the Model Law only provide access to commence and participate in such proceedings for foreign creditors (e.g. art. 13); the interests of interested persons are to be taken into account with respect to relief (art. 22). In other words, although interested persons are referred to in the scope provisions of the Model Law, they are not included in the substantive articles referring to matters mentioned in those scope provisions. The Working Group may wish to consider the application of subparagraph (f) in this draft text in the light of those observations.

4. Revisions or additions to the draft article might be required, depending on the Working Group's decisions with respect to the articles in chapters 4 and 5 of the draft text, as noted above in note [1]; it may be appropriate to develop a separate scope article for part B (noting the comments in paras. 5-7 of the general drafting notes above with respect to the content of part B).

5. Paragraph 2 is based upon principles 1 and 1 bis of the previous draft of this text (A/CN.9/WG.V/WP.137/Add.1), which the Working Group agreed should be retained and redrafted as articles for future consideration (A/CN.9/870, para. 13). The redrafting focuses on the type of provision that could be included in a model law to be proposed for enactment in a particular State and how the limitations would apply in the enacting State; the drafting of the principles was more universal and potentially unsuitable for inclusion in a model law. In subparagraph (c), a reference to the law of the enacting State has been added to the drafting of the principle to clarify the connection between that State and the enterprise group member referred to.

Article 2. Definitions

[3] The definitions of “enterprise”, “enterprise group” and “control” from part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) are included for the information of the Working Group, as agreed at the forty-fifth session (A/CN.9/803, para. 16); if not required in the final text on the basis of the form the Working Group concludes it should take (e.g. if it is to be a part of the Model Law), they can be deleted.

[4] The definition of “enterprise group member” reflects the drafting supported by the Working Group at its forty-ninth session (A/CN.9/870, para. 14).

[5] The definition of “group representative” also reflects the drafting supported by the Working Group at its forty-ninth session (A/CN.9/870, paras. 16-17). The words “and implementing” have been added, as indicated above in the general drafting notes.

Subparagraph (f)

[6] 1. The word “developed” in the chapeau of subparagraph (f) replaces the word “adopted” for reasons of consistency with the usage indicated in the general drafting note; the proposals are not so much adopted as developed in a planning proceeding.

2. Subparagraph (f)(iii) refers to matters that are not strictly definitional in nature, but rather operative i.e. it doesn’t describe what a group insolvency solution is, but rather anticipates the manner of its approval. The substance of that subparagraph is currently addressed in draft article 20. The Working Group may wish to consider whether it should be retained in the definition.

Subparagraph (g)

[7] 1. The current revision of the definition of “planning proceeding” reflects the preference of the Working Group at its forty-ninth session (A/CN.9/870, para. 19) for variant 2 of the previous text (A/CN.9/WG.V/WP.137/Add.1, art. 2, subpara. (g)). “Main proceeding” would be defined in accordance with article 2(b) of the Model Law: “[Foreign] main proceeding’ means a [foreign] proceeding taking place in the State where the debtor has the centre of its main interests”. Consideration might be given as to whether a definition is required in this draft text (see note [3]).

2. A question that may arise with respect to a planning proceeding is whether that proceeding: (i) is commenced as a planning proceeding; or (ii) becomes a planning proceeding when other group members decide to participate and a group representative is appointed; or (iii) both (i) and (ii) are possible. That issue might be clarified in the drafting or in a guide to enactment.

Chapter 2. Cooperation and coordination

Article 3. (9) Cooperation and direct communication between a court of this State and foreign courts, foreign representatives [and a group representative]

[8] 1. The proposal relating to the structure of this draft text (A/CN.9/864, para. 18) was that it should consist of various chapters, some of which might be regarded as core (chapters 2, 3 and 4) and others as optional (chapter 5). Chapter 2, which is based upon the recommendations of part three, chapter III of the Legislative Guide, might be enacted to improve cooperation and coordination in cross-border insolvency proceedings, in two situations: (i) where a group solution is being developed; and (ii) where there is no group solution, but cooperation and coordination would nevertheless be useful in the conduct of multiple group-related proceedings (see note [2.1] above).

2. As currently drafted, the reference at the beginning of article 3, paragraph 1 to the matters referred to in article 1 may enable the provision to be used in both of the above circumstances. There may be no need to include the references to the development and implementation of a group insolvency solution, e.g. at the end of paragraph 1, as that may serve to narrow the scope of the cooperation provisions. To accommodate the situation where a group solution is to be developed, however, the references to a group representative might be retained, but with the qualification

“where appointed” added. This proposal is reflected throughout the draft text. That approach might be explained in a guide to enactment.

[9] 1. Variant 1 of paragraphs 1 and 2 of this article reflects the drafting of the previous version of the text (A/CN.9/WG.V/WP.137/Add.1).

2. Variant 2 of paragraphs 1 and 2 proposes drafting that omits specific reference to a group solution on the basis that it is covered by the reference to draft article 1. A guide to enactment might point out the relevance of these provisions where a group solution is to be developed and implemented. It might be indicated with respect to paragraph 2, for example, that the information or assistance sought may relate, in particular, to the development and implementation of a group solution, including the roles of the different courts with respect to implementation.

Article 4. (10) Cooperation to the maximum extent possible under article 3

Subparagraph (f)

[10] Since it refers to matters addressed in draft article 21, subparagraph (f) may need to be aligned with whatever decision is taken with respect to draft article 21, in particular the application of that article in circumstances where there is no planning proceeding, or it may need to be deleted.

Subparagraph (g)

[11] Although proposed at the forty-ninth session (A/CN.9/870, para. 21), there was no agreement to delete the words at the end of paragraph (g) “to facilitate the development and implementation of a group insolvency solution”. However, on the basis of the observation in note [8] above that these provisions might also have application in situations where a group solution is not to be developed, those words at the end of variant 1 of subparagraph (g) might be deleted to broaden the application of the draft article, without losing the essence of the provision. As an alternative, language along the lines of that proposed in draft article 9 might be adopted, as reflected in variant 2.

Article 5. (12) Effect of communication under article 3

[12] Support was expressed at the forty-eighth session (A/CN.9/864, para. 23) in favour of both deleting and retaining draft article 5, but it was ultimately agreed that it should be retained in the text for further consideration. Since no decision was made at the forty-ninth session (A/CN.9/870, para. 22), it remains in the draft text.

Subparagraph (a)

[13] A query was raised at the forty-ninth session as to the meaning of the word “compromise” in the draft article (A/CN.9/870, para. 22). The draft text of subparagraph (a) is based upon recommendation 244 of the Legislative Guide, part three. From the context of that recommendation, it is clear that the word “compromise” refers to a compromise of the court’s powers. To remove any possible confusion as to the meaning of that word in this draft text, it is suggested that the order of the words be reversed, as indicated.

Article 6. (13) Coordination of hearings

[14] In response to an observation at the forty-ninth session (A/CN.9/870, para. 23), it may be recalled that an explanation of this draft article is provided in the Legislative Guide, part three, chap. III, paras. 38-40. It is noted, in particular, that coordination of hearings might include a joint hearing. That material could be included in a guide to enactment of this draft text.

Article 7. (14) Cooperation and direct communication between a group representative, foreign representatives and foreign courts

[15] Article 7, as drafted, applies in the context of the development and implementation of a group insolvency solution in the enacting State. It addresses neither the situation where a group solution is being developed in another State and cooperation by local insolvency representatives of group members might be desirable nor the situation where no group solution is being developed, but cooperation between proceedings concerning group members is desirable. Draft article 7 bis aims to address these additional situations to complement the scope of article 7.

Article 8. (15) Cooperation to the maximum extent possible under articles 7 [and 7 bis]

Subparagraph (b)

[16] The words at the end of subparagraph (b) of variant 1 might be deleted to broaden the application of the draft article, as discussed above in note [11], without losing the essence of the provision. As an alternative, language along the lines of that proposed in draft article 9 might be adopted, as reflected in variant 2.

Subparagraph (c)

[17] The drafting of subparagraph (c) might be broadened to provide for allocation of responsibilities between a person appointed in the enacting State, a foreign representative and a group representative, where one has been appointed.

Subparagraph (e)

[18] Draft article 8, subparagraph (e) might be qualified by addition of the words “where applicable”.

Article 9. (17) Authority to enter into agreements concerning the coordination of proceedings

[19] The wording of draft article 9 might be broadened, as indicated in variant 2, in line with recommendation 253 of part three of the Legislative Guide to facilitate its use where no group solution is being developed (see notes [11] and [16] above). Reference to a group solution might also be retained, as indicated at the end of the variant.

Article 10. (18) Appointment of a single [or the same] insolvency representative

[20] 1. This draft article has been revised in accordance with the discussion at the forty-ninth session (A/CN.9/870, para. 27). Although the words “where a group

insolvency solution is being developed” have been retained, the Working Group may wish to consider whether (and how) this article could apply in the context of a group solution. To some extent, the appointment of a group representative may reduce the desirability of appointing a single or the same insolvency representative to different group members, particularly with respect to those participating in the development of a group solution. The article may, however, be relevant where no group solution is to be developed. For that reason, the words “where a group insolvency solution is being developed” might be omitted.

2. The drafting of article 10, paragraph 2 may need to be reconsidered in so far as it purports to establish requirements applicable in multiple States, rather than focusing on what should occur under the law of the State enacting this text. Providing, for example, that the insolvency representative is subject to the supervision of each appointing court in different States may be a matter that is difficult to regulate through the law of one enacting State.

Chapter 3. Conduct and recognition of a planning proceeding

Article 11. (B) Participation by enterprise group members in an insolvency proceeding under [identify laws of the enacting State relating to insolvency]

Paragraph 1

[21] 1. It may be appropriate to consider whether the reference to “solvent” and “insolvent” group members might be deleted, so that article 11 would focus simply on the participation of “other group members” to avoid the drafting complexities of explaining or defining, in particular, what constitutes an “insolvent” group member. The Working Group may recall that that word is used sparingly, if at all, in the Legislative Guide, where the focus is upon the debtor for which insolvency proceedings can and have commenced under the relevant commencement criteria (recommendations 15 or 16). The phrase used in part three of the Legislative Guide to describe group members that are not solvent is those “subject to insolvency proceedings”. While that phrase could be used in this draft, it is implied by draft article 1, subparagraph 2(c) and articles 21 and 22 that insolvency proceedings may not necessarily be commenced for some group members participating in a planning proceeding, even though they might otherwise be eligible for such commencement (this is particularly the case where so-called “synthetic proceedings” are used). If the word “insolvent” is to be retained, a definition might be helpful to explain what is intended.

2. The general principle of draft article 11, paragraph 1 could be that all types of group member might participate in the development of a group solution where they are relevant to that solution (and are not precluded from doing so). The guide to enactment could explain that broad application, without distinguishing between solvent and “insolvent” members. It could also explain that participation by solvent group members would be entirely voluntary on the basis described in part three of the Legislative Guide (rec. 238 and associated commentary), and that solvent group members would not be subject to other provisions of the draft text, for example, those on relief.

Paragraph 2

[22] 1. Variants 1 and 2 of paragraph 2 respond to a request to the Secretariat at the forty-ninth session to reconsider the drafting of that paragraph in the light of the discussion (A/CN.9/870, paras. 28-29). The relevance of the drafting of article 10 of the Model Law might be noted, albeit that it covers a slightly different situation:

“The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.”

2. For the reasons noted above, the word “insolvent” in paragraph 3 might be omitted, however some explanation may be required with respect to how this provision would operate with respect to solvent group members, whose decision to participate would be an ordinary business decision and would not require the agreement, for example, of creditors, unless required by applicable company law.

Article 12. (B) Appointment of a group representative

[23] 1. This draft article was previously paragraph 3 of draft article 11. Although closely related to draft article 11, it possibly warrants a separate article and has thus been included as draft article 12. At its forty-ninth session, the Working Group agreed to retain both variants for further consideration (A/CN.9./870, para. 30). It might be noted that this draft article overlaps with draft article 18 (see note [45]).

2. The proceeding referred to in article 11 becomes a planning proceeding once a group representative has been appointed. It may be appropriate to include a statement or note to that effect in draft article 12, since the text subsequently refers to “planning proceedings” (see note [7.2] above).

[24] 1. The Working Group may wish to consider the nature of the proceedings in which the group representative is being authorized to participate under draft article 12: is it limited to a “foreign proceeding” as defined in the Model Law, or should it include other proceedings in which the group member is a party (reflecting the idea of article 24 of the Model Law)? It might be noted that the outbound authorization provided by article 5 of the Model Law refers only to the insolvency representative being authorized “to act” in a foreign State on behalf of a proceeding under the law of the enacting State, as permitted by the applicable foreign law. By way of comparison, and noting that the following provisions of the Model Law apply only following recognition of a foreign proceeding (an inbound application), the word “participate” is used in article 12 of the Model Law to refer to participation (following recognition) by the foreign representative in local insolvency proceedings, as opposed to the word “intervene” in article 24, which refers to intervention (following recognition) by the foreign representative in any local proceeding in which the debtor is a party. The meaning of those two words is explained in the Guide to Enactment and Interpretation of the Model Law (paras. 100-102 and 168-172).

2. If the drafting is intended to authorize the group representative to act in a foreign State in accordance with what is permitted by foreign law, that intention could be reflected in whichever variant the Working Group prefers. Further detail may be provided in draft article 18 (see note [45]).

Article 13. (D) Relief available to a planning proceeding

[25] 1. The Working Group requested the Secretariat to consider whether articles 13, 15 and 17 could be rationalized. Before doing so, the Secretariat considered the overall structure of the relief provisions. As currently drafted, a goal of the relief in this draft text is to facilitate conduct of the planning proceeding and the development and implementation of a group insolvency solution.

2. There are several issues that might be considered, including the relief that should be available to support the development of a group solution and the States in which it might be required.

3. As to the first issue, the relief that should be available would include: (a) relief to support the development of a group solution in the planning proceeding State; (b) relief to support recognition of the planning proceeding and development and implementation of a group solution. The relief might thus be granted: (a) in the State in which the planning proceeding is pending, or (b) in another State, which might include the State in which a relevant group member has its COMI or an establishment and a third State in which that group member has assets. That relief might cover assets and operations of: (a) group members subject to the planning proceeding, and (b) group members participating in the planning proceeding.

A. State in which relief might be granted

(a) In the planning proceeding State

4. As indicated above, relief ordered in the State of the planning proceeding might cover both: (a) the group member (or members) subject to the planning proceeding (in other words, the proceeding that becomes the planning proceeding was commenced with respect to that group member or members); and (b) the group member or members, whether foreign or local, participating in that proceeding.

5. As currently drafted, relief relating to (b) is addressed by draft article 13, and could be sought by the group representative, presumably in so far as the group member in question has assets or operations in the State of the planning proceeding that could be subject to the relief sought and the relief granted was not contrary to the law of the State of the centre of main interests of that group member (as required under draft art. 13, para. 2) or incompatible with relief granted in insolvency proceedings taking place in that State, whichever drafting option is appropriate in draft article 13, paragraph 2. The application of the relief provisions to foreign participating group members under this article may need to be aligned with draft article 11, paragraph 2 concerning application of the law of the planning court to participating group members.

6. Relief relating to (a) would be addressed by the insolvency law of the planning proceeding State and may not need to be addressed in this draft text.

(b) In a foreign State

7. If the structure of the Model Law is to be maintained, relief might be available in a foreign State following an application for recognition of a planning proceeding in that State (interim relief) (addressed by draft article 15) and following recognition of that proceeding (currently addressed by draft article 17). It might cover the assets and operations located in that State of a group member subject to

the planning proceeding, as well as any assets and operations of participating group members located in the foreign State (based upon centre of main interests, establishment or the presence of the assets). As currently drafted, article 13 might also cover those participating group members, as it is not specific as to which court it refers to — the planning proceeding court or the foreign recognizing court.

8. Given the complexity of these different situations, it is difficult to see how the different types of relief can be drafted in a single article. Separate articles might therefore be maintained, but some degree of rationalization might be achieved to the extent the specific relief sought is the same or similar in each case. Draft article 13 might set out the types of relief available to the planning proceeding. Draft articles 15 and 17 could then refer to the elements of draft article 13 that might apply and to any other relief that should apply in the situations they refer to. Interim relief, for example, is likely to be more restricted than the relief available under article 13, while relief under article 17 might make reference to extension of the relief granted under article 15.

9. Consideration may need to be given as to whether additional articles might be required to address issues of coordination of relief between the different proceedings, along the lines of article 29 of the Model Law.

B. Assets and operations in respect of which relief might be granted

10. While the first optional text in the chapeaus of articles 13, 15 and 17 focuses solely on the development of a group insolvency solution, the second option (which may be more broadly applied) includes references to different group members — article 13 refers to protecting the assets of group members “participating” in a planning proceeding and article 15 refers to protecting the assets of group members “subject” to a planning proceeding, while article 17 simply refers to protecting the interests of “the” group member; the latter would presumably refer only to the group member subject to the planning proceeding that has been recognized, but that would need to be clarified.

11. It might be noted that the recognizing court may be in a position to order relief with respect to both a group member subject to the planning proceeding that has assets or operations in the recognizing State, as well as one participating in the planning proceeding, if that group member has its centre of main interests (or an establishment or assets and operations) in the recognizing State. Resolving the issue of consistency might not be needed if the first optional text is preferred, although that raises in turn the issue of the scope of the draft text.

Paragraph 1, chapeau

[26] Use of the word “insolvent”: the use of that word in draft article 13, paragraph 1 may be slightly problematic, for the reasons outlined above in note [21]. It may suggest only that those group members cannot be considered to be solvent, but not necessarily that they are subject to insolvency proceedings in any State. It may also suggest that, in so far as that usage is consistent with part three of the Legislative Guide, those participating group members are subject to insolvency proceedings that are probably taking place in another State (if they were taking place in the planning proceeding State, we can perhaps assume those group members would be “subject” to the planning proceeding following procedural

coordination under part three of the Legislative Guide — see principle 5, note [60]). If the word “insolvent” were to be omitted, the draft article may need to clarify that it is not intended to apply to solvent group members participating in the planning proceeding under article 11, along the lines of the drafting suggested in square brackets.

Subparagraph 1(c)

[27] It may be desirable to add further language to clarify which proceeding or type of proceeding subparagraph 1(c) refers to i.e. the planning proceeding or other proceedings (whether relating to insolvency or some other cause of action) that might be taking place in the enacting State with respect to participating members. If the proceedings are under the insolvency law, the words “under [*identify laws of the enacting State relating to insolvency*]” might be added.

Subparagraph 1(g)

[28] Subparagraph 1(g) reflects the relevant subparagraphs of the previous draft articles on interim relief and relief following recognition (A/CN.9/WG.V/WP.137/Add.1 — art. 6, subpara. 1(d) and art. 7, subpara. 1(h)) and includes the reference to safeguards approved at the forty-ninth session (A/CN.9/870, para. 41)). The guide to enactment might note that the funding entity could be another member of the same group.

Paragraph 2

[29] 1. The language of draft article 13, paragraph 2 is based on a decision at the forty-ninth session (A/CN.9/870, para. 34). The report includes the observation that in the event of a conflict between an order issued by the court of the planning proceeding and an order issued by the State in which the affected debtor had its centre of main interests, the practical solution could be that the court of the centre of main interests, under draft article 14, could decline to recognize or enforce the order issued in the planning proceeding. Such an approach, it was suggested, would preserve the pre-eminence of the centre of main interests principle as reflected in draft article 1, paragraph 2.

2. As noted above in note [25.9], it may be appropriate to consider including an article along the lines of article 29 of the Model Law, which specifically addresses consistency of relief between different proceedings, balancing the main proceeding and the local proceeding, to achieve certainty and clarity as to how the relief granted in different States is to be treated.

3. The Working Group may wish to consider whether the incompatibility referred to in draft article 13, paragraph 2 should be to the law of the foreign State or to relief granted in the insolvency proceedings taking place in that State; the latter issue may be of a different character and might need to be the subject of a separate article.

Article 14. (3) Recognition of a planning proceeding

Paragraph 1

[30] 1. The words “in this State” were included in the previous draft of this text (A/CN.9/WG.V/WP.137/Add.1).

Subparagraph 2(a)

[31] With respect to subparagraph 2(a), see note [7.2] on the issue of when a proceeding becomes a planning proceeding. For that reason, the draft article might use the words “proceeding designated as a planning proceeding” or some other formulation, rather than “commencing the planning proceeding”.

Subparagraph 3(a)

[32] Subparagraph 3(a) reflects drafting suggestions made at the forty-eighth session (A/CN.9/864, para. 33(a)), modified in accordance with suggestions made at the forty-ninth session (A/CN.9/870, para. 37). While the Working Group agreed to retain variant 1 of the previous text (A/CN.9/WG.V/WP.137/Add.1, art. 3), as drafted it is potentially inconsistent with draft article 11, paragraph 3, which refers to preclusion from participation, rather than specifying a requirement for approval to participate. The Working Group may wish to reconsider the drafting.

Subparagraph 3(b)

[33] Subparagraph 3(b) was included in the previous draft of article 14 (A/CN.9/WG.V/WP.137/Add.1, art. 3), but since no comment was made on it at the forty-ninth session, it remains in square brackets.

Subparagraph 3(c)

[34] Subparagraph 3(c), proposed at the forty-ninth session (A/CN.9/870, para. 37(c)), includes suggested drafting to clarify the group member to which it applies i.e. a group member subject to the planning proceeding. The Working Group may wish to consider whether the reference to overall combined value should be to the group as a whole or to the group members involved in the planning proceeding, noting that the definition of “group insolvency solution” refers to the overall combined value of the group members involved in the group insolvency solution (see also subpara. (e) of the Preamble).

Article 15. (6) Interim relief that may be granted upon application for recognition of a planning proceeding

[35] Draft article 15 has been redrafted in accordance with the proposal set forth in note [25] above.

Paragraph 1

[36] The optional drafting in square brackets in paragraph 1 of draft article 15 reflects: (i) the chapeau of draft article 13; and (ii) the chapeau of article 19 of the Model Law. If the second optional text is preferred, an issue to be considered is whether the chapeau should also refer to those group members participating in the planning proceeding that may also have assets in the recognizing State.

[37] The Working Group may wish to consider which subparagraphs of draft article 13, paragraph 1 should be available as interim relief. It may be recalled that article 19 of the Model Law includes the equivalents of subparagraphs (a), (b), (e), (f) and (h) of article 13, paragraph 1.

Paragraph 4

[38] The optional drafting in square brackets at the end of paragraph 4 (which was added at the forty-eighth session (A/CN.9/864, para. 36(e)) may need to be aligned with the text determined to be appropriate in draft article 13, paragraph 2, which refers to the issue of incompatibility of relief (see note [29.2 and 3]).

Article 16. (5) Decision to recognize a planning proceeding

[39] and [40] 1. There is neither a public policy exception nor an article specifying the competent court in the draft text; when the Working Group decides whether this draft text should be part of the existing Model Law or a standalone text, it may be appropriate to consider any additional articles that might be required (or incorporated by reference to the Model Law).

2. In the context of recognition under the Model Law, it might be recalled that article 6 applies to any action governed by the Model Law. Accordingly, it relates not only to the question of recognition, but also to relief, whether interim or discretionary, and any other actions that a court might take under the Model Law. It may be appropriate to consider including a public policy exception in the draft text to the extent it relates to the recognition of foreign proceedings and the granting of relief; to the extent it relates to the conduct of local proceedings, such as a planning proceeding, it may not be relevant.

Article 17. (7) Relief that may be granted upon recognition of a planning proceeding

[41] Draft article 17 has been revised as indicated above in note [25]. The Working Group may wish to specify the relevant subparagraphs of article 13, paragraph 1 and any other relief that should be available following recognition of the planning proceeding.

Paragraph 1

[42] As noted with respect to draft article 15 (note [36]), the optional drafting in paragraph 1 repeats the wording used: (i) in draft article 13; and (ii) in article 21 of the Model Law. It may be appropriate to align whichever drafting is chosen across the three articles i.e. articles 13, 15 and 17.

[43] Subparagraph 1(b) may need to be aligned with draft article 21, paragraph 1 and article 22, paragraph 1, noting that those two articles are intended to apply irrespective of whether a planning proceeding is taking place, or it may need to be deleted.

Paragraph 2

[44] In paragraph 2, it may be helpful to indicate which group member's assets are being referred to — a group member subject to the planning proceeding, one

participating in the planning proceeding or both. It may also be helpful to indicate which creditors are being referred to — the creditors of the enterprise group member alone, or any creditor of any group member within the jurisdiction of “this State”.

Article 18. (D) Participation of a group representative in a proceeding in this State

[45] As noted above (see notes [23-24]), this provision overlaps with draft article 12. If the proceedings referred to in article 18 are insolvency proceedings, the words “[*identify the laws of the enacting State relating to insolvency*]” might be added, as indicated, by way of clarification. The words “in this State” might then be deleted. If this article should be broader to cover both types of proceeding referred to in note [24] (i.e. insolvency proceedings and other proceedings in which the debtor is a party), appropriate wording along the lines of “and intervene in any proceedings in which the group member is a party” might be added.

Article 19. (8) Protection of creditors and other interested persons

[46] There was general support at the forty-eighth session for inclusion of an article along the lines of article 19 as drafted (A/CN.9/870, para. 48). The Working Group may wish to note that draft article 19 may overlap with other articles, including draft article 23, paragraph 2. As currently drafted, this article is based on article 22 of the Model Law and thus applies only in the context of recognition (i.e. to relief under draft articles 15 and 17). The Working Group may wish to consider whether this article would have any application in the context of draft article 13.

Article 20. (E) Approval of local elements of a group insolvency solution

[47] Draft article 20 has been revised to reflect the understanding of the Working Group at its forty-ninth session (A/CN.9/870, para. 49). The article assumes that there is a proceeding underway in the receiving State in which approval of the group insolvency solution can be obtained. The Working Group may wish to consider how approval of the group insolvency solution would be obtained in the absence of such a proceeding, which may be because draft article 21 (dealing with the so-called “synthetic” treatment of creditor claims) applies or for other reasons. The wording of draft paragraphs 1 and 4 anticipates the need to address that issue. One solution to that issue might be to address approval in the context of recognition of the planning proceeding in the States in which approval is required.

2. A further issue that may need to be considered is how the approval procedure will affect any solvent group member participating in the group solution.

Paragraph 1

[48] 1. The definition of group insolvency solution does not address the question of whether a group member must participate in the planning proceeding in order for it to be affected by the group insolvency solution. If the Working Group considers that that should be the case, words such as “[participating in the planning proceeding]” might be added to the chapeau of draft article 20 after the words “affects a group member”. The definition of “planning proceeding” might also require adjustment.

2. Not all of the references to “in this State” might be required in the draft article, as indicated by the use of square brackets.

[49] The reference to “establishment” is included in draft article 20 (paras. 1 and 4) in accordance with a suggestion made at the forty-eighth session (A/CN.9/864, subpara. 48(b)). If retained, the Working Group may wish to consider other articles to which that reference should be added, including the definition of a group insolvency solution.

Paragraph 3

[50] Not all insolvency laws provide that courts play a role in confirmation or implementation of an approved reorganization plan. For that reason, it may be appropriate to indicate that this draft text should adopt the same (or a similar) approach to approval of a group solution as national law takes to the approval of a reorganization plan, rather than including a specific requirement that the court confirm and implement the solution. That possibility is reflected in the drafting.

Paragraph 5

[51] Draft paragraph 5 is based upon principle 8, which the Working Group decided at its forty-ninth session to retain and reassess at a future session (A/CN.9/870, para. 50). If this draft paragraph is to be retained, the Working Group may wish to consider whether it might apply to the approval, as well as the implementation, of the group solution.

Chapter 4. Treatment of foreign claims in accordance with applicable law [51]

[52] No comments of a drafting nature were made with respect to draft articles 21-23 at the forty-ninth session (A/CN.9/870, para. 51).

Article 21. (F) Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

[53] It may be recalled that draft articles 21 and 22 are not limited to cases where a group solution is being developed through a planning proceeding.

[54] 1. A suggestion was made at the forty-ninth session that additional safeguards might be required in draft articles 21 and 22 (A/CN.9/870, para. 51) and that Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the Regulation recast) might provide some guidance.

2. Firstly, with respect to the treatment that creditors might receive as a result of the commitment under draft article 21, paragraph 1 of this text, it may be noted that under article 36 of the Regulation recast the terms of a similar undertaking that may be given by an insolvency representative concern compliance with the distribution and priority rights under the law of the non-main State that creditors would have when the insolvency representative was distributing either assets located in the non-main State or the proceeds received as a result of the realization of those assets.

3. Second, as to safeguards, the Regulation recast (art. 36, para. 5) requires approval of the undertaking by known local creditors in accordance with the rules applicable to approval of a recognition plan in the non-main State. Further detail on the procedure associated with the undertaking and the effect of giving an undertaking are addressed in article 36, paragraphs 6-11.

4. With respect to draft article 20, paragraph 2 of this text, the Regulation recast provides that the court can decline to commence a non-main proceeding if the undertaking adequately protects the general interests of local creditors (art. 38, para. 2). In certain circumstances, it is possible to stay the non-main proceeding for up to 3 months provided suitable measures are taken to protect the interests of local creditors (art. 38, para. 3). An insolvency representative of a main proceeding has a right to be heard on an application for commencement of a non-main proceeding (art. 31, para. 1).

5. The Working group may wish to consider the relevance of this information to the draft text.

Part B

Supplemental provisions

[55] Draft articles 22 and 23 are supplemental components, which would be additional options for a State to enact, and would go a step further than the core provisions in part A, chapters 1-3 and paragraph 1 of article 21.

Article 22. (G) Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

Article 23. (H) Additional relief

[56] The type of additional relief referred to in draft article 23, paragraph 1 is potentially covered by draft article 17. The two articles may need to be aligned.

[57] The cross-reference in draft article 23, paragraph 2 to article 20, paragraph 1 may need to be reconsidered in view of the revision of draft article 20.

Additional issues

Principle 4, paragraph 1

[58] The Working Group was unable to decide whether principle 4, paragraph 1 should remain in the draft text or be deleted or redrafted. It may be covered by article 5 of the Model Law, which provides general authorization to act in a foreign State on behalf of local proceedings (an outbound request). Draft article 1, subparagraph 1(b) of this text refers to assistance being sought in such a situation, but although draft articles 12 and 18 provide equivalent outbound authorization in respect of the planning proceeding, the draft text does not include a substantive equivalent to article 5 for proceedings that are not the planning proceeding. It remains for further consideration.

Principle 4, paragraph 2

[59] 1. There was no agreement on the substance of the principle at the forty-ninth session (A/CN.9/870, para. 31), nor on the question of whether it should be redrafted as a substantive provision.

2. Principle 4, paragraph 2 provides that the planning court can receive a request for recognition of the type referred to in paragraph 1 of this principle i.e., recognition by the planning court of a proceeding taking place at the centre of main interests of a group member, along the lines of article 15, paragraph 1 of the Model Law. That issue is not addressed in this draft text, although it is potentially covered by the Model Law. It may be appropriate to consider the purpose for which recognition might be required and in particular, the relationship between recognition and the planning proceeding.

Principle 5, sentence 2

[60] 1. There was no agreement on either the substance of the principle at the forty-ninth session (A/CN.9/870, para. 31) or whether it should be redrafted as a substantive provision.

2. Principle 5 provides that, for those group members whose centres of main interest are located in the same jurisdiction as the planning proceeding, the recommendations of part three of the Legislative Guide with respect to joint application and procedural coordination could apply. This notion is not addressed in the draft text.
