

International Corporate Rescue



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UNCITRAL Adopts the Model Law on Enterprise Group Insolvency

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Synopsis

The United Nations Commission on International Trade Law ('UNCITRAL') has recently adopted the Model Law on Enterprise Group Insolvency (the 'Model Law') alongside a guide to enactment (the 'Guide') and a guide for directors of enterprise groups. The new Model Law addresses the coordination of multiple insolvency proceedings, allows for 'planning proceedings' to develop a group insolvency solution and provides for relief that might be needed when managing and coordinating an enterprise group insolvency. This article discusses the adoption of the model law and outlines its main features.

Introduction

The United Nations Commission on International Trade Law ('UNCITRAL') has adopted the Model Law on Enterprise Group Insolvency (the 'Model Law') 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 2019.²

The Model Law on Enterprise Group Insolvency was developed to address a gap in the original Model Law on Cross-Border Insolvency (1997), which had not foreseen the need to provide for the management and coordination of multiple insolvency proceedings of affiliated companies belonging to a single enterprise group.³ It includes provisions on cooperation and coordination of proceedings, the development of a group insolvency solution, procedures to hold planning proceedings among enterprise group entities and incentives to minimise the commencement of 'non-main' insolvency proceedings.

Although some measures of the Model Law are similar to relief that can be found in the Model Law on

Cross-Border Insolvency, the focus of the Model Law on Enterprise Group Insolvency 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 on Enterprise Group Insolvency 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, which was adopted by UNCITRAL in 2018.⁴

Cooperation and coordination

Cooperation and coordination are core provisions to the Model Law. While it may be possible to treat enterprise group members completely separately and allow them to reorganise 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. The Model Law provides a non-exhaustive list of examples of cooperation, including communication between courts, insolvency representatives and group appointed representatives; coordination of supervision and management of the affairs of the enterprise group; coordination of insolvency proceedings and hearings; the ability to enter into coordination agreements, cost sharing arrangements and simplified dispute resolution mechanisms; and modified claims treatment procedures.⁵ Importantly, the Model Law allows courts to directly communicate and request documents from

Notes

- 1 Kathlene Burke is IWIRC Delegate to UNCITRAL Working Group V (Insolvency).
- 2 Press Release, U.N. Info. Serv. Vienna, UN Commission on International Trade Law concludes 52nd Session in Vienna (July 25, 2019).
- 3 U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Sales No. E.14.V.2.
- 4 U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment, U.N. Sales No. E.19.V.8.
- 5 U.N. Comm'n on Int'l Trade Law, Draft model law on enterprise group insolvency, arts. 9-18, U.N. Doc. A/CN.9/972, Annex (2019).

another court while allowing each court to maintain its independent jurisdiction.⁶ The Guide notes that 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.⁷

Planning proceedings and relief available

The Model Law provides 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 (‘Centre of Main Interests’) or where a court with jurisdiction over the main proceeding approves a separate planning proceeding.⁸ The law also allows for more than one planning proceeding under certain circumstances, for example, where there are independent units that could be reorganised separately or where different plans are required for different parts of the enterprise group.⁹ 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 reorganisation, a sale as a going concern of part or all of the business, a sale of assets, or a combination of a liquidation and reorganisation of members of the enterprise group.¹⁰

Once a planning proceeding is commenced or recognised, the group representative may request the court grant ‘any appropriate relief’ in order to protect or preserve value of an enterprise group member.¹¹ Interim relief is also available where an application for the recognition of a planning proceeding is pending and relief to protect an enterprise group member is urgently needed.¹² The examples of relief listed in the Model Law are typical for insolvency proceedings and include stays, injunctions, discovery and the approval of funding arrangements for enterprise group members.¹³ There are some limitations to the relief available

that are specifically designed to protect the interests of enterprise group members that are not subject to insolvency proceedings or that have their COMI in another jurisdiction and, more generally, to protect the interests of creditors and other interested parties.¹⁴

Incentives to minimise the opening of non-main proceedings – synthetic proceedings

The Model Law also seeks to minimise 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 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.¹⁵ These ‘synthetic’ proceedings may preserve value for the enterprise group by allowing for the centralised treatment of claims and alleviating the need to commence multiple ‘non-main’ proceedings.

Enactment

The Model Law has been adopted by UNCITRAL and is therefore, ready for enactment by any state. However, it is important to note that the enactment by one state does not provide for reciprocal treatment in other states. Consequently, in order for the model law to be useful, it must be enacted widely. This is expected to take time and if the history of the original Model Law on Cross-Border Insolvency is any indication, it may take decades. As it stands, the original Model Law on Cross-Border Insolvency, which was adopted by UNCITRAL in 1997, has only been enacted in 46 States in a total of 48 jurisdictions.¹⁶

Notes

6 *Id.* at art. 9.

7 U.N. Comm’n on Int’l Trade Law, Enterprise Group Insolvency: draft guide to enactment, para. 72, U.N. Doc. A/CN.9/WG.V/WP.165 (2019).

8 U.N. Comm’n on Int’l Trade Law, Draft model law on enterprise group insolvency, art. 2(g), U.N. Doc. A/CN.9/972, Annex (2019).

9 U.N. Comm’n on Int’l Trade Law, Enterprise Group Insolvency: draft guide to enactment, para. 44, U.N. Doc. A/CN.9/WG.V/WP.165 (2019).

10 *Id.* at para. 42.

11 U.N. Comm’n on Int’l Trade Law, Draft model law on enterprise group insolvency, arts. 20 & 24, U.N. Doc. A/CN.9/972, Annex (2019).

12 *Id.* at art. 22.

13 *Id.* at arts. 20, 22 & 24.

14 *Id.* at arts. 20 (2)-(3), 22 (4)-(5), & 24 (3)-(4).

15 U.N. Comm’n on Int’l Trade Law, Enterprise Group Insolvency: draft guide to enactment, para. 192, U.N. Doc. A/CN.9/WG.V/WP.165 (2019).

16 UNCITRAL Model Law on Cross-Border Insolvency – Status, <uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>.

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