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Legislative Guide on insolvency Law

Part three: Treatment of enterprise groups in insolvency

Note by the Secretariat

Contents

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I. Introduction

1. This note revises the draft recommendations contained in documents A/CN.9/WG.V/WP.82 and Addenda 1-3 on the basis of the Report of Working Group V on the work of its thirty-fifth session (A/CN.9/666). It does not include the commentary, which is currently being revised and extended and will be available for consideration by the Working Group at its thirty-seventh session.

2. This note includes a number of explanatory notes to the Working Group. They are intended only to explain the changes that have been made to the draft recommendations, to facilitate discussion and to raise questions for consideration by the Working Group; it is not intended that they would form part of the commentary.

3. The numbering of the recommendations now follows on in sequence from the Legislative Guide. Numbers from the previous version of the recommendations (A/CN.9/WG.V/WP.82 and Addenda 1-3) have been retained in square brackets for ease of reference and comparison. Cross-references to recommendations "of the Legislative Guide" have been retained for clarity and readability, but as previously noted (A/CN.9/WG.V/WP.82, para. 2), those words could be deleted in the final text.

II. Glossary

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

(b) "Enterprise": any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;[1]

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

(d) "Procedural coordination": coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct;[2]

(e) "Substantive consolidation": the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate[3] [pooling of the assets and liabilities of two or more enterprise group members to form a single insolvency estate].

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[1] Consistent with the approach adopted [in the *Legislative Guide*] with respect to individual debtors, the focus in this part is upon the conduct of economic activities by entities that would conform to the types of entities described as an "enterprise". It is not intended to include consumers or other entities that would not be governed by an insolvency law pursuant to recommendations 8 and 9 above.

[2] The concept of procedural coordination is explained in detail in the commentary, see above paras. …

[3] For the effects of substantive consolidation and the treatment of security interests, see recommendations 222 and 223 and the commentary at paras. ...

Note to the Working Group

4. An alternative formulation has been included in paragraph (f) for consideration by the Working Group. That formulation uses the word "pooling" rather than "treatment" to more clearly describe the manner in which the assets and liabilities are put together following an order for substantive consolidation.

III. Recommendations

A. Joint application

1. Purpose of legislative provisions

The purpose of provisions on joint application[4] for commencement of insolvency proceedings with respect to two or more enterprise group members is:

(a) To facilitate coordinated consideration of an application for commencement of insolvency proceedings with respect to two or more enterprise group members;

(b) To enable the court to obtain information concerning the enterprise group that would facilitate determination of whether commencement with respect to group members should be ordered;

(c) To facilitate efficiency and reduce the costs associated with commencement of those insolvency proceedings; and

(d) To provide a mechanism for the court to assess whether procedural coordination of those insolvency proceedings would be appropriate.

2. Contents of legislative provisions

Joint application for commencement of insolvency proceedings

199. [1] The insolvency law may specify that a joint application for commencement of insolvency proceedings may be made with respect to two or more enterprise group members that satisfy the applicable commencement standard.[5]

Persons permitted to apply

200. [1] A joint application may be made by:

(a) Enterprise group members that satisfy the applicable commencement standard in recommendation 15 [of the *Legislative Guide*]; or

(b) A creditor provided it is a creditor of each group member that is to be included in the joint application.

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[4] A joint application for commencement does not affect the legal identity of each group member included in the application; each member remains separate and distinct.

[5] See above, recommendation 15, which addresses debtor applications and recommendation 16, which addresses creditor applications.

Competent courts

201. [2] For the purposes of recommendation 13 [of the *Legislative Guide*], the words "commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings" include a joint application for commencement of insolvency proceedings with respect to two or more enterprise group members.[6]

3. Note to the Working Group

5. The words "The insolvency law should indicate that" have been deleted from recommendation 201 on the basis that the text is intended to be an aid to interpretation of recommendation 13 rather than a recommendation for inclusion of a specific provision in the insolvency law.

B. Procedural coordination

1. Purpose of legislative provisions

The purpose of provisions on procedural coordination of insolvency proceedings with respect to two or more enterprise group members is:

(a) To facilitate coordination of the administration of those insolvency proceedings, while respecting the separate legal identity of each group member; and

(b) To promote a better return to creditors and cost efficiency.

2. Contents of legislative provisions

Procedural coordination of two or more insolvency proceedings

202. [3(a)] The insolvency law should specify that the administration of insolvency proceedings with respect to two or more enterprise group members may be coordinated for procedural purposes.

203. [4] The insolvency law should specify that, at the request of a person permitted to make an application under recommendation 206, the court may order procedural coordination.

204. [3(b)] Procedural coordination may involve, for example, joint provision of notice; coordination of procedures for filing of claims in accordance with the insolvency law; coordination of avoidance proceedings; cooperation between the courts, including coordination of hearings; and cooperation between insolvency representatives, including information sharing and coordination of negotiations. [3(a)] The scope and extent of the procedural coordination should be specified by the court.

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[6] The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, paras. ...

Application for procedural coordination

- *Timing of application*

205. [3(c)] An application for procedural coordination may be made at the time of an application for commencement of insolvency proceedings or at any subsequent time.

- *Persons permitted to apply*

206. [4] The insolvency law should specify that an application for procedural coordination may be made by:

(a) An enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings;

(b) The insolvency representative of an enterprise group member; or

(c) A creditor[7] of an enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings.

- *Coordinating consideration of an application*

207. [5] The insolvency law should specify that the court or courts[8] may take appropriate steps to coordinate consideration of an application for procedural coordination of insolvency proceedings concerning two or more enterprise group members. Those steps might include: coordinated and joint hearings; and sharing and disclosure of information.

Modification or termination of an order for procedural coordination

208. [7] The insolvency law should specify that an order for procedural coordination may be modified or terminated, provided that any actions or decisions taken pursuant to the order should not be affected by the modification or termination. [The courts that have ordered procedural coordination may take appropriate steps to coordinate modification or termination of the procedural coordination.]

Competent courts

209. [8] For the purposes of recommendation 13 [of the *Legislative Guide*], the words "commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings" include applications and orders for procedural coordination of insolvency proceedings with respect to two or more enterprise group members.

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[7] To be eligible to make an application for procedural coordination, a creditor does not have to be a creditor of all the group members in respect of which it is seeking procedural coordination.

[8] Coordination might involve different courts competent with respect to different group members or a single court that is competent with respect to a number of different insolvency proceedings concerning members of the same group.

Notice of procedural coordination

210. [9] The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural coordination and modification or termination of procedural coordination, including the scope and extent of the order; to whom notice should be given; the party responsible for giving notice; and the content of the notice.

3. Note to the Working Group

6. Recommendations 202-204 have been revised to reflect the discussion in the Working Group concerning the need for the court to consider procedural coordination on the basis of an application. Draft recommendation 202 is now formulated as a general enabling provision. Draft recommendation 203 provides that the court may order procedural coordination on the basis of an application under draft recommendation 206 and draft recommendation 204 includes some explanation as to what procedural coordination might involve.

7. The Working Group may wish to consider the last sentence, which has been added to recommendation 208 to ensure coordination between the courts throughout the process.

C. Post-commencement finance

1. Purpose of legislative provisions

The purpose of provisions on post-commencement finance for enterprise groups is:

(a) To facilitate finance to be obtained for the continued operation or survival of the business of the enterprise group members subject to insolvency proceedings or the preservation or enhancement of the value of the assets of those group members;

(b) To facilitate the provision of finance by enterprise group members, including group members subject to insolvency proceedings;

(c) To ensure appropriate protection for the providers of post-commencement finance and for those parties whose rights may be affected by the provision of that finance; and

(d) To advance the objective of fair apportionment of the benefit and detriment associated with the provision of post-commencement finance among all group members.

2. Contents of legislative provisions

Provision of post-commencement finance by a group member subject to insolvency proceedings

211. [10] The insolvency law should permit an enterprise group member subject to insolvency proceedings to:

(a) Advance post-commencement finance to other enterprise group members subject to insolvency proceedings;

(b) Pledge its assets as security for post-commencement finance provided to other enterprise group members subject to insolvency proceedings; and

(c) Provide a guarantee or other assurance of repayment for post-commencement finance obtained by other enterprise group members subject to insolvency proceedings, provided the insolvency representative of the member advancing finance, pledging assets or providing a guarantee determines it to be 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 the estate of that enterprise group member. The insolvency law may require the court to authorize or creditors of the lending, pledging or guaranteeing group member to consent.

Priority for post-commencement finance

212. [11] The insolvency law should specify the priority that applies to post-commencement finance provided by one enterprise group member subject to insolvency proceedings to another group member that is subject to insolvency proceedings.

Security for post-commencement finance

213. [12] The insolvency law should specify that a security interest of the type referred to in recommendation 65 [of the *Legislative Guide*] may be granted by an enterprise group member subject to insolvency proceedings for repayment of post-commencement finance provided to another group member subject to insolvency proceedings, provided creditors consent or a determination is made in accordance with the insolvency law that any harm to creditors is offset by the benefit to be derived from the granting of the security interest.[9]

Guarantee or other assurance for repayment of post-commencement finance

214. [13] The insolvency law should specify that an enterprise group member subject to insolvency proceedings may guarantee or provide other assurance of repayment for post-commencement finance obtained by another group member subject to insolvency proceedings, provided creditors consent or a determination is made in accordance with the insolvency law that harm to creditors is offset by the benefit to be derived from the provision of the guarantee or other assurance of repayment.

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[9] Recommendations 66-67 [of the *Legislative Guide*] set forth the safeguards to apply to the granting of a security interest to secure post-commencement finance. Those safeguards would apply to the granting of a security interest in the enterprise group context.

3. Note to the Working Group

8. The Working Group may wish to consider the relationship between draft recommendations 211, 213 and 214 and the standards and provisos currently attaching to each draft recommendation as discussed in the following paragraphs.

9. As currently drafted, draft recommendations 213 and 214 repeat part of draft recommendation 211, i.e. paragraphs (b) and (c). Draft recommendation 211 was intended to state, as a general principle, that a group member subject to insolvency proceedings could advance or facilitate the provision of post-commencement finance to other group members also subject to insolvency proceedings. In addressing the provision of post-commencement finance, the draft recommendation is intended to complement recommendation 63, which addresses the obtaining of post-commencement finance.

10. If draft recommendation 211 is to be retained as a general statement of principle, paragraphs (b) and (c) could be deleted and paragraph (a) amended as follows, where the phrase "facilitating the provision of post-commencement finance" refers to the granting of a security interest or guarantee under draft recommendations 213 and 214:

> 211. The insolvency law should permit an enterprise group member subject to insolvency proceedings to advance or facilitate the provision of post-commencement finance to other enterprise group members subject to insolvency proceedings, provided the insolvency representative of the group member advancing or facilitating the provision of post-commencement finance determines it to be 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 the estate of that enterprise group member. The insolvency law may require the court to authorize or creditors of the member advancing or facilitating the provision of post-commencement finance to consent.

11. A second issue relates to the proviso in draft recommendation 211 and the requirements included in draft recommendations 213 and 214. The proviso in draft recommendation 211 repeats the proviso in recommendation 63, requiring a determination by the insolvency representative as to the necessity of the post-commencement finance. The second sentence points to the possibility that the insolvency law might also require the court or creditors of the member advancing or facilitating post-commencement finance to approve or consent.

12. Draft recommendations 213 and 214 include requirements for creditor consent (it is not specified which creditors are required to consent – the creditors of the advancing or facilitating group member or the receiving group member or both) and a determination as to harm (since it is not specified who should make that determination, it is not clear how it relates to the determination of necessity to be made by the insolvency representative under draft recommendation 211). The Working Group may wish to note that recommendation 65, which is the basis of draft recommendation 213, does not include requirements for creditor consent or a determination as to harm for the granting of the security interest.

13. The requirement for consent in draft recommendations 213 and 214 responds to the possibility raised in the last sentence of draft recommendation 211.

14. What is therefore required under the current drafts of the recommendations in order to provide post-commencement finance is: (a) a determination by the insolvency representative that the post-commencement is necessary (draft recommendation 211) and (b) the consent of creditors or a determination as to harm and benefit (draft recommendations 213 and 214).

15. The Working Group may wish to consider whether the requirements of draft recommendation 211 might need to be aligned with those of draft recommendations 213 and 214. Draft recommendation 211 might include, for example, the requirement for creditor consent or a determination as to harm and benefit as follows:

> 211. The insolvency law should permit an enterprise group member subject to insolvency proceedings to advance or facilitate the provision of post-commencement finance to other enterprise group members subject to insolvency proceedings, provided:
>
> (a) The insolvency representative of the group member advancing or facilitating the provision of post-commencement finance determines it to be 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 the estate of that enterprise group member; and
>
> (b) Creditors of the member advancing or facilitating the provision of post-commencement finance consent; or
>
> (c) A determination is made in accordance with the insolvency law that any harm to creditors is offset by the benefit to be derived from advancing or facilitating the provision of post-commencement finance.

16. That drafting retains the standard of paragraph (a) as the first requirement, with the addition of the standard of either paragraph (b) or (c). Paragraph (c) may be interpreted as including the reference in the second sentence of the previous draft of recommendation 211 (reflecting the second sentence of recommendation 63) to approval by the court. A further alternative might be to combine the determination in paragraph (a) with that of paragraph (c).

D. Avoidance provisions

1. Purpose of legislative provisions

The purpose of avoidance provisions as among enterprise group members is:

(a) To ensure the integrity of the insolvency estates of two or more enterprise group members subject to insolvency proceedings;

(b) To ensure the equitable treatment of creditors of enterprise group members, both internal and external to the group;

(c) To establish clear rules for the circumstances in which transactions occurring between members of the same enterprise group prior to the commencement of insolvency proceedings involving the assets of enterprise group members may be considered injurious and therefore subject to avoidance; and

(d) To facilitate the recovery of money or assets from persons, including group members, involved in transactions that have been avoided.

2. Contents of legislative provisions

Avoidable transactions

215. [14] The insolvency law should specify that, in considering whether a transaction of the kind referred to in recommendation 87 (a), (b) or (c) [of the *Legislative Guide*] that took place between enterprise group members or an enterprise group member and other related persons should be avoided, the court may have regard to the circumstances in which the transaction took place. Those circumstances may include: [the relationship between the parties to the transaction within the enterprise group]; the degree of integration between enterprise group members that are parties to the transaction; the purpose of the transaction; [whether the transaction contributed to the operations of the group as a whole without prejudicing the creditors of the group member or members involved]; and whether the transaction granted advantages to the enterprise group members or other related persons that would not normally be granted between unrelated parties.

Elements of avoidance and defences

216. [15] The insolvency law may specify the manner in which the elements referred to in recommendation 97 [of the *Legislative Guide*] would apply to avoidance of transactions in the enterprise group context.[10]

3. Note to the Working Group

17. Paragraph (d) of the purpose clause has been revised in accordance with the decision of the Working Group to include a reference to both persons and enterprise group members. Draft recommendation 215 has also been revised to include the notion that transactions subject to avoidance in the enterprise group context might be between group members, but also between group members and other related persons. The later type of transaction, especially where the related persons are natural persons such as owners, or directors or other office holders, also has the potential to raise issues particular to enterprise groups. The Working Group may wish to consider whether those revisions should be maintained. A further circumstance, focusing on transactions that benefit the group without prejudice to creditors, has been added to the factors that might be taken into consideration by the court.

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[10] That is, the elements to be proved in order to avoid a transaction, the burden of proof, specific defences to avoidance, and the application of special presumptions.

E. Substantive consolidation

1. Purpose of legislative provisions

The purpose of provisions on substantive consolidation is:

(a) To provide legislative authority for substantive consolidation, while respecting the basic principle of the separate legal identity of each enterprise group member;

(b) To specify the very limited circumstances in which the remedy of substantive consolidation may be available in order to ensure transparency and predictability; and

[(c) To specify the effect of an order for substantive consolidation, including the treatment of security interests.]

2. Contents of legislative provisions

Exceptions to the principle of separate legal identity

217. [16] The insolvency law should respect the separate legal identity of each enterprise group member. Exceptions to that general principle should be limited to the grounds set forth in recommendation 218.

Circumstances in which substantive consolidation may be available

218. [17] The insolvency law may specify that, at the request of persons permitted to make an application under recommendation 221, the court may order substantive consolidation with respect to two or more enterprise group members:

(a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

(b) Where the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and the court is satisfied that substantive consolidation is essential to rectify that scheme or activity.

Exclusions from substantive consolidation

219. [21] The insolvency law may specify that, [in unusual circumstances], the court may exclude specified assets and claims from an order for substantive consolidation.

Application for substantive consolidation

- *Timing of application*

220. [18(b)] The insolvency law should specify that an application for substantive consolidation may be made at the time of an application for

commencement of insolvency proceedings with respect to two or more enterprise group members or at any subsequent time.[11]

- *Persons permitted to apply*

221. [18(a)] The insolvency law should specify the persons permitted to make an application for substantive consolidation, which may include an enterprise group member, the insolvency representative of an enterprise group member or a creditor of any such group member.

Effect of an order for substantive consolidation

222. [19] The insolvency law should specify that an order for substantive consolidation has the following effects:[12]

(a) A [single] [consolidated] insolvency estate is created for those enterprise group members subject to the order;

(b) Claims and debts between group members included in the order are extinguished; and

(c) Claims against group members included in the order are treated as claims against the [single] [consolidated] insolvency estate.

Treatment of security interests in substantive consolidation

223. [20] The insolvency law should respect the rights and priorities of a creditor holding a security interest over an asset of an enterprise group member that is subject to an order for substantive consolidation, unless:

(a) The secured indebtedness is owed solely between enterprise group members and is extinguished by an order for substantive consolidation;

(b) The court determines the security was obtained by fraud in which the creditor participated; or

(c) The transaction granting the security is subject to avoidance in accordance with recommendations 88 [of the *Legislative Guide*] and 215.

Recognition of priorities in substantive consolidation

224. [19(d)] The insolvency law should specify that the priorities established under insolvency law and applicable to individual enterprise group members prior to an order for substantive consolidation should be recognized in substantive consolidation.

Meetings of creditors

225. [19(d)] The insolvency law should provide that, to the extent a meeting of creditors is required by the law to be held subsequent to an order for substantive consolidation, creditors of all consolidated group members are eligible to attend.

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[11] The impracticability of ordering substantive consolidation at an advanced stage of the insolvency proceedings is discussed in the commentary, see above, paras. ...

[12] The effect on security interests is addressed in recommendation 223.

Calculation of suspect period in substantive consolidation

226 (1) [22] The insolvency law should specify the date from which the suspect period with respect to avoidance of transactions of the type referred to in recommendation 87 [of the *Legislative Guide*] should be calculated when substantive consolidation is ordered.

(2) When substantive consolidation is ordered at the same time as commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively should be determined in accordance with recommendation 89 [of the *Legislative Guide*].

(3) When substantive consolidation is ordered subsequent to commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively may be:

(a) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or commencement of insolvency proceedings with respect to each such group member, in accordance with recommendation 89 [of the *Legislative Guide*]; or

(b) A common date for all enterprise group members included in the substantive consolidation, being the earliest of the dates of application for or commencement of insolvency proceedings with respect to those group members.

Modification of an order for substantive consolidation

227. [23] The insolvency law should specify that an order for substantive consolidation may be modified provided that any actions or decisions taken pursuant to the order are not affected by the modification.[13]

Competent court

228. [24] For the purposes of recommendation 13 [of the *Legislative Guide*], the words "commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings" include an application or order for substantive consolidation, including modification of that order.[14]

Notice

229. [25] The insolvency law should establish requirements for giving notice with respect to applications and orders for substantive consolidation and modification of substantive consolidation, including the parties to whom notice should be given; the party responsible for giving notice; and the content of the notice.

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[13] It is not intended that use of the term "modification" would include termination of an order for substantive consolidation.

[14] The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, paras. ...

3. Note to the Working Group

Purpose clause

18. The Working Group may wish to consider the following revisions to the purpose clause. Paragraph (a) of the previous version has been added to paragraph (b) on the basis that while respect for the separate legal identity of each group member is an underlying principle of these recommendations on enterprise group members, it is not, of itself, a purpose of the provisions on substantive consolidation. The previous paragraph (d), which referred to establishing the objective standards and procedures upon which substantive consolidation could be based, has been deleted on the basis that the objective standards are covered by paragraph (b). Paragraph (c) has been added on the basis that it is important to clearly specify the effect of an order for substantive consolidation.

Draft recommendation 217

19. The chapeau has been revised in response to a decision of the Working Group at its thirty-fifth session (A/CN.9/666, paras. 83-84) and to align it with the approach taken in draft recommendation 203 (procedural coordination), making it clear that substantive consolidation is available upon application to the court, where the persons permitted to apply are addressed in draft recommendation 221.

Draft recommendation 218

20. The draft recommendation currently refers to enterprise group members that are engaged in a scheme or other activity as specified. The Working Group may wish to consider whether that requires further explanation in the commentary to make it clear that the activity must be ongoing at the time of the application for substantive consolidation or whether it would also include activity that had taken place in close proximity to the commencement of insolvency proceedings.

Draft recommendation 219

21. This draft recommendation previously referred to orders for partial substantive consolidation, a concept that created some confusion and misunderstanding. The Working Group may wish to consider whether it would be clearer to permit certain assets and claims to be excluded from an order for substantive consolidation, rather than creating what appears to be a second type of substantive consolidation. Although the need for such exclusions might rarely arise, including such a possibility might enhance the flexibility of the recommendations. A discussion of relevant circumstances and examples might be included in the commentary.

Draft recommendation 222

22. Paragraph (a), specifying the creation of a single insolvency estate, has been added to the draft recommendation for greater clarity on the basis that it is a key effect of an order for substantive consolidation. This addition reflects the decision of the Working Group at its thirty-fifth session (A/CN.9/666, para. 88). Paragraph (c) of the previous draft of the recommendation, which referred to recognition of priorities, has been moved to a separate recommendation on the basis that that recognition is not an effect of substantive consolidation, but rather an underlying principle that should be observed.

Draft recommendation 223

23. This draft recommendation establishes the general principle that priorities should be recognized in substantive consolidation. The Working Group may wish to consider the extent to which the requirement to recognize might be qualified by the addition of words such as "as far as possible" (see A/CN.9/666, para. 88).

F. Insolvency representative

1. Purpose of legislative provisions

The purpose of provisions on appointment of insolvency representatives in an enterprise group context is:

(a) [To permit appointment of a single or the same insolvency representative] to facilitate coordination of insolvency proceedings commenced with respect to two or more enterprise group members; and

(b) To encourage cooperation where two or more insolvency representatives are appointed, with a view to avoiding duplication of effort; facilitating gathering of information on the financial and business affairs of the enterprise group as a whole; and reducing costs.

2. Contents of legislative provisions

Appointment of a single or the same insolvency representative

230. [26] The insolvency law should specify that, where the court determines it to be in the best interests of the administration of the insolvency proceedings of two or more enterprise group members, a single or the same insolvency representative may be appointed to administer those proceedings.

Conflict of interest

231. [27] The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members. Such measures may include the appointment of one or more additional insolvency representatives.

Cooperation between two or more insolvency representatives in a group context

232. [28] The insolvency law may specify that where insolvency proceedings are commenced with respect to two or more enterprise group members [and different insolvency representatives are appointed to administer those proceedings], those insolvency representatives should cooperate to the maximum extent possible.[15]

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[15] In addition to the provisions of the insolvency law with respect to cooperation and coordination, the court generally may indicate measures to be taken to that end in the course of administration of the proceedings.

Cooperation between two or more insolvency representatives in procedural coordination

233. [29] The insolvency law should specify that, when more than one insolvency representative is appointed to administer insolvency proceedings that are subject to procedural coordination, the insolvency representatives should cooperate to the maximum extent possible.

Forms of cooperation

234. [30] To the extent permitted by law, cooperation to the maximum extent possible should be implemented by any appropriate means, including:

(a) Sharing and disclosure of information;

(b) Approval or implementation of agreements with respect to division of the exercise of powers and allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating or leading role;

(c) Coordination with respect to proposal and negotiation of reorganization plans, [communication with creditors and meetings of creditors]; and

(d) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; submission and admission of claims; and distributions to creditors.

G. Reorganization plan

1. Purpose of legislative provisions

The purpose of provisions relating to the reorganization plan in an enterprise group context is:

(a) To facilitate the coordinated rescue of the businesses of enterprise group members subject to the insolvency law, thereby preserving employment and, in appropriate cases, protecting investment; and

(b) To facilitate the negotiation and proposal of coordinated reorganization plans in insolvency proceedings with respect to two or more enterprise group members.

2. Contents of legislative provisions

Reorganization plan

235. [31] The insolvency law should permit coordinated reorganization plans to be proposed in insolvency proceedings with respect to two or more enterprise group members.

236. [32] The insolvency law may provide that an enterprise group member that is not subject to insolvency proceedings may [voluntarily] participate in a reorganization plan proposed for two or more enterprise group members subject to insolvency proceedings.