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PROSPECTIVE PRINCIPLES FOR COORDINATION OF MULTINATIONAL CORPORATE GROUP INSOLVENCIES

Draft: Multinational Corporate Group Guidelines

By

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Salt Lake City

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GUIDELINES FOR COORDINATION OF MULTINATIONAL ENTERPRISE GROUP INSOLVENCIES

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FOREWORD

One of the greatest challenges in the international insolvency area is to develop systems and structures that will enable and encourage international coordination of insolvencies within corporate groups that carry on business in multiple jurisdictions. The current state of coordination in multinational corporate group insolvencies has improved in recent years but the lack of internationally-approved standards and procedures for coordinating insolvencies of multinational groups is still responsible for the loss of substantial amounts of value to employees, suppliers, creditors and even public revenue authorities through the loss of viable but financially over-committed businesses.

In a typical situation involving financial failure within a multinational corporate group, different types of creditors holding different types of claims with different priorities and operating under different rules in each of the jurisdictions in which the corporate group previously carried on business attempt to take advantage of their particular opportunities to secure whatever advantage they can over other creditors. The result is that the financially-troubled multinational business that once carried on business seamlessly in many different jurisdictions collapses into a series of separate, disconnected administrations which do not have to co-operate with each other and which, in fact, often compete or conflict with each other. In this context, it is easy to conclude that the current structure for dealing with multinational corporate group insolvencies has been designed to *promote* liquidations and insolvencies rather than to save financially-overcommitted businesses. There has been considerable analysis and study of this issue but, a practical solution to the difficulties presented by insolvencies within international corporate groups remains as elusive as ever. It is this unfortunate and largely unnecessary result that the International Insolvency Institute's Committee on International Jurisdiction and Coordination has addressed.

The III's Committee under the dedicated direction of Hon. Ralph R. Mabey as Chair and with Susan P. Johnston as Committee Reporter and with a stellar Advisory Group of III Members has developed a set of *Guidelines for Coordination of Multinational Enterprise Group Insolvencies* ("*Corporate Group Guidelines*").

The III is exploring the adaptability and suitability of the *Corporate Group Guidelines* in all of the 60 countries represented within the III. The objective is to seek an internationally-acceptable consensus on the most appropriate manner and structure by which to deal with insolvencies within multinational corporate groups and, in this way, to protect and enhance the rights and interests of all stakeholders that are involved in or affected by multinational corporate group insolvencies. Considerable effort will be required to develop an international standard for the coordination of multinational group insolvencies but the *Corporate Group Guidelines* represent an exceptionally valuable and constructive basis on which to develop a workable solution that will change international insolvency systems and procedures in this area in a very significant and positive way for the benefit of all stakeholders who are affected by international insolvencies and restructurings.

Bruce Leonard

Chair

International Insolvency Institute

Toronto, May, 2012

TRANSMITTAL

The Committee on International Jurisdiction and Coordination of the International Insolvency Institute developed these Guidelines through the expertise of many contributors.

The Committee's Advisory Group assisted the Guidelines to their completion: Mr. Justice Eberhard Nietzer, The Honorable James Peck, Mr. Justice Jean Luc Vallens, James Bromley, and Dr. Irit Ronen-Mevorach. Dr. Irit Ronen-Mevorach and Mr. Justice Eberhard Nietzer merit particular recognition for their valuable contributions. Dr. Christoph Keller provided extensive commentary demonstrating the viability of the Guidelines in civil law jurisdictions. Professor Jay Westbrook and Dan Glosband spent hours with us considering the Guidelines, providing invaluable insights, comments, suggestions and advice.

From start to finish, Bruce Leonard, Founding Chair of the International Insolvency Institute, provided the animating vision, encouragement and resources behind the Guidelines. We are grateful for the opportunity he afforded us to play a role in the development of these Guidelines.

The Committee submits these Guidelines with the hope that, through the efforts and goodwill of many, they will advance the rescue of multinational enterprise groups for the benefit of all concerned.

May 2012

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INTRODUCTION

The existing cross-border statutory schemes and proposals state common goals for cross border insolvencies: efficient markets, increased certainty for trade and investment, fair and efficient administration to protect the interests of parties, protection and maximization of the value of the debtor's assets, and facilitation of the rescue of financially troubled businesses thereby protecting investment and preserving employment.¹ These regimes assume that the debtor's value is more likely to be maximized if its insolvency is administered from a central location, and they seek to achieve this goal by recognizing unified international jurisdiction over the debtor and its assets, wherever found, in the court of the country in which the debtor's center of main interests, or "COMI", is located.

Despite these shared goals, the international insolvency statutes in existence around the world are not able to resolve many of the problems that arise when multinational enterprise groups fail. No legislation anywhere in the world explicitly governs the insolvencies of multinational enterprise groups, and it is often not possible to find a tribunal that may legitimately exercise in personam or in rem jurisdiction over all affiliates of a corporate group.

Moreover, multinational enterprises, and their failures, are not restricted to the regions of the world that have enacted international insolvency statutes. In general, local insolvency laws do not ensure that the value of the assets of a multinational enterprise are maximized, because they have as their principal purpose the regulation and protection of local concerns. They provide only limited guidance for courts that seek to coordinate with other jurisdictions to maximize values for stakeholders around the world. In the absence of legislative guidance, national courts have struggled to address the fact-specific needs of insolvent multinational enterprise groups, and competing claims for jurisdiction over insolvencies have arisen, putting at risk the fundamental goal of value maximization. Additional tools to achieve cooperation and coordination between courts with jurisdiction over members of multinational groups are needed to facilitate efficient restructuring of viable global businesses.

These Guidelines are intended to apply to an enterprise group with members, operations, assets and employees located in more than one country, which has unified corporate governance, either through common or interlocking shareholding or by contract. They may also provide assistance in coordinating the insolvencies of multinational enterprise groups

¹ See European Council Regulation on Insolvency Proceedings, Council regulation 1346/2000, 29 May 2000, on insolvency proceedings, 2000 O.J. (L160) ("EU Regulations"), Par. 2 of Preamble; 11 U.S.C. § 1501(a). These provisions, which govern all countries in the European Union, track the preamble to the Model Law. See also the Overview to the NAFTA Principles, applicable to Canada, the United States and Mexico, which demonstrate that they are intended to achieve some of the same goals as the EU Regulations within the NAFTA member states: "One of the principal purposes of the NAFTA is to promote trade and investment on a regional basis throughout North America, without regard to national borders. As the EU Regulation recognizes, such a goal requires commercial predictability in the event of financial default and is best served by mechanisms that maximize the value of enterprises in financial distress. Cooperation and coordination in bankruptcy cases across national lines are essential to those goals. Not only will investors be more confident in making investments of debt or equity across national borders when there is a coherent system for managing default, but such a system makes it more likely that companies can be sold or restructured in a way that preserves jobs and community values." p. 7. And see Global Principles for Cooperation in International Insolvency Cases, December 2011, promulgated by the American Law Institute and the International Insolvency Institute (the "Global Principles"). The Global Principles focus on the needs of single debtors with insolvency proceedings in multiple jurisdictions.

whose component parts operate with relative independence. These Guidelines should be acknowledged before the courts or insolvency representatives take decisive action that may have precedential effect within a multinational enterprise's insolvency proceedings.

Courts in civil law countries have less discretion than those in common law countries to adopt or implement guidelines such as these without explicit statutory authority. Even where courts and insolvency representatives are unable to implement these Guidelines as proposed, however, they may endeavour to effectuate the objectives of these Guidelines within the strictures of existing law.²

The forms of cooperation proposed in these Guidelines among courts and insolvency representatives across national borders in multinational enterprise insolvencies fall along a continuum, beginning with forms of cooperation that are possible now under many existing insolvency laws and ranging to forms of cooperation that will require amendment to most existing laws to achieve.

The format followed below first provides definitions that are employed in the Guidelines and Commentary. The definitions are followed by “universal principles,” contained in Guidelines 1-6, which may be employed under many if not most existing insolvency regimes, and which should be applied in all cross-border multinational enterprise insolvencies. Guidelines 7-11 are currently permitted in many insolvency jurisdictions, but not all. Guidelines 12-22 would require amendment of existing law in most if not all jurisdictions, and are, therefore, proposals for legislative reform.

²For example, Model Law Articles 25-27 mandate inter-court transnational cooperation to the “maximum extent possible” and may be read to authorize these Guidelines in appropriate circumstances.

I. Definitions Used in These Guidelines

“Affiliate” means a member of a multinational enterprise group.

“COMI” means the center of main interests of an individual debtor entity, as that expression is used in the Model Law.

Commentary

Although the phrase “center of main interests” is used in both the UNCITRAL Model Law on Cross-Border Insolvency (the “Model Law”) and in the EU Regulation, courts in different jurisdictions have reached different conclusions about the factors and weighting relevant to the identification of an entity’s COMI.³ Professor Westbrook questions whether the U.S. and Europe need to have the same interpretation of this central concept in “Locating the Eye of the Financial Storm,” 32 *Brook. J. Int’l L.* 1019 (2007). But even in several insolvencies involving multinational enterprises within the European Union, competing claims for “main” proceeding status have been made on behalf of members of an enterprise group, leading to several different interpretations of the provisions in Article 3 of the EU Regulation relating to COMI and the meaning and the strength of the presumption that a debtor’s COMI is at its registered office.⁴

Guidelines 1, 4 and 9 use the COMI term in referring to single entities, in recognition of the obligation placed on courts operating under the EU Regulation and the Model Law to determine a debtor’s COMI. The intent of the Guidelines, however, is to urge courts and insolvency practitioners to give overarching emphasis to the Group Center when dealing with multinational enterprise group insolvencies.

³See ECJ, Case C -- 341/04 [2006] ECR I-3813 “Eurofood”; Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 *Columbia Journal of European Law*, 429 (2006); Samuel L. Bufford, “Center of Main Interests, International Insolvency Case Venue and Equality of Arms: The Eurofood Decision of the European Court of Justice,” *Northwestern Journal of International Law and Business* 351, January 2007. Compare: I Mevorach, “Jurisdiction in insolvency - a study of European courts’ decisions”, *Journal of Private International Law*, 2010, vol. 6, No. 2 (showing that the location of the ‘head office functions’ has played a major role in COMI determination by EC Member States’ courts).

⁴Compare, e.g., *Eurofoods IFSC Ltd.*, 2006 ECJ CELEX Lexis 777, 206 ECR I-3813, *Re Daisytek-ISA Ltd. ors.*, [2003] B.C.C. 562, ¶ 14, 2003 WL 21353254 (Ch.D). In *the Matter of Ci4net.com Inc.*, [2005] B.C.C. 277, 2004 WL 2578376, and *BenQ*, discussed in Wessels, *BenQ Mobile Holding BV Battlefield Leaves Important Questions Unresolved*, 20 *Insolvency Intelligence* Nr. 7, August 2007, pp. 103-108. And compare *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff’d* 389 B.R. 325 (S.D.N.Y. 2008) with *In re SPhinX, Ltd.*, 351 B.R. 103, 115, n. 15 (Bankr. S.D.N.Y.2006), *aff’d* 371 B.R. 10 (S.D.N.Y. 2007).

“Court-to-Court Communications Guidelines” means the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases developed by the American Law Institute and International Insolvency Institute.

Commentary

The Court-to-Court Communications Guidelines are reproduced at <http://www.iii.global.org/component/jdownloads/?task=view.download&cid=355>.

“ECJ” means the European Court of Justice.

“EU Regulation” means the European Union Regulation on Insolvency Proceedings, Official Journal of European Communities 160 (June 20, 2000).

“Group Center” means the jurisdiction from which the operations of an integrated multinational enterprise are directed.

Commentary

The purpose in these Guidelines of identifying a Group Center for a multinational enterprise group is to identify the jurisdiction to which other jurisdictions should defer, to the extent permitted by law, on issues of global asset maximization. These Guidelines deliberately do not use the term “center of main interests” of a multinational enterprise group. The drafters believe that it is preferable to avoid use of the COMI term in considering coordination of multinational enterprise group insolvencies for several reasons. First, the purpose of identifying the center of main interests in the EU Regulation is to determine what law will apply to the insolvency proceeding. That is, in the European Union, an insolvency proceeding should be filed where the debtor’s center of main interests is located, and the laws of that jurisdiction apply to the proceeding. COMI has a very different purpose in the Model Law: if a foreign proceeding is taking place where the debtor’s COMI lies, it will be a foreign main proceeding, and if the foreign proceeding arises from a location other than where the debtor’s COMI is located, it will be a foreign non-main proceeding. The distinction between main proceedings and non-main proceedings under the Model Law has to do at least in part with what relief is automatic and what relief must be based on a

separate showing of need. Neither the purpose underlying the COMI concept in the EU Regulation, nor the purpose underlying the COMI concept in the Model Law, is the same as the purpose of identifying a Group Center for a multinational enterprise group.⁵

Second, the term “COMI” does not have universal application and is only used in nations that have adopted either the Model Law or the EC Regulation. Moreover, as the UNCITRAL Working Group V⁶ has concluded, it would be difficult to reach a definition of the COMI of an enterprise, principally because it would be difficult to agree on what it would mean for an enterprise COMI to be identified. It is unlikely to be feasible to enact local legislation that would expect other nations to defer to an enterprise COMI definition made both locally and unilaterally.

It is, however, important to note that many if not most integrated multi-national enterprise groups are controlled centrally, and that cross-border insolvencies of multinational enterprise groups will function more efficiently if they are coordinated under central direction, at least with respect to maximization of global assets.⁷ The concept of a Group Center provides a pathway to the coordination of proceedings involving multiple members of an enterprise group.

Even in the absence of strong central organization, integration and management, an insolvent multinational enterprise may benefit from recognition of a Group Center. In other cases, and in certain jurisdictions, it may be more appropriate to recognize multiple centers, and to maximize value by coordination of multiple proceedings through protocols, either informal or court-approved, rather than through administrative consolidation of those proceedings.⁸

⁵In some cases Group Center and a group COMI might be the same. For example, if members of a group have the same COMI, then there is no difference between the two concepts. Similarly, in practice under the Model Law many group cases are dealt with in a coordinated centralized manner with the court recognizing proceedings against all group members in a single jurisdiction.

⁶Working Group V is the UNCITRAL group that addresses international insolvency law reform. It addressed the matter of enterprise groups in insolvency (2006-2010), and a new addition to the UNCITRAL Legislative Guide will contain recommendations on both the domestic and international aspects of enterprise groups in insolvency.

⁷See the extensive discussion of the nature of enterprise groups in Part Three, B, of the Legislative Guide.

⁸See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, 2010 (“Practice Guide”).

“Group Center Court” means the court with jurisdiction over the debtor(s) in the Group Center.

“Insolvency Representative” means a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate.

Commentary

This definition is taken from the UNCITRAL Legislative Guide. It generally includes a debtor in possession.

“Legislative Guide” means the UNCITRAL Legislative Guide on Insolvency Law.

“Model Law” means the UNCITRAL Model Law on Cross-Border Insolvency.

“Multinational enterprise groups” are those companies established in more than one country which are linked together by some form of control, whether direct or indirect, or ownership, by which linkage their businesses are centrally controlled or coordinated.

Commentary

This definition of a multinational enterprise group is drawn from the Legislative Guide, Part Three: Treatment of Enterprise Groups in Insolvency, and I. Mevorach, “The ‘Home Country’ of a Multinational Enterprises Group Facing Insolvency,” ICLQ Vo. 57, April 2008, p 431.

“NAFTA Principles” means the Principles of Cooperation Among the NAFTA Countries.

Commentary

The goal of the NAFTA Principles was to “develop principles and procedures for managing the general default of an economic enterprise having its center of interests in a NAFTA country and having assets, creditors and operations in more than one NAFTA country.” Apart from Procedural Principles 23 and 24, which address filing a subsidiary’s bankruptcy case in the same forum as the parent and coordinating the cases, and coordination and cooperation in parallel proceedings for parent and subsidiaries, the Principles do not address coordination of a multinational enterprise group.

“Opening of insolvency proceedings” means the earliest practicable occasion in the life of the insolvency case. In those jurisdictions in which a formal judgment is required for proceedings to be opened, the time of opening of the proceedings means the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.

II. Objectives

These Guidelines have the following objectives:

- A. To maximize the value of multinational enterprise groups that are, in whole or in part, in insolvency proceedings in multiple national jurisdictions.
- B. To facilitate reorganization of financially viable businesses.
- C. To facilitate coordination, cooperation and communication among courts with jurisdiction over members of multinational enterprise groups.
- D. To facilitate coordination, cooperation and communication among insolvency representatives for members of multinational enterprise groups.

It is beyond the scope of these Guidelines to address issues of what law should be applied and how distributions to creditors should be made in a multinational enterprise insolvency, although the principles of coordination, cooperation and communication articulated here will often be of assistance to courts and insolvency representatives facing these issues.

III. Central Coordination of Multinational Enterprise Group Insolvencies

Many if not most multinational enterprise groups are controlled centrally, and cross-border insolvencies of multinational enterprise groups will function more efficiently if they are coordinated under central direction.⁹

The Legislative Guide discusses factors relevant to determining the degree of integration of a group, including “the economic organization of the group (e.g., whether the administrative structure is arranged centrally or maintains the independence of the various members, whether subsidiaries depend on the enterprise group for financing or loan guarantees, whether personnel matters are handled centrally, the extent to which the parent makes key decisions on policy, operations and budget and the extent to which the businesses of the group are integrated vertically or horizontally); how the group manages its marketing (e.g., the importance of intra-group sales and purchases, the use of common trademarks,

⁹ See Principle 1 of IBA Committee J Cross-Border Insolvency Concordat: “If an entity or individual with cross-border connections is the subject of an insolvency proceeding, a single administrative forum should have primary responsibility for coordinating all insolvency proceedings relating to such entity or individual;” *see also* Legislative Guide Part 3 p. 17.

logos and advertising programmes and the provision of guarantees for the products); and the public image of the group (e.g., the extent to which the group presents itself as a single enterprise, and the extent to which the activities of the constituent companies are described as operations of the group in external reports, such as those for shareholders, regulators and investors.) Legislative Guide, ¶ 16.

Reorganization or rescue of strongly integrated, centrally managed multinational enterprise groups in financial distress will be more successful with central coordination. Even in the absence of strong central management, a multinational enterprise group may benefit from central coordination. In certain cases, and in certain jurisdictions, it may be more appropriate to recognize multiple centers, and to maximize value by coordination of multiple proceedings either with protocols or, in jurisdictions with appropriate legislation, with statutory coordination and cooperation between courts, rather than through administrative coordination of those proceedings.

The Group Center of multinational enterprise groups with strong integration and central management should be readily ascertainable. Where the group is less integrated, or is organized horizontally rather than vertically, it may not be as easy to ascertain whether there is an appropriate coordination center, and it may not be appropriate in such cases for a single Group Center to direct the insolvency process.

IV. Guidelines for Coordination of Multinational Enterprise Group Insolvencies

The Guidelines fall along a continuum of cooperation and coordination, from simple matters that should be attainable in all cases to more complicated concepts that are to some extent aspirational under existing insolvency laws and that will only be attained to the extent permitted by local law or to the extent that local law is amended. The principles that should have universal application (Guidelines 1-11) are discussed first, followed by those that may or will require legislation to achieve (Guidelines 12-22).¹⁰ It is important that legislators who consider cross-border insolvency issues affecting multinational enterprise groups give consideration to these principles.

UNIVERSAL PRINCIPLES

Notice and Standing Provisions

Guideline No. 1

Upon the opening of insolvency proceedings against, or a petition for relief by or against, a debtor that is an affiliate of a multinational enterprise group, and before the determination of that debtor’s COMI, the debtor’s insolvency representative should:

- a) Identify the affiliates of the debtor who may be claimants in the case;**
- b) Advise the court if any of the affiliates are or may be in their own proceedings and if so in what court; and**
- c) Identify the corporate officers responsible for managing the affiliates.¹¹**

Guideline No. 2

The insolvency representative should give notice of the opening of the insolvency proceeding to all affiliates identified to the court or otherwise known to the representative. Where local law does not require that notice of the proceeding be given to affiliates of the debtor, the insolvency representative should nevertheless ensure that all affiliates or their insolvency representatives receive a form of notice of key events and dates in the proceeding that complies with local notice rules.¹²

¹¹ This Guideline uses the term “COMI” in recognition that courts operating under the EU Regulation and the Model Law are directed to determine a debtor’s COMI. The purpose of the Guideline is to suggest that courts dealing with multinational enterprise group insolvencies should take the nature of the group into consideration when making the COMI determination.

Many civil law countries require the maintenance of public registers (Germany [*Handelsregister*], Austria [*Firmenbuch*], Spain [*Registro Mercantil*] and Italy [*Registro Imprese*]). Further information on commercial registers in EU countries can be found under www.e-justice.europa.eu.

The registers include information about the debtors’ affiliates and the affiliates’ management. As a result, the information required by this Guideline to be ascertained and communicated to the court is generally available to the insolvency representative, and it should be feasible to adopt Guideline 1 in both common law and civil law jurisdictions. Note for example that in Germany under § 22 of the German Insolvency Act, the insolvency representative is required to investigate the identity of affiliates and of corporate officers responsible for managing the affiliates, and to provide that information to the court.

Note that, in civil law countries, insolvency representatives are neither obliged nor entitled to investigate whether affiliates of the debtor are balance sheet or cash flow insolvent, but they may file a petition for the relevant affiliate, resulting in the appointment of an insolvency administrator for that affiliate who will investigate the financial and economic situation of the affiliate.

¹² Local law may permit, if not require, such notice to be given even in the absence of specific direction. For example, the Model Law, Chapter 15 of the United States Bankruptcy Code and the NAFTA Principles all require the debtor or its insolvency representative to provide the courts with updates on related foreign insolvency proceedings. Article 31 of the EU Regulation directs insolvency representatives in main and secondary proceedings to cooperate closely with one another, principally by exchanging information. The Court-to-Court Communications Guidelines suggest methods with which courts may communicate among themselves about cross-border matters. Courts in both civil and common law jurisdictions should accordingly be comfortable with the concept of obtaining and providing such communications. This Guideline No. 2 contemplates that the courts will require such communications even if the debtors or their representatives fail to offer them voluntarily, to ensure coordination between insolvency proceedings involving members of a multinational enterprise group.

Courts with jurisdiction over insolvent multinational enterprise groups located in multiple nation states may wish to consider whether the concepts set out in the NAFTA Principles and the ALI/III Global Principles may be useful, and specifically those guidelines relevant to enterprise groups. The European Communication and Cooperation Guidelines for Cross-border Insolvency, proposed by a group of academics and practitioners, and supported by several judges, may also be helpful, as may the IBA Committee J Cross-Border Insolvency Concordat. The text of the European Communication and Cooperation Guidelines for Cross-border Insolvency is included in an article located at <http://bobwessels.nl/wordpress/wp-content/uploads/2007/09/icr-editorial-oct-07.pdf>. (Continued on pg 15)

Guideline No. 3

To the extent permitted by local law, the court should authorize other affiliates in the enterprise group or their insolvency representatives to be heard on matters that materially affect their rights or interests in the enterprise group.¹³

Guideline No. 4

A court sitting in a jurisdiction that has adopted the Model Law should not decide the COMI of an affiliate in a multinational enterprise group until it has first ascertained the facts relating to the enterprise group's structure, location and solvency, and has heard from authorized representatives of the enterprise group affiliates on the proper location of the enterprise group member's COMI.¹⁴

Some courts, particularly in civil law jurisdictions, may conclude that they are restricted from ordering that notice be given to entities that are not direct parties to the local proceedings filed before them. This Guideline No. 2 addresses what notice insolvency representatives (as opposed to the court) should provide. Courts may wish to consider whether other statutory provisions may justify the provision of such notice. For example, section 5 of the German Insolvency Act directs the court to investigate all circumstances relevant to the proceedings, which could provide support for providing notice to enterprise group members that have no direct standing in the local case. Similarly, various provisions of the EU Regulation may permit a local court to permit practices that are legal in another state with concurrent jurisdiction over the debtor, even if not explicitly authorized in the local state. *See, e.g.*, Article 38.

¹³ Section 1109(b) of the United States Bankruptcy Code confers on a party in interest standing to raise and appear and be heard on any issue in a case under Chapter 11, which governs reorganizations. The term "party in interest" is not defined, but it includes "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder or any indenture trustee." The term is interpreted to include any entity with a direct legal interest at issue in the case. It does not include, for example, investors in a fund that is itself the direct creditor, or an entity that is a secured creditor of a debtor's affiliate. *See In re Refco, Inc.*, 2006 U.S. Dist. LEXIS 85691 (S.D.N.Y. 2006); *In re Newcare Health Corp.*, 244 B.R. 167 (B.A.P. 1st Cir. 2000). These Guidelines do not go so far as to recommend that all parties in interest in one debtor's case be granted standing to appear and be heard in its affiliates' cases. But it would be advisable to confer this kind of party in interest standing on the insolvency representative of the debtor's affiliates, as well as any official creditor bodies.

In civil law countries, while no legal obligation to issue notices is imposed on the court, the officers of the debtor or an insolvency representative, the law does not prohibit such notices to be issued. Furthermore, the court order by which insolvency proceedings are commenced is made public in most civil law countries. In most civil law countries the court order is announced on the internet (*see* for Germany www.insolvenbekaentmachungen.de)

¹⁴ Article 17(c) of the Model Law contemplates that the COMI decision will be made at the earliest possible time. This does not mean, however, that the court must make the COMI decision before it has before it all the relevant facts. In the case of a single debtor, the Model Law authorizes the court to presume that the debtor's COMI lies in the nation with jurisdiction over the foreign proceeding, although this presumption can and has been rebutted. But in the case of a multinational group, the COMI decision for members of an enterprise group, and other initial decisions respecting a member of an enterprise group, should be made on the basis of information, and argument where requested by the court, respecting the member's relationship to the enterprise group, even if no other insolvency proceeding respecting the enterprise group has yet been initiated.

While it is important for all members of the enterprise group to receive notice, the court should exercise its discretion in determining which additional parties should also receive notice. Where more than one insolvency proceeding has been initiated, the court may, where appropriate and where permitted by local law, first defer a COMI decision to afford the parties an opportunity to develop a consensual protocol that addresses jurisdictional and administrative issues.

In civil law countries, as in most common law countries, standing to be heard is generously granted to all parties in interest who believe they have rights and interests in a case. It is not necessary to first obtain a court order granting standing. When ruling on the COMI of a company that is a member of a multinational enterprise group, a civil law court will take into consideration the arguments and opinions presented by affiliates. In particular, German courts, when deciding on the COMI of a member of a multinational enterprise group, is under an obligation to hear its affiliates and/or investigate the circumstances of such companies.

Communications

Guideline No. 5

To the extent permitted by local law, the Court-to-Court Communications Guidelines should be employed to enable courts that have jurisdiction over affiliates in corporate groups that are in insolvency proceedings to communicate with one another.¹⁵

Guideline No. 6

Insolvency representatives should communicate freely and openly with debtors and other insolvency representatives in other nations to ensure cooperation and coordination of multinational insolvencies. Creditors should support such cross-border communications among debtors and insolvency representatives.

¹⁵ The Court-to-Court Communications Guidelines authorize a court to communicate directly with another court or with an administrator in another jurisdiction to coordinate proceedings before it with foreign proceedings. The court may also permit an administrator it has appointed to communicate with a foreign court either directly or through a foreign administrator, for the same goal.

The court may receive communications from foreign courts and foreign administrators, and may respond as appropriate, either directly or indirectly. The court may communicate by sending copies of transcripts, orders or opinions or other documents, by providing notice to parties in interest, by directing counsel or a foreign or domestic administrator to transmit copies of documents, pleadings, affidavits, briefs or other documents filed with the court to the other court, and by participating in telephone or video conference calls, or other electronic means of communication. Court-to-Court Communication Guideline 7 specifies the ways that telephone and video conference calls should proceed, so as to ensure transparency and fairness. It is not intended that these oral communications be *ex parte*; the courts are to ensure that notice is given to parties in interest so that they may participate, and that the calls are transcribed and filed as part of the record in the cases. The Court-to-Court Communications Guidelines also suggest the possibility of jointly conducted hearings between the courts, and specify the mechanisms by which such joint hearings may be conducted. The Court-to-Court Communications Guidelines authorize a court to communicate directly with another court or with an administrator in another jurisdiction to coordinate proceedings before it with foreign proceedings. The court may also permit an administrator it has appointed to communicate with a foreign court either directly or through a foreign administrator, for the same goal. See “The Development of Court-to-Court Communications in Cross-Border Cases,” B. Leonard, 17 JBLP 619 at 625-27, 629.IK. To date, the Court-to-Court Communications Guidelines have been approved by, or adopted in, the National Conference of Bankruptcy Judges, the National Bankruptcy Conference, the Toronto Commercial Court, the Supreme Court of Bermuda, the Supreme Court of New South Wales, the Canadian Judicial Council and the Central District of California (by General Order). They have also been adopted pursuant to protocols approved by courts in a number of jurisdictions. The ALI/III Global Principles also adopt them for global use.

In civil law countries, the insolvency representatives are expected to engage in the kind of communications specified in the Court-to-Court-Communications Guidelines when and as necessary. They do not require a court order authorizing such communications. In Germany, the right and the obligation to communicate with foreign insolvency representatives are derived from the insolvency representative’s obligation to maximize the value of the estate, §§ 159 and 357 of the German Insolvency Act [see *Nerlich/Römermann*, *Insolvenzordnung*, 22th ed. 2011, Article 3 EU Regulations, note 32; *Gottwald/Kolmann*, *Insolvenzrechts-Handbuch*, 4th ed. 2010, § 131 note 178]. In insolvency proceedings governed by the EU Regulations, insolvency administrators are obliged to cooperate and hence communicate under Article 31. Article 31, while only addressing the issue of communication between insolvency representatives, does not prohibit court-to-court communication.

This Guideline, however, may be problematic in civil law countries where insolvency proceedings are non-public proceedings.

Coordination and Protocols

Guideline No. 7

To the extent permitted by local law, the courts should direct, authorize, or permit the debtor or insolvency representative over whom they have authority or jurisdiction to enter into agreements or protocols with other members of the enterprise group to further the objectives of these Guidelines.¹⁶

Guideline No. 8

Where courts are not permitted to authorize or to direct the parties to enter into the agreements or protocols referred to in Guideline No. 7, the debtors, the insolvency representatives or the creditors should, where permitted, initiate development of agreements or protocols to promote the orderly, effective, efficient and timely administration of the cases.¹⁷

¹⁶ The use of protocols is quite common in both civil and common law countries. In civil law countries, however, the protocols represent an agreement between two or more insolvency representatives, without the intervention of the insolvency courts, which are not parties to the agreements. While there is a broad consensus in civil law nations that nothing in the law obliges insolvency representatives to make use of protocols or that enables courts to order insolvency representatives to enter into protocols (for Austria see *Landesgericht Leoben*, order of 31 August 2005 - 17 S 56/05, NZI 2005, 646 “Collins & Aikman”), the insolvency representatives are free to use protocols to facilitate the goal of value maximization (see for example *Wessels/Virgós* (eds.), “European Communication and Cooperation Guidelines for Cross-border Insolvency” [available under www.insol-europe.org], who adopt, in essence, the III standard provided for in the “Guidelines for Court-To-Court-Communications in Cross-Border cases”. On the use of protocols in Germany see *Gottwald/Kolmann*, *Insolvenzrechts-Handbuch*, 4th ed. 2010, § 131 note 180.). The civil law insolvency representative may need the consent of the creditors to enter into the protocol.

In intra-European group insolvencies, Article 31 of the EU Regulation obliges insolvency representatives to cooperate and communicate without specifying the means by which these goals should be accomplished. This provision has been criticized for failing to explicitly impose the same obligations to cooperate and communicate on the insolvency courts, and it is open to debate whether and to what extent courts may have such an obligation. On the application of the III Court-to-Court Communications Guidelines in Germany see *Busch/Remmert/Rünz/Vallender*, *Communications between Courts in Cross-Border Insolvencies: What Does Work and what Does Not*, Norton Annual Review of International Insolvency, Article No. 5, (2012 Edition).

¹⁷ The vitally important contribution that can be made by cross-border protocols in multinational enterprise group insolvencies is laid out in detail in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. Courts and parties in interest should consider protocols as a fundamental and primary tool for facilitating cross-border multinational enterprise group insolvencies. Where courts are not authorized by local law to direct parties to enter into protocols, they may wish to examine the governing laws for authority to permit or encourage the development of protocols.

Protocols may address procedural and administrative issues. They may also reflect consensus concerning the enterprise’s corporate governance while in insolvency proceedings (see discussion below regarding the usefulness of corporate governance protocols in the context of competing coordination center decisions), and they may establish dispute resolution mechanisms. They may reflect agreement among the parties in interest on matters of substance, such as coordination centers, and which courts should exercise jurisdiction over what matters and assets. Finally, they may recite agreement, made either before or after the commencement of proceedings, to submit certain trans-national issues to binding arbitration. The International Insolvency Institute has collected all known cross-border protocols on its website at <http://www.iiiglobal.org/component/jdownloads/?task=viewcategory&catid=574>. See also Practice Guide. Insolvency professionals should consider negotiating protocols with the significant parties in interest before insolvency proceedings are commenced, whenever feasible.

Reference

Guideline No. 9

Where insolvency proceedings have been commenced in different nations by or against more than one member of a multinational enterprise group, to the extent permitted by local law, a court with authority or jurisdiction over a member of the group may consider delaying its decision on the COMI of the member over which it has authority or jurisdiction until the Group Center Court has rendered a decision about the COMI of the enterprise group as a whole.¹⁸

Insolvency Representatives

Guideline No. 10

To the extent not precluded by conflicts of interest, a single insolvency representative should be appointed for all of the cases filed in respect of members of the enterprise group to handle matters in which members of the group have common interests and as to which there are no conflicts of interest among the group members.¹⁹

¹⁸ In civil law countries, the debtor as well as the creditors has a right to speedy court proceedings. Hence, the insolvency court is under an obligation to conduct insolvency proceedings promptly. This goal may conflict with the practice of waiting for foreign court decisions to be made where all of the relevant facts are already before the domestic court.

¹⁹ The common issues that may require a single representative may include procedural matters and may also include efforts to sell assets that cross national borders, if necessary to maximize values for creditors. Generally, determination of claims and distribution of value to creditors will not be appropriately handled by a single representative.

Multinational enterprises groups are by definition subject to centralized control or coordination. Even if multiple insolvency representatives have been appointed to oversee insolvency proceedings in multiple local jurisdictions, it will be beneficial to the preservation of value for the enterprise if a single spokesperson for the enterprise is recognized in all courts with jurisdiction over the component parts of the enterprise group. To be effective in facilitating the development of the protocol, the independent officer should be acceptable to the parties in interest and of a recognized stature in the international insolvency community. It may be advisable for a central listing of persons who have performed this task in the past, or who are widely recognized as capable of performing the task in the future, to be generated and maintained by one or more of the organizations concerned with international insolvencies. Recognition of the standing of such a spokesperson to be heard in all such courts, however, is distinct from a requirement that the national courts defer to a Group Center court, if such deference is contrary to local law.

The Legislative Guide, Part II.B, contains an extensive discussion of the “insolvency representative”, its appointment, role and supervision. In the United States, an insolvency representative, in the form of a trustee, is appointed by the United States Trustee’s office in all Chapter 7 cases, in which the debtor’s assets are liquidated for the benefit of the creditors. In contrast, in reorganization cases in the United States, usually no insolvency representative is appointed, and the debtor’s management is permitted to direct the reorganization proceedings. However, the debtor’s management, including its directors, are charged with a fiduciary duty to maximize the value of the enterprise as a whole for the benefit of all constituents. For that reason, bankruptcy courts in the United States presume that management has a fiduciary duty to the parties with an interest in the bankruptcy estate, and acts with integrity in the reorganization process. Creditors may, however, seek to remove management in favor of a trustee on a showing that management is not acting in accordance with fiduciary standards. On occasion, special chief restructuring officers are appointed from independent professional firms to guide the debtors through their restructurings, whether or not the creditors have experienced a lack of confidence in pre-bankruptcy management. *(Continued on p. 19)*

Guideline No. 11

To the extent not precluded by conflicts of interest, there should be a single officeholder for each other category provided for under the applicable domestic insolvency law. Such officeholders include legal counsel, accountants, restructuring officers, committees of creditors and their professionals, and creditors' representatives (e.g., French law). If local law so provides, any office holder may consist of an entity or several individuals.

Due to their lack of familiarity with the concept of debtors in possession and with the fiduciary duties imposed on management while under the jurisdiction of the U.S. bankruptcy courts, courts in other jurisdictions may be reluctant to permit U.S. debtors in possession that are part of multinational enterprise groups to participate in their proceedings on the same footing granted to an independent insolvency representative appointed by a court. But the criteria for insolvency representatives discussed in the Legislative Guide are very similar in substance to the duties and obligations of debtors in possession. U.S. bankruptcy courts may provide comfort to non-U.S. courts by entering orders acknowledging the equivalence of the debtor in possession with an insolvency representative.

The idea of integrated insolvency of a corporate enterprise group is, generally speaking, alien to civil law jurisdictions. Civil law jurisdictions adhere strongly to corporate entity doctrines and do not employ the concepts of substantive or procedural consolidation that are in some cases used in common law jurisdictions to facilitate restructuring of corporate enterprise groups. But in recognition of the practical demands of corporate enterprise group insolvencies, civil law insolvency practitioners have often interpreted existing statutory insolvency law to facilitate the restructuring of corporate groups.

For example, as a consequence of the entity doctrine, each corporate entity will be dealt with in a separate insolvency proceeding, resulting in the appointment of different insolvency representatives for each member of a group. Civil law practitioners have developed what may be referred to as the principle of personal union, which permits the same individual to be the insolvency representative of every member of a corporate group, in one of two ways. (*Rotstege*, "Konzerninsolvenz", S. 460 ff.). First, the individual may be appointed initially only as insolvency representative of the parent company, in which capacity he may decide how to proceed with regard to the subsidiaries, i.e. whether they also file for insolvency or whether they, being financially sound companies, continue trading as going concerns. If insolvency petitions for the subsidiaries are to be filed, the insolvency representative will urge the court to appoint him as representative of these companies as well. In a second approach, the same individual is appointed from the outset as insolvency representative of all insolvent group companies. This takes place if the individual companies – possibly due to 'domino' or 'rippling' effects throughout the group – make insolvency applications simultaneously or almost simultaneously.

The principle of personal union is widely used in national group insolvencies in civil law jurisdictions. As yet, it has, however, been used only very sparsely in multinational enterprise group insolvencies, because national judges, although not prohibited from appointing foreign individuals as insolvency representatives (for Germany see *Jaeger*, "Konkursordnung", 8th ed. 1973, § 78 note 7; *Paulus*, "Die europäische Insolvenzverordnung und der deutsche Insolvenzverwalter", NZI 2001, 505, 511), are still reluctant to appoint foreign individuals as they fear those individuals may be unable to cope with the legal and lingual requirements of national insolvency administration. The implementation of the principle of personal union in multinational enterprise group insolvency cases will therefore require a higher level of mutual trust across borders.

In the absence of additional legislative measures, the appointment of a single insolvency representative in all group-related insolvency proceedings is likely to be subject to certain difficulties. The prohibition of self-dealing and laws against conflicts of interest in the laws of some civil countries (such as Germany and Austria) prevents a 'group administrator' from representing all affiliates because common representation would require agreements between the individual companies, and the group administrator could encounter debilitating conflicts of interest. In practice, this is resolved by the appointment of an *ad hoc* administrator for certain decisions (referred to in US bankruptcy law as conflicts counsel or representatives). Thereby, certain powers to which the insolvency representative is entitled by virtue of his appointment (e.g. to enter into agreements with group companies) are withdrawn from him and assigned to the special administrator.

ASPIRATIONAL GUIDELINES

Identification of Enterprise Group Center

Guideline No. 12²⁰

In those cases where, before insolvency proceedings were commenced for any members of a multinational enterprise group, the group operated as an integrated enterprise, and international coordination is likely to assist in maximizing the value of assets for all creditors, a Group Center where the coordination center for the enterprise group is located should be identified.²¹

Results and Consequences of Identification of the Group Center

Guideline No. 13

- A. The Group Center is presumptively the proper country for the filing of main insolvency proceedings and for the filing of cases for affiliates of the group over which the Group Center has jurisdiction, regardless of where such affiliates have their registered offices or main places of business.²²
- B. Agreements and protocols should be used to coordinate the insolvency proceedings for any affiliate over whom the Group Center Court is unable to assert jurisdiction.²³

²⁰ In the early part of the last decade, there was a strong tendency in some of Europe's civil law countries to concentrate jurisdiction with one court in group insolvency cases. To this end, the center of main interests of group members was held to be located where the coordination center for the enterprise group was located, thereby rebutting the legal presumption in Art. 3 EU Regulation according to which the center of main interests of a company is presumed to be located where such company has its statutory seat (for Germany see *Amtsgericht München*, order dated 4 May 2004 – 1501 IE 1276/04 “Hettlage”; ZIP 2004, p. 962; for Italy see *Tribunale Civile di Parma*, order of 19 February 2004 – 53/04, ZIP 2004, p. 1220 “Parmalat”; for Hungary see *Municipality Court of Fejér/Székesfehérvár*, order of 14 June 2004 – 9. Fpk. 01–04 – 002916/2 “Parmalat Hungary/Slowakia”).

The ECJ has, however, not adopted this view. In its *Eurofood* decision the court held that the presumption of Art. 3 EU Regulation cannot be rebutted by merely showing that the relevant company is part of a group of companies the center of coordination of which is located in a state other than that in which the registered office of the debtor is located. Following this decision, the suggestion was (and is) made by insolvency practitioners for multinational enterprise groups to transfer their registered offices to the place of the registered office of the parent company. Where this is done on an international basis the term “migration” is commonly used (for Germany see *Weller*, “Die Verlegung des Center of Main Interests von Deutschland nach England,” ZGR 2008, 835, *passim*). Such migration will usually have to take place before the insolvency petition is filed as otherwise the jurisdiction of the court will generally not be effected (*perpetuatio fori*, see *ECJ*, order dated 17 January 2006 - C-1/04m NZI 2006, 153 “Susanne Staubitz-Schreiber”).

²¹ The insolvency representatives should consider this issue as a threshold matter either before or soon after a case is opened. If the insolvency representative concludes that the case is one which would benefit from consolidated administration, it should so advise all courts before whom cases pertaining to members of the enterprise group are pending.

The factors listed below may be relevant in determining (a) whether recognition of a Group Center is appropriate, and if so in what location, or in the alternative (b) whether coordination among courts with jurisdiction over multiple group members is more feasible. Existing local law may prevent consideration of one or more of these factors. These Guidelines are intended to be flexible enough to accommodate existing laws and should not be read to suggest or encourage breach of local law.

- Is there a single location at which high level coordinated economic decisions of the enterprise as a whole are made and from which the enterprise is managed;
- To what extent is there financial or operational integration and interdependence among the members of the group, including the existence of cash management systems, intellectual property licenses that are essential to the global operation, joint borrowing arrangements or cross-guarantee provisions;
- To what extent is there business integration and interdependence among the members of the group;
- To what extent is there a single location whose local law will govern most disputes arising in the enterprise's insolvency proceedings;
- Which of the possible coordination center courts is best situated to ensure maximization of global values for the benefit of all creditors;
- What is the extent of common ownership among members of the group?

²² For civil law jurisdictions, see notes 19 and 20.

²³ This concept may require amendment of jurisdictional statutes, to enable the Group Center Court to assert jurisdiction over foreign debtors. See above on Guidelines No. 8 and 9.

Guideline No. 14

To the extent permitted by local law, courts in other nations with authority or jurisdiction over affiliates of the multinational enterprise group should acknowledge the jurisdiction of the Group Center Court over the group enterprise.²⁴

Guideline No. 15

To the fullest extent permitted by law, each member of the multinational enterprise group seeking insolvency relief should file its own main insolvency case in the Group Center Court.²⁵

Guideline No. 16

All affiliate cases filed in the Group Center should be administratively coordinated unless the Group Center Court orders otherwise.

Guideline No. 17

The moratorium of the Group Center should be enforced internationally as to each affiliate. Secondary or non-main proceedings under Guideline 18 may be opened where necessary to obtain enforcement of the moratorium of the Group Center Court.

Guideline No. 18

A proceeding filed for an affiliate of a multinational enterprise group for which a Group Center Court has been established may only be filed in another jurisdiction as a secondary proceeding.²⁶

²⁴ In civil law countries the recognition of foreign court decisions is, generally speaking, not within the discretion of the court. Conversely, the laws of civil law countries establish precise preconditions under which such recognition may take place. Generally speaking, foreign court decisions are recognized if there is reciprocity and if the court decisions do not violate the state's *ordre public*. The position is different in cases governed by the EU regulation. Within the ambit of the EU Regulation, the orders of a foreign court are recognized without further formality.

²⁵ The reference to a "main" proceeding invokes the Model Law concept of a main proceeding. See notes 19 and 20.

²⁶ The reference to a "secondary" proceeding invokes the Model Law concept of a non-main, or secondary, proceeding. This guideline is consistent with the EU Regulation and the insolvency laws of most civil law countries (e.g., those of Germany, Italy and Spain).

Guideline No. 19

In any case where there are applications in two or more countries to open multinational enterprise group insolvency proceedings, no court should make a decision on an application until suitable notice of the request as described in Guideline No. 2 has been given to affiliates, the insolvency representatives and other interested parties have had an opportunity to be heard on the location of the Group Center, and if appropriate, court to court communications with any other jurisdictions in which a request to open an affiliate's group proceeding is pending have taken place.²⁷

Guideline No. 20

Where the multinational enterprise group has assets in more than one country, or where the enterprise group requires court assistance in its reorganization or liquidation, the courts should cooperate in a manner similar to that provided for individual entities under the Model Law.

Guideline No. 21

Where the Group Center Court cannot assert jurisdiction over a meaningful segment of the enterprise affiliates, where the Group Center Court's asserted jurisdiction is not honored in other jurisdictions, or where it is determined that a single Group Center Court is not appropriate because the multinational enterprise group lacks sufficient integration to justify full central coordination, coordination of the multinational enterprise group insolvency is nevertheless important. The courts and the parties should take all actions permitted by applicable local law to accomplish the purposes of these Guidelines, including implementation of the Universal Principles where appropriate and feasible.

²⁷ Amendments to the Model Law may be necessary to assist courts in taking these actions.

Guideline No. 22

Insolvency representatives shall inform the Group Center Court promptly of (a) any material change in the status of any affiliate of the multinational enterprise group that becomes known to the insolvency representatives, and (b) any known foreign proceeding regarding any affiliate of the multinational enterprise group. The Group Center Court may modify or terminate the Group Center designation if it is shown that the grounds on which it was predicated were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the designation.²⁸

²⁸ This Guideline reflects the concepts in Articles 17(4) and 18 of the Model Law pertaining to potential changes in circumstances that could affect the court's recognition of a foreign proceeding. The purpose of those sections is to ensure that the court is provided with the information it requires to evaluate the recognition decision in light of changed circumstances and that the recognition decision is subject to review as any other decision, under the laws of the forum jurisdiction. Similarly, a court's determination of a Group Center should also be subject to material changes in circumstances that might affect the determination, and the court must accordingly be kept informed of such changes. It may not, however, be feasible in civil law countries where the procedural laws are cognizant of the concept of *perpetuatio fori*. The *ECJ* has held that, in order to avoid forum shopping, the jurisdiction of the insolvency court will endure even if the debtor shifts its interest to another country after the petition is filed (*ECJ*, order dated 17 January 2006 - C-1/04, NZI 2006, 153 "Susanne Staubitz-Schreiber").



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