

Update on UNCITRAL

The New Model Law for Enterprise Group Insolvencies

The United Nations Commission on International Trade Law (UNCITRAL) has adopted a new Model Law for Enterprise Group Insolvencies alongside a guide to enactment (the Guide) and a guide for directors of enterprise groups, which was presented by Working Group V (Insolvency) at the General Assembly's 52nd Session in Vienna on 15 July 2019.

The Model Law for Enterprise Group Insolvencies was developed to address a gap in the original Model Law on Cross-Border Insolvency (1997), 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. This gap was highlighted after the collapse of Lehman Brothers in 2008, which involved more than 100 affiliated entities that filed insolvency proceedings in over 16 jurisdictions. The various administrators and trustees of Lehman Brothers' entities entered into a nonbinding protocol to coordinate proceedings and resolve disputes among the estates. The Model Law for Enterprise Group Insolvencies codified the basic principles in the Lehman Protocol of cooperation and communication and built upon these concepts by providing for the development of a group insolvency solution and a procedure to hold planning proceedings among enterprise group entities, post-commencement finance arrangements in the enterprise group context and incentives to minimize the commencement of "non-main" insolvency proceedings.

While it may be possible to treat enterprise group members completely separately and allow them to reorganize or liquidate through their own domestic proceedings, there are certain enterprise groups that operate in such a manner that a more inclusive group-wide solution is appropriate. For these enterprise groups, it may be important for courts and group representatives to communicate and coordinate proceedings both domestically and cross-border. Importantly, the Model Law for Enterprise Group Insolvencies allows court-to-court communications while allowing each court to maintain its independent jurisdiction. This procedure could do away with more time-consuming procedures implemented through diplomatic channels and facilitate the ability of courts to act with urgency when needed.

As noted above, a core innovation in the Model Law for Enterprise Group Insolvencies is the ability to participate in a "planning proceeding" to develop a group insolvency solution. The planning proceeding is intended to be a "main proceeding" (drawing from the definition of a "foreign main proceeding" in the Model Law on Cross-Border Insolvency) where the debtor has its COMI (Center of Main Interests) or where a court with jurisdiction over the main proceeding approves a separate planning proceeding. The law also allows for more than one planning proceeding under certain circumstances, for example, where there are independent units that could be reorganized separately or where different plans are required for different parts of the enterprise group. Moreover, a group insolvency solution is intended to be a flexible concept in that it could be achieved in a variety of ways. The Guide explains that such a solution could include a reorganization, a sale as a going concern of part or all of the business, a sale of assets, or a combination of a liquidation and reorganization of members of the enterprise group. Article 20 of the Model Law for Enterprise Group Insolvencies provides a non-exhaustive list of types of relief that are typical for insolvency proceedings and may be needed to facilitate the development of an enterprise group solution. There are some limitations to the relief available that specifically are designed to protect the interests of enterprise group members with assets in the jurisdiction of the planning proceeding and, more generally, to protect the interests of creditors and other interested parties.

The Model Law for Enterprise Group Insolvencies also seeks to minimize the opening of "non-main" proceedings for all of the enterprise group members by providing for 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, where appropriate. These

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mechanisms have been referred to as “synthetic” proceedings, where the claims of a foreign creditor are accorded the same treatment in a main proceeding as it would have received in a foreign “non-main” proceeding under applicable law, were such proceeding to commence. These “synthetic” proceedings allow for the centralized treatment of claims and alleviate the need to commence multiple “non-main” proceedings.

Although some measures of the Model Law for Enterprise Group Insolvencies are similar to relief that can be found in the Model Law on Cross-Border Insolvency, the focus of the Model Law for Enterprise Group Insolvencies is on managing and coordinating the specific needs of insolvency proceedings affecting multiple enterprise group members, as opposed to a single debtor seeking recognition in multiple jurisdictions. The Model Law for Enterprise Group Insolvencies has been drafted as a stand-alone text to enable it to be adopted without first having to adopt the Model Law on Cross-Border Insolvency, but it is designed to be incorporated into and complement the Model Law on Cross-Border Insolvency and the Model Law on the Recognition and Enforcement of Insolvency-Related Judgements (2018), which was adopted by UNCITRAL in 2018.

In addition to finalizing the Model Law for Enterprise Group Insolvencies and recently enacting the Model Law on the Recognition and Enforcement of Insolvency Related Judgments, Working Group V has continued to develop guidance on micro and small enterprise insolvencies. Prior to the UNCITRAL General Assembly meeting, the Working Group held a session to discuss the development and future work on this important project. Finally, the UNCITRAL General Assembly has approved the request of Working Group V to hold a colloquium on (i) the proposal for future work put forward by the United States for the development of model legislative provisions on civil asset tracing and recovery and (ii) the proposal for future work put forward by the European Union on harmonizing applicable law in insolvency proceedings. The next meetings for UNCITRAL Working Group V are scheduled for 2-6 December 2019 in Vienna and 11-15 May 2020 in New York. The colloquium on civil asset tracing and recovery will take place at the December session, and the colloquium on harmonizing applicable law in insolvency proceedings will take place at the May session.

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