The UNCITRAL 2019 Model Law on (multinational) enterprise groups insolvency with Guide to Enactment. An example of legislative practicality, convenience and pragmatism.

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Abstract:

The purpose of this paper is to reflect on and make an overall assessment of the recent UNCITRAL *Model Law on Enterprise Groups Insolvency with Guide to Enactment* (2019) (hereinafter MLEG and the *Guide*, respectively).

In this paper the author does not discuss insolvency of corporate groups at the national level (contained in *Chapter II of Part Three* of the 2010 *UNCITRAL Legislative Guide on Insolvency Law*). Instead, it only focusses on the MLEG and its precedents.

Also, the author omits any analysis or reference to the topics left out from the final text of the MLEG that were discussed at the UNCITRAL Working Group V (Insolvency Law) between 2006 and 2019, but he mentions them because they are relevant to know the antecedents of the final text of the adopted MLEG. To consider them in this opportunity is pertinent to this commentary and assessment of the proposed final text by the UNCITRAL.

The method adopted in this paper is the selection and critical analysis of the most relevant legislative proposals by UNCITRAL pertaining to the MLEG.

The sources used in this paper are the UNCITRAL proposals for future rules in connection with the insolvency of enterprise groups; the relevant paragraphs of the *Guide*; the Group V (Insolvency Law) *Working Papers* and, finally, the *Reports* of each session.

The paper ends with an overall critical assessment of the MLEG and a possible solution for the future reform of the Argentine Multinational Corporate Groups in Insolvency regime, *de lege ferenda*.

Keywords: Enterprise Corporate Groups; Corporate Groups in Insolvency; Multinational Corporate; Groups in Insolvency; UNCITRAL *Model Law*; UNCITRAL *Model Law on Enterprise Groups Insolvency with Guide to Enactment* (2019)

A. Introduction: purpose, methodology and sources.

The purpose of this paper is to reflect on and make an overall assessment of the recent UNCITRAL *Model Law on Enterprise Groups Insolvency with Guide to Enactment* (2019) (hereinafter MLEG and the *Guide*, respectively).

I will not discuss insolvency of corporate groups at the national level (contained in *Chapter II of Part Three* of the 2010 *UNCITRAL Legislative Guide on Insolvency Law*). I will only focus on the MLEG and its precedents.

I will also omit any reference to the topics left out from the final text of the MLEG that were discussed at the UNCITRAL Working Group V (Insolvency Law) between 2006 and 2019[1], but they are relevant to know

1 We mention the following documents and items:
Convention on Certain International Insolvency Issues: Report 9/798 of 8 January 2014, paras. 18–19; Report 9/803 of 6 May 2014, para. 39(a); WP 117 of 8 October 2013, paras. 7–16; WP 93/Add. 6 of 19 April 2010, 'Insolvency law: possible future work. Comments of the International Bar Association concerning proposals for the development of an international convention and/or model law on cross-border insolvency of enterprise groups' (in respect of a Convention).
Intellectual property issues: Report 9/666 of 2 December 2008, paras. 112–117; Report 9/671 of 25 May 2009, paras. 125–127; Report 9/691 of 28 April 2010, paras. 94–98; Report 9/798 of 8 January 2014, para. 29; Report 9/798 of 8 January 2014, para. 29.
Insolvency of large and complex financial institutions: WP 117 of 8 October 2013, paras. 17–22; Report 9/798 of 8 January 2014, paras. 20–22; WP 93/Add 5 of 16 April 2010. 'Insolvency law: possible future work. Proposal by the Swiss delegation for the preparation of a study on the feasibility of a resolution tool for cross-border insolvency cases of highly complex financial institutions'; WP 93 of 19 February 2010, 'Insolvency law: possible future work', paras. 9–20. In the latter document see also on sovereign debt initiatives at paras. 26–29 and on insolvency of public or state-owned enterprises at paras. 30–33; Report 9/763 of 7 December 2012, paras. 95–96; WP 118 of 9 October 2013, paras. 4–28. A list of documents on the subject can be found in the Annex; WP 109 of 24 September 2012, paras. 1–64. A list of international sources on the subject can be found in the Annex to this document.
Cross-border insolvency protocols: Report 9/618 of 8 January 2007, para. 68.
Jurisdiction of the intervening courts: WP 74/Add. 2 of 4 October 2006, para. 5; WP.122 'Comments by the United States of America on document WP 120' of 27 March 2014, para. 3.

the antecedents of the final text of the adopted MLEG and this commentary and assessment of the proposed text by the UNCITRAL. The method adopted in this paper is the selection and critical analysis of the most relevant legislative proposals by UNCITRAL pertaining to the MLEG.

The sources used in this paper are the UNCITRAL proposals for future rules in connection with the insolvency of enterprise groups; the relevant paragraphs of the *Guide*; the Group V (Insolvency Law) *Working Papers*[2] and, finally, the *Reports* of each session.[3]

B. UNCITRAL's work on the law of insolvency of multinational enterprise groups

In December 2019, and after several deliberations,[4] UNCITRAL adopted the MLEG, with its respective *Guide*, which aims to provide modern legis-

Contract law: WP 76/Add. 1 of 5 March 2007, para. 49; WP 78 of 26 August 2007, para. 4; WP 117 of 8 October 2013, paras. 35–38 (Financial contracts and netting in cases of insolvency); Report 9/803 of 6 May 2014, para. 39(c).

'Synthetic procedures' to facilitate coordination of multiple procedures: WP 120 of 11 February 2014, Section D(1), paras. 47–52; WP.122 of 27 March 2014, para. 3, 'Comments by the United States of America on document WP 120'; WP 124 of 2 October 2014, paras. 27–35.

Conflicts of laws: Report 9/622 of 25 May 2007, para. 92); WP 74/Add. 2 of 4 October 2006, paras. 13–14; WP 76/Add. 2 of 6 March 2007, para. 33.

2 Hereinafter the *Working Papers* will be cited by the respective number and date, preceded by the acronym WP, which can be found in chronological order in the UNCITRAL website, Working Group V tab, in English, in https://uncitral.un.org/en/working_groups/5/insolvency_law.

3 Hereinafter these *Reports* will be cited by number and date, which can be found in chronological order on the UNCITRAL website, in the Working Group V tab, in English, in https://uncitral.un.org/en/working_groups/5/insolvency_law.

4 Discussions on the future MLEG can be found in the following documents, where appropriate WP 92 Add 2 of 11 February 2010; WP 120 of 11 February 2014; WP 122 of 27 March 2014 ('Comments of the United States of America on WP 120'); WP 124 of 2 October 2014; WP 128 of 13 March 2015; WP 131 of 12 May 2015 ('Comments of the Government of France on WP 128'); WP 133 of 28 September 2015 ('Fundamental Principles'); WP 134 of 30 September 2015; WP 137 of 19 February 2016; WP 137 Add. 1 of 19 February 2016; WP 142 of 3 October 2016; WP 142 Add. 1 of 3 October 2016; WP 146 of 2 March 2017; WP 152 of 21 September 2017; WP 158 of 26 February 2018; WP 161 of 18 September 2018; WP 162 of 20 September 2018; WP 165 of 20 March 2019; Report 9/903 of 26 May 2017: Facilitation of cross-border insolvency of multinational enterprise groups (reference to WP 146 and Report numbers 803, 864, 870 and 898); Report 9/864 of 8 January 2016, paras. 13–53 (on 'principles' see this document at

lative proposals on insolvency proceedings related to the insolvency of enterprise (or corporate) groups at the international level.

This text is a specific development of the following regulations on the insolvency of enterprise groups: (1) 1997 *Model Law of Cross-Border Insolvency* (hereinafter, the 1997 MLCBI); (2) 2010 *Part Three of* the *UNCITRAL Legislative Guide on Insolvency Law* (hereinafter, the *2010 Guide*); (3) the 2019 *Legislative Guide on Insolvency Law. Part four: Directors' obligations in the period approaching insolvency (including in enterprise groups). First edition (2019), Second edition* (2020).

The relevant parts of the texts of all these documents apply to the MLEG, by direct reference or by analogy.[5]

The insolvency of so-called corporate groups or enterprise groups,[6] in the context of more than one national jurisdiction, requires specific rules governing the corporate control relationship, together with a unified economic policy. As discussed in this article, in such a multinational enterprise group, one, some, or all of its members are in insolvency status.

In this sense, the new legal problems relative to the insolvency of corporate groups that have emerged in recent decades caused the need to create appropriate substantial and procedural solutions such as those developed by UNCITRAL, intended to serve as an example for States, and specifically the 2019 MLEG and its *Guide*.

C. The UNCITRAL MLEG. Structure and core provisions

The MLEG has two parts. Part one consists of thirty-two articles distributed in six chapters. Part two consists of the text of the *Guide to Enactment* of

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paras. 13–19); Report 9/870 of 6 May 2016, paras. 12–51; Report 9/898 of 21 December 2016, paras. 61–115 (on the planning procedure and Group insolvency solution see this paper paras. 91–95); Report 9/903 of 26 May 2017, paras. 86–138; Report 9/931 of 15 January 2018, paras. 44–95; Report 9/937 of 18 May 2018, paras. 48–104; Report 9/966 of 20 December 2018, paras. 1–111 (Draft MLEG and Draft Guide to Enactment); Report 9/972 of 7 June 2019, paras. 13–23 (Draft MLEG in the Annex hereto and Draft Guide to Enactment).

5 On the logical relationships of between the two Model Laws, as well as their complementarity, see the *Guide*, para. 14.

6 The terminology used by UNCITRAL deliberations from 2006 until 2008 was 'corporate groups'. From that year on it used the term 'enterprise groups', which does not alter the substance of the activity of creating a model law. According to the literal wording of the MLEG definitions in art. 2, both concepts are to be understood as synonyms and interpreted as broadly as possible.

the MLEG, which has two hundred and twenty-two paragraphs. There are also two annexes containing the General Assembly Resolutions referring to the regulation.

The *Guide* is not only an instrument that facilitates the incorporation of the regulations to domestic law by potential adopters, but also constitutes an interpretative guideline, as far as it indicates the purposes of the regulation.[7]

Flexibility in the search for solutions and proportionality in the means to achieve them are present throughout. This flexible approach, on the one hand, makes it easier for enacting States to put the regulations into effect and, on the other hand, once passed by the legislatures, to interpret them broadly in accordance with their specific purposes.[8] Finally, this feature reflects a policy to adjust to the inherent complexity of an insolvent group of multinational enterprises, as we shall discuss below.

D. Purpose and origin of the MLEG

The MLEG makes proposals for future legislation on the following topics, which in turn are the purposes of the regulation, namely:[9]

(a) to facilitate coordination and cooperation among courts, the 'Insolvency Representatives', and the 'Group representative', in insolvency proceedings of members of a multinational enterprise group;
(b) to provide the appropriate tools to achieve a 'Group insolvency solution' either for a plurality, or a significant part, or all the members of a multinational enterprise group, through a single insolvency proceeding (referred to as 'Planning proceeding') commenced in the place where at least one member of the group has the 'Centre of Main Interests' (hereinafter referred to as 'COMI');
(c) to facilitate the voluntary participation of group members in the 'Planning proceeding' to coordinate a 'Group insolvency solution' and the access to foreign courts of group members and of 'Group representatives';

7 See *Guide*, para. 8.
8 See *Guide*, paras. 76–83, 101, 141 '*in fine*', 184 and 187.
9 See MLEG, *Preamble*, and *Guide*, para. 2.

(d) to provide for the appointment of a 'Group representative' to coordinate the development of such a 'Group insolvency solution' through the aforementioned 'Planning proceeding';
(e) to negotiate and approve post-commencement finance arrangements and authorize the provision of funds according to them, where necessary for the reorganization of the group;
(f) to provide for measures to minimize as far as possible the commencement of a 'non-main proceeding' relative to group members participating in the 'planning proceeding';
(g) to provide examples of relevant measures to facilitate the treatment of creditors' claims against group members and foreign claims in the 'main proceeding';
(h) to provide examples of some supplementary provisions in respect of arrangements made on the treatment of foreign claims and other eligible measures;
(i) to facilitate the creation and recognition of a 'Group insolvency solution'.

Potential adopting States may consider incorporating additional mechanisms or institutions such as those discussed in *Part Three, Chapter II* of the 2010 *Legislative Guide*, which are intended to facilitate, mainly, the domestic treatment of the insolvency of enterprise groups.[10]

As to the origin of the Model Law, the UNCITRAL Working Group V (Insolvency Law) started discussing the issue of insolvency of corporate groups in December 2006,[11] during the 31st session, held in Vienna, as reflected in documents A/CN.9/WG.V/WP 74 and WP 74, Add 1 and WP 74, Add 2 (both dated 4 October 2006) and in the respective subsequent deliberations until 2019.[12]

The standard was adopted by consensus on 15 July 2019, during negotiations at the 52nd session of UNCITRAL, which was held in Vienna from 8 to 19 July 2019, with 60 Member States, 31 Observer States and 34 international organizations in attendance, and adopted by the United Nations General Assembly by Resolution 74/184 of 18 December 2019.[13]

10 See *Guide*, para. 115.
11 See Report 9/618 of 8 January 2007.
12 Pertaining the crucial moments of the discussions see *Guide*, paras. 4–7.
13 See *Guide*, Annex I, p. 99.

E. Relevant topics on the insolvency of enterprise groups discussed by UNCITRAL during the period 2006–2019

I. The complexity of the economic and legal structure of enterprise groups and the pragmatism of UNCITRAL

From the outset of its deliberations and throughout its development, UNCITRAL Working Group V has highlighted the remarkable complexity of the structure of enterprise groups, both in terms of their economic and legal elements. This reality has caused difficulties in defining the legal fundamental concepts of enterprise groups and in regulating them adequately. This has been the case due to factual complexities and conceptual legal problems such as the following, among others:[14]

1. dissimilarity in the formulation of the concept of enterprise group or corporate group according to the legal principles and rules of each relevant branch of law (e.g., contract, criminal, tax, corporate, labour, insolvency law, etc.);

14 On the conceptual difficulties of defining and regulating corporate groups and pertaining other definitions of related concepts, see the following UNCITRAL documents: Report 9/622 of 25 May 2007, para. 12 and paras. 77–84; Report 9/643 of 16 November 2007, para. 123; Report 9/647 of 14 March 2008, paras. 14–17; Report 9/666 of 2 December 2008, paras. 43–44; Report 9/671 of 25 May 2009, para. 57; WP 74 of 4 October 2006, para. 1 (Glossary), paras. 7–24 (nature of corporate groups) and paras. 35–38 (definition of corporate group, ownership and control); WP 74 Add. 2 of 4 October 2006, paras. 1–4; WP 76 of 2 March 2007, (Glossary) para. 3 (national or international group of companies); WP 78 of 26 August 2007, paras. 2–11; WP 80 of 31 December 2007, paras. 1–9; WP 120 of 11 February 2014, paras. 4–9; WP 122 of 27 March 2014, 'Comments by the United States of America on WP 120', para. 6 and *passim*; WP 124 of 2 October 2014, paras. 4–20 (with various factual scenarios discussed in the context of group insolvency and the concept of COMI); WP 124 of 2 October 2014, paras. 27–35 (on the treatment of the so called 'synthetic measures'). For other difficult legal issues see the same WP 124, paras. 36–63; WP 128 of 13 March 2015, Annex (Scenarios 1 and 2); Report 9/798 of 8 January 2014, paras. 16–23; Report 9/803 of 6 May 2014, paras. 15–38; Report 9/829 of 26 January 2015, paras. 33–51 (in the English version); Report 9/835 of 9 June 2015, paras. 23–46; WP 93/Add. 2 of 17 February 2010, 'Insolvency law: possible future work. Proposal by the delegation of the United States of America: Background paper on international court cases involving the insolvency of enterprise groups', paras. 1–11 and paras. 66–71; WP 93/Add. 1 of 17 February 2010, 'Insolvency law: possible future work. Proposal by the delegation of the United States of America: on the preparation of a model law or model provisions addressing some issues of insolvency law at the international level'.

2. legal independence of their components as opposed to their economic integration;
3. different economic activities conducted by each member of the enterprise group;
4. economic size;
5. some special forms of internal corporate control;
6. the existence of special purposed groups;
7. diverse types of joint ventures;
8. agreements for the temporary acquisition of control of one company by another;
9. the increasing emergence of groups in specific economic activities which were traditionally subject to separate corporations, such as insurance and banking;
10. the cross-liability of the companies belonging to the same corporate group;
11. the liability of controlling or dominant corporation for the debts of subsidiary entities, not only in good economic times but also in situations of insolvency;
12. the conceptual difficulties or ambivalences of the concepts of ownership and control applicable to groups, by a narrow analogy;
13. the recognition of important social, commercial, and legal objectives pursued by corporate groups; and
14. the fact that the circumstances of the insolvency of enterprise groups cases are rarely such that the basic principles of groups are disregarded, rejected, or not applied.[15]

An example of this remarkable complexity can be found in the factual scenarios that the UNCITRAL Working Group V has hypothetically considered during the deliberations on the subject.[16]

Moreover, considering insolvency institutions for corporate groups at the national level, which are difficult to regulate due to their complexity,[17] it seems unquestionable that their recognition and application at the interna-

15 See Report 9/618 of 8 January 2007, paras. 9–14.

16 See these hypothetical factual scenarios, in WP 124 of 2 October 2014, paras. 4–21, and in WP 128 of 13 March 2015, and Annex (Scenarios 1 and 2).

17 Consider issues such as, for example: substantive consolidation, subordination of claims, joint reorganization, financial contribution order against the parent corporation, liability of the parent corporation for the debts of the insolvent subsidiary and joint liquidation.

tional level would be much more complex than at the national or domestic level.[18]

This complexity is relevant and probably has determined a different attitude in terms of what can be called 'a traditional way of creating law' on the part of pre-legislators of Private International Insolvency Law such as UNCITRAL (Working Group V), which is based on prudence. Indeed, faced with these difficulties, UNCITRAL has adopted a policy consisting of drafting texts as a non-traditional internationalist would have done. Thus, it has refrained from legislating on subjects such as applicable law, the jurisdiction of the courts, foreign proceedings as such, conflict rules, renvoi, and other typical concepts of private international law. On the contrary, it has drafted rules, practically excluding other topics (or at least predominantly), on the communication, cooperation and coordination of the courts, insolvency representatives and parties involved in international insolvency proceedings of enterprise groups. All this work has been done as broadly and flexibly as a prudent legislator would have done.

This decision, from our point of view, has been a wise example of wisdom, not only because of the difficulties that this traditional creation of rules of private international law could have caused, but also because, at least in cases of insolvency of international corporate groups, of its virtually impossible application or ineffectiveness in practice. This is due to the double economic-legal complexity of the problems to be solved and of their solutions. The legislative product can therefore be described as satisfactory and adequate for the difficulty of the situation and to the flexibility demanded by the substance of the groups of companies in insolvency.

18 See the discussions leading to the *UNCITRAL Legislative Guide on Insolvency Law, Chapter II, Part Three: Treatment of Enterprise Groups in Insolvency 2010*, in the following documents: WP 82 of 1 September 2008, paras. 1–41; WP 82/Add. 1 of 2 September 2008, paras. 1–29; WP 82/Add. 1 of 4 September 2008, paras. 1–44; WP 82/Add. 3 of 5 September 2008, paras. 1–55; WP 82/Add. 4 of 10 September 2008, paras. 1–36 (where appropriate); WP 85 of 6 March 2009, (where appropriate); WP 85/Add. 1 of 13 March 2009, paras. 1–20 (where appropriate); WP 88 of 9 April 2009, 'Proposal of the United States of America on post-commencement finance', paras. 1–6 (where appropriate); WP 90 of 31 August 2009, paras. 1–185 (where appropriate); WP 90/Add. 1 of 31 August 2009, paras. 1–47 (where appropriate); WP 90/Add. 2 of 31 August 2009, paras. 1–24 (where appropriate); WP 92 of 10 February 2010, paras. 1–152 (where appropriate); WP 92/Add. 1 of 11 February 2010, paras. 1–54 (where appropriate); WP 92/Add. 2 of 11 February 2010, paras. 1–39 (where appropriate).

II. Proposals on the Centre of Main Interests (COMI) concerning the insolvency of a multinational enterprise group. Another case of a pragmatic solution

Regarding the COMI in the framework of enterprise groups, we can mention another practical and pragmatic solution of UNCITRAL in the articles of the MLEG,[19] after encountering difficulties raised by the question of its conceptual definition, its singular elements, and its regulatory framework.

Indeed, after lengthy discussions on the COMI, specifically in group insolvency cases, the UNCITRAL Working Group V has, in my view, rightly addressed these difficulties through the legislation on communication, cooperation and coordination as noted in the paragraph above immediately preceding the heading.[20]

19 On the COMI see the following articles of the MLEG: 2.J), 4, 18.1, 18.2., 20.3., 21.3.c), 22.5., 24.4., and 26.1. In the *Guide* see the following paras: 2.b), 5, 44 and 211, and in the respective paras. commenting on the articles of the MLEG mentioned in this footnote.

20 See on the treatment of the COMI, specifically in enterprise group cases, see the following documents: Report 9/618 of 8 January 2007, paras. 50–54.; Report 9/666 of 2 December 2008, paras. 24–32; Report 9/763 of 7 December 2012, paras. 13–65; WP 74/Add. 2 of 4 October 2006, paras. 6–11; WP 76/Add. 2 of 6 March 2007, paras. 2–17; WP 107 of 13 September 2012, *passim*; WP 124 of 2 October 2014, paras. 4–20; WP 120 of 11 February 2014, paras. 11–12; WP 128 of 13 March 2015, paras. 15–18; WP 131 of 12 May 2015 ('Comments by the Government of France on WP 128 of 13 March 2015 entitled 'Facilitation of proceedings related to the cross-border insolvency of multinational enterprise groups') with reference to 'choice of forum'; WP 133 of 28 September 2015, paras. 1–14, with reference to coordination in 'Group insolvency solution' and its fundamental principles applicable to the insolvency of enterprise groups; also on principles applicable to Group insolvency solution and planning proceedings see WP 137/Add. 1 of 19 February 2016; Report 9/766 of 26 April 2013, paras. 13–54, 103 and 105–107; WP 95 of 30 August 2010, paras. 5–50; WP 95/Add. 1 of 30 August 2010, paras. 1–43. See annex to the latter document for a list of court cases; WP 99 of 29 July 2011, paras. 9–64; WP 101 of 4 August 2011, (Proposed definition of 'Centre of main interests' (Articles 2(b) and 16.3 of the UNCITRAL Model Law on Cross-Border Insolvency) submitted by the delegations of Spain, Mexico and the UIA); WP 103 of 28 February 2012 ('Interpretation and application of certain concepts in the UNCITRAL Model Law on Cross-Border Insolvency relating to Centre of Main Interests'); WP 103/Add. 1 of 28 February 2012 (follow-up to WP 103); WP 105 of 28 March 2012 (Proposal of the United States of America, *inter alia*, on the COMI); WP 112 of 11 February 2013 ('Interpretation and application of certain concepts set out in the UNCITRAL Model Law on Cross-Border Insolvency relating to the Centre of Main Interests'), ps. 2–33; WP 114 of 13 February 2013, paras. 1–16 ('The Centre of Main Interests in the context of enterprise groups').

The same happened regarding the treatment of the so-called 'Coordination Centre' of a group of companies,[21] which has no longer been discussed since 2014.

The UNCITRAL Working Group V itself summarized these deliberations and this pragmatic decision — with its usual diplomacy — in WP 120 of 11 February 2014, para. 12,[22] the text of which is reproduced below:

> '*12. The application of the COMI concept to the group situation has been the subject of several working papers (A/CN.9/WG.V/WP.74/Add.2 (paras. 5–12); A/CN.9/WG.V/WP.76/Add.2 (paras. 2–17); A/CN.9/WG.V/WP.82/Add.4 (paras. 10–15); A/CN.9/WG.V/WP.85/Add.1 (paras. 3–13); A/CN.9/WG.V/WP.99, paras. 55–64; and A/CN.9/738, paras. 36–37.) and the issue has been discussed by the Working Group on numerous occasions. (*The conclusions reached in these discussions are summarized in A/CN.9/WG.V/WP.114*). At its thirty-first session, for example, the Working Group concluded (A/CN.9/618, para. 54) that the difficulties of achieving an agreed definition of the COMI of an enterprise group suggested the need to focus, instead, on facilitating the conduct of group cross-border insolvency proceedings by way of coordination and cooperation. At its thirty-fifth session, the Working Group generally agreed (A/CN.9/666, paras. 26–27) that it would be difficult to reach a definition of the COMI of an enterprise group in order to limit commencement of parallel proceedings or to apply the recognition regime of the Model Law to the enterprise group as a whole*'.[23]

Thus, this statement is not only relevant regarding the COMI, but also regarding other devices proposed by UNCITRAL relative to enterprise groups in insolvency, as highlighted above in para. 5.1. This solution is realistic and adjusted to the reality of the issues addressed, and therefore it is relevant and prudent.

21 See the adopted policy of suspending its treatment in WP 120 of 11 February 2014, para. 35.

22 See WP 120 of 11 February 2014, p. 5, paras. 11 and 12.

23 All these documents mentioned by UNCITRAL in the transcribed text, regarding the deliberations prior to WP 120 of 11 February 2014 on the COMI are cited in note 20.

III. Three new concepts

The MLEG introduces three new concepts: the 'planning procedure', the 'group representative', and the 'group insolvency solution'. The rest of the definitions in the MLEG (for completeness) were already included in previous UNCITRAL texts in the 1997 MLCBI.[24]

1. Planning procedure

In connection with the planning procedure, the following can be deducted from the relevant paragraphs of the *Guide* and the text of Article 2(g) of the MLEG:[25]

'Generally, a main proceeding[26] with respect to one group member, a type of 'insolvency proceeding',[27] essentially hybrid (that is, including reorganization, liquidation or both). Its purpose and aim are to negotiate and develop a 'Group insolvency solution', across the different proceedings in different jurisdictions. This is provided that: (a) one or more group members are participating in the main proceeding for the purpose of developing and implementing a 'Group insolvency solution'; (b) the group member subject to the main proceeding is likely to be a necessary and essential part of that 'Group insolvency solution'; and (c) a 'Group representative' has been appointed'.

The 'Planning procedure' is intricately linked to the concept of the COMI,[28] it is also treated in two other UNCITRAL documents[29] and is regu-

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24 See *Guide*, para. 15. Those other terms include the following: 'insolvency representative', 'insolvency proceeding', 'main proceedings', 'non-main proceedings', 'enterprise', 'enterprise group', 'enterprise group member', 'Insolvency representative' and 'control'.

25 See *Guide*, paras. 17, 35, 36, 37 and 44–49.

26 The 'main proceeding' is defined as a proceeding in the State where the debtor has the COMI according to Article 2 (j) of the 1997 MLCBI and is based on the definition of the 'foreign main proceeding' in the same 1997 MLCBI.

27 The 'Insolvency proceeding' was defined by the 1997 MLCBI and reproduced in the MLEG, Art. 2, para. (h). See note 25 in this paper.

28 See WP 137 of 19 February 2016, paras. 5–17; WP 133 of 28 September 2015, referring to coordination in the 'Group insolvency solution' and its fundamental principles applicable to the insolvency of enterprise groups. Also, on the principles applicable to Group insolvency solution and their relationship to planning proceedings see WP 137/Add. 1 of 19 February 2016, pp. 1–19.

29 The meaning and interpretation of the COMI in general is discussed in detail in the Guide to Enactment and Interpretation of the 1997 UNCITRAL Model Law on

lated in the MLEG as a local procedure of the adopting State in Chapter 3 and as a foreign procedure in Chapter 4.

As far as it is aimed at the 'Group insolvency solution', in my opinion this process is the most important device created by the MLEG.

2. Group representative

Article 2 (e) of the MLEG defines 'Group representative' as a person, even if appointed on a provisional basis, who is authorized to act as a representative of a group of companies in the 'Planning procedure'.[30]

Once appointed, the Group representative has the task of seeking to develop a 'Group insolvency solution'. To this end, he or she may apply for measures under Articles 19 and 20 and is authorized to act in another State as a foreign representative of the 'Planning proceeding'.[31]

Article 25 regulates the participation of the Group representative in proceedings in the enacting State based on the recognition of a foreign 'Planning proceeding', with the possibility of acting in any proceeding in relation to a group member participating in those proceedings.

This is another device that is legislated flexibly with reasonableness, proportionality, fairness and considering all the interests at stake. Likewise, the prohibition of participation and its exceptions are reasonable, as far as the legislator attempts to reduce the complexity inherent in the insolvency of multinational groups of companies and contemplates the exceptions in the rule. In my view, this is a fair and appropriate procedural solution for the problem of group insolvency.

3. Group insolvency solution

Article 2(f) of the MLEG defines the term 'Group insolvency solution'[32] as a proposal or set of proposals developed in the 'Planning proceeding' for

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Cross-Border Insolvency (2013) in paras. 144–149 and in UNCITRAL Model Law on Cross-Border Insolvency. Judicial Perspective (2011–2013) in paras. 93–135.

30 The *Guide* elaborates on the relationship between this term and the definition of 'foreign representative' in the MLCBI of 1997 and the concept of 'insolvency representative' in the Legislative *Guide* of 2013. See on this, the *Guide*, para. 41.

31 See *Guide*, para. 116.

32 On this concept see WP 128 of 13 March 2015, paras. 4–7; WP 137 of 19 February 2016, paras. 5–17; WP 137 of 19 February 2016, paras. 5–17; WP 133 of 28 September

the reorganization, sale as a going concern or liquidation of all or some of the assets or operations of one or more enterprise group members. The aim is to protect, preserve, liquidate, or enhance the total combined value of those group members.[33]

This adopted policy is coherent and proportionate to the aim of arriving at a single, universal insolvency solution for the whole enterprise group, which is fair and appropriate, considering the unified economic integration of the group and the notable complexity inherent in such an issue. Ultimately, this is the central objective of any international private insolvency law, and what is regulated here is therefore relevant.

In short, the creation of these three new concepts or institutions are, in my opinion, a success of UNCITRAL Working Group V on the issue at hand and deserves to be highlighted here as commendable. This is so because they constitute procedural solutions that are adapted to the specific problems posed by the insolvency of enterprise groups, given their inherent complexity, both from the point of view of procedural law and substantive law. Moreover, they are appropriate because they provide an adequate basis for achieving cooperation and coordination of the proceedings and of the parties and courts involved in the insolvency. Such coordination will ultimately lead to that solution. This is another example of a pragmatic *approach* to the problem.

IV. Specific case law

The harmonious interpretation of the MLEG will be facilitated by the 'CLOUT' information system, under which the Secretariat of UNCITRAL Working Group V publishes extracts of court decisions and arbitral awards.

The purpose of this collection and dissemination of information is to promote knowledge of these legislative texts at the international level and to facilitate their uniform interpretation and application.[34] This is another

2015, referring to coordination in 'Group insolvency solution' and its fundamental principles applicable to the insolvency of enterprise groups; also on the principles applicable to Group insolvency solution and their relationship to planning proceedings see WP 137/Add. 1 of 19 February 2016.

33 See MLEG, articles: 2 f), 4b), 10f), 13.1, 15b), 15e), 16, 18.1, 18.4, 18.5, 19.1, 19.2, 19.3.a), 20.1, 22.1, 24.1, 24.1.f), 24.2, 26, 32.2.; and in the *Guide*, paras. 42 and 43; also see the *Guide*'s commentary of the respective articles referred to in this note.

34 See *Guide*, paras. 67 and 222.

practical tool for legal practitioners regarding the solutions that can be adopted in each case.

In my opinion, all this material will be reasonable provided that an analogy can be made between the rules and the solutions in the precedents and new cases. We are not in favour of a uniform interpretation *per se*, but only to the extent that it conforms to appropriate and proportional standards of justice for each individual case. There is nothing more realistic than a solution adapted to the specific case, far away from any *a priori* generic uniformity in the interpretation of the applicable rules.

V. Specific cooperation and coordination

Regarding cooperation and coordination in the case of insolvency of corporate groups, there is a reciprocal interaction between the relevant parts of the MLCBI 1997 and its corresponding *Legislative Guide* 2010 and the MLEG of 2019; one is general, and the other is specific. Therefore, all similar (partly the same and partly different) rules of Cross-Border Insolvency in general will be applicable by analogy to the specific case of enterprise groups insolvency, *mutatis mutandis*.[35]

Specific cooperation and coordination are discussed in Chapter 2, Articles 9 to 18 of the MLEG.

This UNCITRAL proposal innovation is relevant because it makes it possible to arrive at consensual solutions between the parties and the courts involved in international insolvency proceedings more quickly and efficiently, compared to a possible legislation on the traditional concepts of private international insolvency law. This policy is, from my point of view, prudent and relevant.

VI. Specific conflicts of interest

In cases where a single or plural 'insolvency representative' is appointed to administer several companies of a group (including their complex commercial and financial relationships with their respective creditors), there is a risk of losing his or her neutrality and independence and the typical conflicts of interest related to groups of companies may arise.

35 For details of such reciprocal regulatory interaction see, those mentioned in the *Guide*, paras. 69–72, 76, 84, 86, 90, 93, 95, 96, 97 and 98.

Such conflicts could exist if, for example, the same 'insolvency representative' is appointed in situations where there are cross-guarantees, interlocking claims and similar debts within the same group; or post-commencement finance, submission and verification of claims or infringements by one group member against another.[36]

This list is not exhaustive, as there could be other cases not mentioned in the *Guide,* such as identity of members of the boards of directors of the different members of the group; commingling or confusion of assets and liabilities; cross liabilities of one or even several controlling companies for the debts of one or several subsidiaries; reciprocal claims; abuse of corporate control from the mother or controlling party over their subsidiaries; subordinated claims in the insolvency of another group member, cross-guarantees; accounts that should be consolidated; 'interlocking boards of directors'; frauds within the group and with third parties.

If usually there are difficulties finding solutions within the jurisdiction of a single country or at the domestic level, *a fortiori* those ones are almost impossible to overcome at the international level. This is another reason UNCITRAL's policy on cooperation and coordination of international proceedings can be considered very prudent.

The [moral and] legal obligation to disclose the existence of conflicts of interest or their mere possibility is relevant in the context of the group insolvency, as reflected in the recommendations of the 2010 *Legislative Guide*.[37]

As a safeguard against potential conflicts of interest, the 'insolvency representative' could be required to make a specific commitment or be subject to the practice or legal obligation to seek the advice of the court.

In addition, insolvency law and the court may provide for the appointment of one or more additional or replacement 'insolvency representatives' to administer the relevant group members in the event of a [potential] conflict of interest. In some jurisdictions those insolvency representatives are called *ad hoc insolvency representative* or *trustee*.

Such conflicts may render Article 17 sole representative of the MLEG inapplicable. Additional appointments could be made based on the specific area of the conflict, limited in time until the conflict is resolved, or the appointments could be more general for the duration of the proceedings.[38]

36 See these cases mentioned by the *Guide*, in para. 104.
37 See 2013 Legislative *Guide*, recommendations 116, 117, 133 and 252.
38 See *Guide*, para. 104.

These solutions are appropriate responses to the problem posed and preserve the professional independence of the 'insolvency representative'.

VII.Voluntary and extended participation of all members of the enterprise group

Article 18 of the MLEG is intended to provide an additional instrument for cooperation and coordination. This provision facilitates the participation of any of the group members, wherever they are located, in the main proceedings, as defined under Article 2(j), which were commenced in the enacting State where a group member has the COMI of the whole group. For this reason and given that the development of a 'Group insolvency solution' is only one of the possible outcomes of participation, the article is part of Chapter 2 and not Chapter 3 of the MLEG. This needs to be considered for a correct interpretation. This flexibility is tailored to the needs of the enterprise group to arrive at a negotiated and consensual solution for one, several or all the group members, whether or not they are in insolvency. Such a voluntary and free participation is suitable for arriving at a 'Group insolvency solution' as flexibly as possible. Moreover, it is in line with the complexity, from an economic and legal point of view, of a multinational enterprise group and is therefore a relevant and prudent policy.

The prohibition on participation in Article 18(2) refers to the non-restriction of the powers of the enacting State with jurisdiction over a group member, to limit such participation and reflects the content of Article 4(a) and (b) of the MLEG.[39]

The provision aims to highlight the usefulness of the institution and to foster the desirability of a group member to participate in the main proceedings. Such participation may be either because that group member has something to contribute to the solution of the group's economic and financial difficulties, or because it intends to protect its own interests, which is, moreover, very frequent in practice. This is another manifestation of the practicality and pragmatism in the solutions adopted by the MLEG and, therefore, this regulatory provision is pertinent and correct.

39 See *Guide*, para. 105.

VIII. Specific protection of creditors and other interested persons in connection with enforceable measures

Article 27 — the only provision of Chapter 5 — protects creditors and other interested persons based on the need for a certain balance between the measures that can be granted and the protection of such interests. This rule is based on Article 22 of the 1997 MLCBI.

In addition to the group member that could be affected by the measures, such persons can include other group members participating in the 'Planning procedure', creditors of those members and other interested third parties.

Paragraph 1 clarifies that it refers to creditors of those group members participating in the 'Planning proceeding'. It does not refer to the interests of creditors of the group in general or to creditors of group members not involved in the 'Planning proceeding'.[40]

This flexible group-specific legislative policy regulates the exercise of the powers provided for in the MLEG, Articles 20, 22, 24, 29 and 31, under conditions to be determined by the court and for the duration of the circumstances taken into account, in accordance with the text being commented and the procedural rules of the enacting State. This is consistent with the right of defence of all interested parties and with the aim of reaching a comprehensive solution of the insolvency of the whole enterprise group.

Furthermore, UNCITRAL's remarkable pragmatism in this area also overcomes the difficulty of proving the solvency or insolvency of the interested party (controlled or controlling member of the group) to be able to take part in the 'Planning procedure'. This protects both the insolvent and the solvent entity from an asset protection policy, within the framework of a comprehensive reorganization plan,[41] and avoids the possibility of unfair discrimination on these grounds.

Consistent with the latter, article 27 implicitly empowers the 'Group representative' to ask the court to modify or revoke any harmful court measures[42]. The inclusion of 'other interested persons' should be emphasized, in our view, by broadly embracing the theory of *stakeholders*. It broadens the subjects protected and potentially affected by the actions of the member of the group in question, extending them beyond the category of mere

40 See *Guide*, para. 189.
41 See Report 9/618 of 8 January 2007, para. 23.
42 See *Guide*, para. 190.

commercial creditors. Consequently, this regulation also includes employees, customers, consumers, suppliers, directors, the State in its different branches, etc.

There is no justification for arbitrarily discriminating against creditors based on criteria such as the place of establishment or nationality of any enterprise group member. Discrimination based on the COMI is also inappropriate, because, in our view, several COMIs may exist, or their location can even change, as a hypothesis. The general policy of the MLEG is that all creditors, regardless of where they are deemed to be located, should be treated equally and, as far as possible, should be treated equally in one State as well as in another.[43]

Given the systematic placement of the single article of Chapter 5, in our view, this rule is applicable to all concerned proceedings: insolvency, planning, main or parallel, etc.

This practical system is fair and appropriate to the nature of the problems inherent in enterprise groups insolvency and to the interest of third parties. It is therefore relevant and appropriate.

IX. Treatment of foreign claims

Another development applicable to corporate groups is the treatment of foreign claims in Chapter 6, in Articles 28 and 29. In this chapter, the UNCITRAL Working Group V has established some measures to facilitate the coordination of cross-border insolvency proceedings specifically applicable to enterprise groups members. These measures, which are often referred to as summary non-main proceedings, involve treating foreign claims in main proceedings in the same way as they would be treated in foreign non-main proceedings under the applicable law, when such non-main proceedings have been opened.

The term ‘treatment’ refers to the status of the claim (its ranking and payment conditions) and the way it is handled under the applicable law.[44] Such treatment of foreign claims normally depends on the arrangements made by the ‘Insolvency representative’ appointed in the main proceeding

43 See *Guide*, para. 191. This criterion is logically in accordance with one of the basilar principles of any insolvency law system, in comparative and historical law, which is the *par conditio omnium creditorum*: equal treatment of all the creditors in general.

44 See *Guide*, para. 193.

or elsewhere; when a 'Group representative' has been appointed in the 'Planning proceeding'; or, finally, by both representatives jointly.

This policy is consistent with the objectives of the system, preserves the equal treatment of creditors in different jurisdictions and facilitates the 'Group insolvency solution' which is the goal of any international insolvency process, specifically in cases of enterprise groups.

To ensure the effectiveness of the policy, it should be considered binding and can be enforced against the insolvency estate in the main proceeding.[45]

These measures are also intended to facilitate the coordinated treatment of claims and to minimize the need to initiate a non-main proceeding or to limit the cases where such proceedings might be necessary, as has been the case in practice.[46]

This is consistent with the necessary protection of all the parties involved, cost saving and the shortening of procedures, which, in my opinion, is a relevant and prudent policy.[47]

However, the use of these measures may be limited in practice. For example, when the claims in the State of origin are not of a purely monetary nature; or when it is unrealistic to deal with them in the main proceedings if they would require some form of approval by the courts of the State of origin; or when there are irreconcilable differences between the insolvency law of the State of origin of the claims and the law applicable to the main proceedings.[48]

Such a flexible provision for the numerous conflict hypotheses is an effective example of a proportional solution, in terms of both procedural and substantive law. I think this is another pragmatic policy that should be endorsed.

Article 28 deals with the situation where an 'Insolvency representative' appointed in main proceedings in the enacting State accords certain treatment to foreign claims that might arise in the State in which the group member has an establishment.

The provision also serves the purpose of minimizing the commencement of non-main proceedings in that second State and facilitating the centralized treatment of claims in the insolvency of an enterprise group. Again, the

45 See *Guide*, para. 194.
46 See *Guide*, para. 196.
47 On the effectiveness and economy of this legislative policy see the concrete results that can be achieved in the *Guide*, para. 197.
48 See *Guide*, para. 198.

purpose is to shorten the necessary procedures, reduce the time they may take and save costs. Therefore, this is a prudent and sound policy for future rules of the different potential adopting States.[49]

These measures are intended to apply regardless of the existence of a 'Planning procedure' and would therefore also be applicable when there is no agreement to initiate such a procedure or where the necessary preconditions for such a procedure do not exist.[50]

The effective operation of the rule requires that: (a) there be an undertaking by the 'Insolvency representative' (if applicable, jointly with the 'Group representative'); (b) that the undertaking complies with the formal requirements the court may require; and (c) that the court should approve the treatment to be accorded in the main proceedings (Article 28(1)(a)(b) and (c)). Under these conditions the agreement will be enforceable and binding on the insolvency estate in the main proceedings.[51]

Article 29 establishes the power of the State with respect to an undertaking made under Article 28 by an 'Insolvency representative' or a 'Group representative' of another State. In such a case the court of this State may: (a) approve the treatment in the main foreign proceeding of claims that might otherwise arise in a non-main proceeding in this State; and (b) stay or decline to commence a non-main proceeding.

I have emphasized that the non-main proceeding may serve different purposes and that it has advantages and disadvantages. Article 29 allows, but does not require, the court of the enacting State (which is the State in which the claim could have been filed in the absence of the undertaking given under Article 28) to approve the treatment to be accorded in the main (foreign) proceedings and to stay any non-main proceedings already opened or to refuse to open such proceedings. These powers are discretionary, and Article 27 applies.[52]

Here again we find the necessary flexibility to protect the creditors of an insolvent enterprise group, while respecting the equal international treatment of all creditors without distinction and cost savings, which is also a relevant and appropriate policy.

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49 See *Guide*, para. 200.

50 See *Guide*, para. 201.

51 For further details on the operation of Article 28 see the *Guide*, paras. 202–207.

52 For the relevant issues in considering whether the opening of the non-main proceeding is desirable or prudent, see the comments of the *Guide*, paras. 209–210.

F. Banks and insurance companies in international insolvency

I believe that the existence of special insolvency regimes for banks, insurance companies and other similar entities should not prevent the application of the MLEG regime to them. That is my opinion even though they are traditionally excluded from general insolvency regimes in many countries but regulated in special ones. On the contrary, I propose the application of the MLEG rules to such entities. The reasons are as follows:

1. It will be possible that such entities have interests or assets outside the State concerned and therefore it may be prudent to apply the same rules to all of them, by analogy and mainly out of respect for the foreign element by the local State. We understand that the opposite case is also true for this opinion.
2. A group of companies consisting of such entities may be economically and legally truly relevant and therefore the application of the rules proposed by UNCITRAL may be appropriate in the absence of other rules, as is probably the case at the international level.
3. This is especially true in the frequent case where such international banks and insurance companies are part of international enterprise groups, since many corporate groups have their financial lungs within them, as controlled or even controlling members (such as a 'Holding bank corporation' in the terminology of some jurisdictions).
4. It is one thing to exclude banks and insurance companies or other similar legal entities from the general domestic insolvency regime of each State, to legislate them in a special regime, and quite another to deny, exclude or not include the applicability of the rules proposed by the MLEG to such multinational groups including banks and insurance companies. The former does not necessarily imply the latter. Such exclusion may even be detrimental in practice.
5. On the contrary, an exclusion of such entities from the proposed regime as a model law would make it more difficult to reach a definitive solution ('Group insolvency solution') to insolvency cases, or else deprive them of the benefits of such rules, all of which seems inconvenient and inappropriate.

I therefore partially disagree with Recommendations 8 and 9 of the UNCITRAL Legislative Guide, Part Two (2004).

G. Overall critical evaluation

The following is an overall critical assessment of the MLEG.

1. The UNCITRAL Working Group V (Insolvency Law) is aware that very few, if any States, have a comprehensive regime on the treatment of the insolvency of multinational enterprise groups. It therefore includes in this MLEG system specific effective mechanisms to achieve cooperation and coordination in the development of a 'Group insolvency solution'. It also promotes the cross-border recognition and implementation of such a solution in multiple States, in a manner that is appropriate, fair, and reasonable from the point of view of the purposes of any Private Insolvency International Law covering multinational enterprise groups.
2. With the 2019 MLEG, UNCITRAL has effectively implemented and applied the following provisions: (1) 1997 *Model Law of Cross-Border Insolvency*; (2) 2010 *Chapter two*, *Part Three of* the *UNCITRAL Legislative Guide on Insolvency Law*; (3) 2019 *Legislative Guide on Insolvency Law. Part four: Directors' obligations in the period approaching insolvency (including in enterprise groups). First edition (2019), Second edition* (2020). This denotes a coherent policy among all of them and the MLEG in connection with an effective model law of international corporate groups in insolvency as pertinent examples to be followed.
3. The text of the MLEG, in each of its articles, comprehensively covers the need for a Model Law to achieve a fair and efficient administration system for the insolvency proceedings of multinational enterprise groups.
4. These policy objectives are in harmony with the extremely complex economic and legal structure of multinational enterprise groups in insolvency, which is based on the economic integration of numerous legal entities that retain their independent existence within the group and to third parties.
5. The proposed standard achieves that purpose by effectively regulating both the protection of all the individual group members and of the total combined value of the assets and operations of all the enterprise group affected by insolvency. It achieves this, not by means of traditional international legislation, but through the primacy of communication, cooperation, and coordination of the different international processes. Thus, there is proportionality between the *factum* of the

rule and its consequence, which gives the entire system a harmonious, legitimate, and versatile effect.

6. These rules not only make it clear what treatment that group of companies will certainly receive in insolvency proceedings, but also ensure, to the extent possible, that such treatment facilitates the expeditious and efficient conduct of all the parties in those sets of proceedings. It is desirable that, under these or similar rules, such conduct would take just a few weeks or only some months rather than several years. These texts facilitate an appropriate simplification, speed, and cost savings in the relevant procedures of an enterprise group in insolvency at the international level.
7. This article is a reflection on the practices on cooperation and coordination that characterize modern and efficient systems of international insolvency administration of corporate groups, both in common law and civil law countries. The remarks here are in line with what has been decided in the cases or comparative legislation of those countries so far.
8. UNCITRAL Working Group V has respected the differences of the national procedural laws and does not attempt to unify procedural or substantive insolvency law. The law offers useful ways or procedures to provide a modern, fair, and harmonized set of rules. In this way, States have a basic tool to successfully conduct the respective negotiations and decisions of the parties and courts involved to achieve a final solution for the insolvency of the whole international group ('Group insolvency solution') in the fastest and most cost-effective way.
9. The proposal is a realistic policy, far away from the unattainable fantasies of substantive — universal or unified — legislation taken to its ultimate extremes. The same consideration applies to excessive national territorialism that neglects or denies foreign interests. In our view, the rule lies somewhere in the middle between these two extremes and gives the proposed procedural avenues appropriate flexibility and reliability in their solutions.
10. Faced with the complex and kaleidoscopic panorama of different national laws that may be applicable to a case of multinational insolvency of corporate groups, this realism also lies in the fact that the proposal advocates a virtually *ad casum* solution. This can be achieved through communication of information, cooperation, and coordination between the different insolvency parties, bodies (officers or parties of the insolvency proceedings, such as trustees in bankruptcy,

corporations, representatives etc.), and courts, on a consensual basis. The proposed procedural routes are suitable for achieving consensus and converge towards this final global agreement.

11. Moreover, we believe that, given the extreme complexity and the large number of possible insolvency processes of a multinational corporate group, it is practically impossible to find satisfactory solutions by the mere and mechanical application of traditional rules of private international insolvency law of each country.[53] For this reason, there is practically no other way than to 'negotiate' a solution by common agreement between the parties, the officers and the courts involved. This is the criterion followed by the UNCITRAL Working Group V as the *leitmotiv* throughout the articles of the MLEG. As a more practicable solution, it seems to us to be appropriate, prudent, and fair. This intractable complexity is also present in the case of the COMI, as UNCITRAL itself has expressly emphasized in the respective Working Papers cited above.
12. The emphasis on international cooperation between judges, parties and bodies of insolvency or representatives of insolvency, coupled with the clear encouragement of direct communication between them, can achieve the swift action that is important in the matter at hand. This is not only true in general and for groups of companies, but it also makes it possible to find the means to limit or prevent international fraud. This is particularly the case in view of the possible reality of international wire fraud through the fraudulent concealment or transfer of liquid insolvency assets to other jurisdictions, especially in the early stages of the insolvency of the members of an enterprise group.
13. The commented text contributes to the strengthening of legal goods, assets, or values such as predictability and legal certainty, factors that are considered when rating country risk at the international level. In this sense, the model law constitutes a preservation of these characteristics in a particularly sensitive area that is very much considered by foreign investors. The regulation establishes clear, concrete, and non-discriminatory rules for dealing with the relations between creditors and debtors of a multinational enterprise group.

53 See regarding this legislative policy, e.g. Report 9/622 of 25 May 2007, para. 92 on the postponement of the treatment of conflict of laws in our topic and the following documents: WP 74/Add. 2 of 4 October 2006, paras. 13–14 and WP 76/Add. 2 of 6 March 2007, para. 33.

14. An appropriate legislative adoption by potential States would make it possible to quickly and easily — as in substance the work has already been done — update the rules of private international insolvency law in the area of multinational enterprise groups. In this respect, the initiative is timely, as there are numerous cases of countries whose international insolvency rules are obsolete, anachronistic, or inconsistent with the appropriate legislative purposes for such cases or are not in line with the most modern comparative trends. The MLEG is technically sound, consensual, comprehensive, and flexible. Finally, it is not a binding rule for the adopting states, which always retain their legislative powers to regulate the issue from other points of view.
15. 'Group insolvency solution' can be described as the goal of international insolvency law in general, and in particular for the insolvency of multinational enterprise groups. It is undoubtedly the ideal situation to be reached after proper communication, cooperation and coordination between courts, insolvency officers, creditors, debtors and other interested third parties. In other words, the aim of any insolvency system is to achieve a fair reorganization of the going concern in its many parts, which benefits all parties involved. If this is true, it is especially true *a fortiori* as a going *concern* (*Going Concern Value*) relative to international corporate groups.
16. However, the ultimate purpose of the solutions to international insolvency problems must be based on the choice of fair solutions for each specific case, regardless of the lesser or greater success in communication, cooperation and coordination that may have existed. In our opinion, the latter are only instruments or means to reach the justice of the solutions, not a goal. Here I have proposed a true legal-philosophical realism of the concrete case regarding procedural and especially substantive law solutions in this matter, beyond any laboratory or *a priori* hypothetical solution.
17. On the issue of achieving jurisprudential uniformity of cases, I understand that this objective will be reasonable if the analogy between the factual assumptions of the rule and the solutions of the jurisprudence are effectively verified with respect to new court cases. We are not in favour of a uniform interpretation *per se*, but only to the extent that it conforms to adequate and proportional standards of justice for each individual case. There is nothing more realistic than a solution adapted to the specific case, far away from any generic normative (legislative or jurisprudential) uniformity.

18. Regarding Article 24 (f) last paragraph of the MLEG, the following should be noted. In our view, *Ordre Public* may be affected if it becomes impossible for the insolvency representative to assume his functions, due to a conflict of interest. We are referring not only to a case of liquidation insolvency (in which imperative rules policy is more evident), but also to a case of reorganization, by analogy. Therefore, and as the same rule expresses, the court should entrust a person other than the 'group representative' appointed by the court to perform those functions.
19. In conclusion, and for all these reasons, this activity of proposing procedural rules conducted by UNCITRAL Working Group V in the MLEG, due to its methodology and its final product, seems reasonable, timely, fair, and adequate. These procedural rules may make it possible to reach substantive law solutions, the final goal of any system of Private International Insolvency Law, especially for multinational enterprise groups.

H. The proposed solution in the case of Argentina and other Latin American countries

Finally, I understand that it would not be helpful in relations between Argentina and the EU to have a treaty (or other bilateral instrument, e.g. a soft-law instrument) on cooperation in corporate group insolvency matters, on the one hand, because of the internal political difficulties the Government of Argentina should solve, and, on the other hand, because of the difficulties that characterize the negotiation and putting into force of an International Treaty, especially in the case of Latin American Countries nowadays. Therefore, and because of these reasons, I think that it would be preferable to approach the topic adopting the UNCITRAL MLEG by means of an Argentine internal formal law. In this sense, Argentina's legislative initiative through the elaboration and drafting of the 2018 Draft Bill on Cross-Border Insolvency may well prove to be the first step in the direction proposed in this paragraph. Other Latin American countries have already adopted the UNCITRAL Model Law of 1997. The next step in the Region consists of adopting the UNCITRAL MLEG, *congrua congruis referendo*[54].

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54 See, in this legislative direction: Miguens, (2018), 74.