

# GUIDANCE NOTE ON ENACTING TWO OR MORE OF THE UNCITRAL MODEL LAWS ON INSOLVENCY

(Prepared by the UNCITRAL secretariat in consultation with experts)

## Background information to this guidance note

At its fifty-fourth session (December 2018), Working Group V (Insolvency Law) unanimously supported<sup>1</sup> the preparation by the UNCITRAL secretariat of materials that would explain to enacting States how the Model Law on Enterprise Group Insolvency (MLEG) could be enacted alongside the Model Law on Cross-Border Insolvency (MLCBI) and the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). The Secretariat was requested to prepare such materials in consultation with experts where necessary, noting that the MLEG should be included upon its finalization and adoption.

At its fifty-second session (2019), during which the MLEG was adopted, the Commission requested the secretariat to proceed with the preparation of explanatory materials on the enactment of two or more of the three UNCITRAL model laws on insolvency. The Commission, at its fifty-third session (2020), reiterated its approval that such materials should be prepared and published by the secretariat.<sup>2</sup>

## Role of this guidance note

1. The three model laws that are the subject of this note are each accompanied by a companion guide to enactment that contains detailed background and explanatory information on each model law. That information is primarily directed to executive branches of Government and legislators preparing the necessary legislation for the implementation of the respective model law but may also provide guidance for those charged with interpretation and application of the model law. The three relevant guides to enactment are:

- (a) The UNCITRAL MLCBI Guide to Enactment and Interpretation (MLCBI Guide);
- (b) The UNCITRAL MLIJ Guide to Enactment (MLIJ Guide); and
- (c) The UNCITRAL MLEG Guide to Enactment (MLEG Guide).

2. The purpose of this guidance note is not to repeat the detailed information that is found in the existing guides or in other useful UNCITRAL insolvency texts, such as the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide); the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation; the UNCITRAL MLCBI: The Judicial Perspective; or the Digest of Case Law on the MLCBI (the Digest). Instead, the role of this note is to provide additional and technical guidance to States wishing to enact two or more of the model laws on how the MLEG, the MLIJ and the MLCBI could be enacted alongside each other, highlighting areas where legislators must be careful in their drafting of any consolidated approach to ensure that the purpose of each model law continues to be achieved.

3. This guidance note contains a series of technical suggestions regarding how specific provisions of each model law could be combined to create a single consolidated enactment. States wishing to enact only the MLCBI and the MLIJ or only the MLCBI and the MLEG can also use the technical comments and the illustrative text (linked at the bottom of this paragraph) for those purposes. For a more

<sup>1</sup> See A/CN.9/966, para. 109.

<sup>2</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 110 and 222 (b), and *Seventy-fifth Session, Supplement No. 17 (A/75/17)* paras. 20(b) and 61.



detailed explanation of how the individual provisions are intended to operate or how they might interact with other provisions, reference should be had to the detailed background and article-by-article information in the MLCBI Guide, the MLIJ Guide and the MLEG Guide, as well as to the other UNCITRAL insolvency texts; references that may be particularly useful are indicated at the end of each of the paragraphs that follow. In all respects, attention has been paid in this note to ensure that the original text of each model law is changed as little as possible, but certain editorial adjustments must be made to ensure that a consolidated enactment of the model laws will operate as intended and is appropriately cross-referenced. It should be noted that States considering how best to implement two or more of the model laws may wish to take a more integrated approach to the legislative drafting. Those areas that would lend themselves to greater integration are identified in this note, but the specific drafting of highly integrated provisions has been left to States in order to simplify this note and make it as clear as possible. An illustration of how the MLCBI, the MLIJ and MLEG could be enacted in a single model law by following this technical guidance may be found by clicking this [link](#). It also may be useful for readers to follow the illustration in that link as they review this note.

## **Consolidated enactment of the MLCBI, the MLIJ and the MLEG**

### *General observations*

4. The subject matter of the MLIJ and of the MLEG is closely related to that of the MLCBI. In fact, both the MLIJ and the MLEG were drafted in the expectation that each or both of them would be enacted along with the MLCBI and must thus work together in a complementary way. While the MLCBI was designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning single debtors experiencing severe financial distress or insolvency, the MLIJ was designed to assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that would facilitate the conduct of cross-border insolvency proceedings and complement the MLCBI. The MLEG was designed to expand on previously existing UNCITRAL insolvency texts to equip States with modern legislation addressing the domestic and cross-border insolvency of multiple debtors that are members of the same enterprise group, thus complementing both the MLCBI and part three of the Legislative Guide. Unsurprisingly, the three model laws have complementary purposes, use similar terminology and definitions, and rely on similar frameworks to achieve their goals. (See MLCBI Guide paras. 1–4; MLIJ Guide paras. 1, 35–41; and MLEG Guide paras. 1–3 and 14.)

### *Preamble*

5. The preamble of the MLCBI could be included as the first preambular paragraph of a consolidated text, and could include preambular subparagraphs 1(a) to (e) of the MLIJ as subparagraphs 1(f) to (j) in that consolidated text. Preambular subparagraphs (a) to (g) of the MLEG could be inserted as subparagraphs 1(k) to (q) into the first paragraph of the consolidated preamble, with slight editorial adjustments to clarify the phrase “those cases” in MLEG preambular subparagraphs (a) and (b). The chapeau of the MLCBI preamble could be adjusted for the first paragraph by including the phrase “and insolvency affecting the members of an enterprise group” from the chapeau of the MLEG preamble. In addition, should a State wish to do so, MLCBI preambular paragraph (d) (“protection and maximization of the value of the debtor’s assets”) could be combined into a single paragraph in the consolidated text with MLIJ preambular paragraph (e) and MLEG preambular paragraph (e), all of which express a similar purpose. (See MLCBI Guide paras. 46–52; MLIJ Guide paras. 43–44; and MLEG Guide paras. 33–34.)

6. By indicating what the MLIJ is not intended to do, the second preambular paragraph of the MLIJ clarifies certain issues concerning the relationship of the MLIJ with other national legislation dealing with the recognition of insolvency proceedings

(such as the MLCBI) or of insolvency-related judgments. MLIJ preambular subparagraph 2(c) could be included as the second paragraph of the consolidated preamble, as it remains necessary in the consolidated text. However, MLIJ preambular subparagraphs 2(a) (“to restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment”), 2(b) (“to replace legislation enacting the MLCBI or limit the application of that legislation”) and 2(d) (“to apply to the judgment commencing the insolvency proceeding”) would be unnecessary in a text consolidated with the MLCBI. (See MLIJ Guide para. 45.)

#### *Scope of application*

7. The first paragraph of article 1 (“Scope of application”) of each of the model laws could be combined into a single first paragraph, with MLIJ article 1(1) becoming subparagraph 1(1)(e) of the consolidated text, and MLEG article 1(1) becoming subparagraph 1(1)(f) of the consolidated text. (See MLCBI Guide paras. 53–54; MLIJ Guide para. 46; and MLEG Guide para. 35.)

8. The second paragraph of article 1 of each of the model laws could also be combined into a consolidated second paragraph, since their wording is substantially the same. Since the MLIJ does not include a note in square brackets explaining what types of judgment might be excluded from the application of the Law, it may be advisable for clarity to include an explanation in the consolidated text along the following lines: “[*designate any types of judgment that should be excluded from the provisions applicable to insolvency-related judgments*]”. (See MLCBI Guide paras. 55–61; MLIJ Guide para. 47; and MLEG Guide paras. 36–38.)

9. For States wishing to prepare a more integrated version of the consolidated text, it would be possible for MLEG article 4 (“Jurisdiction of the enacting State”) to be included as subparagraph 3 of article 1 of the consolidated text. In the alternative, it could be incorporated as a separate provision along with many other operative provisions of the MLEG as a separate chapter of the consolidated text focused on “enterprise group insolvency” (included below as Chapter VII). (See MLEG Guide paras. 54–59.)

#### *Definitions*

10. The three model laws use similar terminology and definitions, and maintain consistency with other UNCITRAL insolvency texts, such as the Legislative Guide, when additional terms are needed. As a consequence, the definition of “establishment” in MLEG article 2(l) and MLCBI article 2(f) could be combined in a single subparagraph of the consolidated text (subparagraph 2(f)), as could the definitions of “insolvency proceeding” and “insolvency representative” in the MLIJ (subparagraphs 2(a) and (b)) and the MLEG (subparagraphs 2(h) and (i)) be combined to become subparagraphs 2(p) and (q) of the consolidated text. Note that “the enterprise group member debtor” referred to in the MLEG article 2(l) definition of “establishment” may already be included in the MLCBI article 2(f) reference to “the debtor”, but inclusion of “the enterprise group member debtor” in the consolidated definition may contribute to greater certainty. Reference to both the “debtor” and the “enterprise group member debtor” in the consolidated definitions of “insolvency proceeding” and “insolvency representative” is also included for greater certainty, but a State may wish to refer only to the “debtor” in these definitions. (See MLCBI Guide paras. 48–52 and 62–90; MLIJ Guide paras. 20–29 and 48–52; and MLEG Guide paras. 15–25 and 39–49.)

11. The definitions in MLIJ subparagraph 2(c) (“judgment”) and (d) (“insolvency-related judgment”) could be inserted in the consolidated text of article 2 as subparagraphs (g) and (h), respectively. Similarly, MLEG subparagraphs 2(a) (“enterprise”), (b) (“enterprise group”), (c) (“control”), (d) (“enterprise group member”), (e) (“group representative”), (f) (“group insolvency solution”), (g) (“planning proceeding”), (j) (“main proceeding”), and (k) (“non-main proceeding”) could be incorporated in article 2 of the consolidated text as

subparagraphs (i) to (o), (r) and (s). Alternatively, the definitions relating to the MLEG could be placed in the separate chapter on “enterprise group insolvency”. (See MLIJ Guide paras. 52–62; and MLEG Guide paras. 39–49.)

*Remaining general provisions in Chapter I*

12. Article 3 of the MLCBI (“International obligations of this State”) is identical to MLIJ article 3(1) and MLEG article 3, and could thus be combined. MLIJ article 3(2) (concerning non-applicability of the MLIJ when a treaty that is in force applies to the recognition and enforcement of civil and commercial judgments) could be inserted as a second paragraph of the consolidated article 3, or it could be incorporated as a separate provision along with other operative provisions of the MLIJ in a separate chapter of the consolidated text focused on “recognition and enforcement of insolvency-related judgments” (included below as Chapter VI). Placement of MLIJ article 3(2) as an article in a separate chapter may make it clearer that a bilateral treaty governing recognition and enforcement of judgments, such as a bilateral investment treaty, would not displace the application of the law, except in cases of actual conflict. (See MLCBI Guide paras. 91–93; MLIJ Guide paras. 63–65; and MLEG Guide paras. 50–53.)

13. Article 4 of the MLCBI (“Competent court or authority”) is substantially similar to MLEG article 5 and to the first phrase of MLIJ article 4, thus the three provisions could be combined into a single consolidated article 4 with the addition of a few key concepts (domestic “courts”, “foreign planning proceeding”, “insolvency representatives”, and “group representatives”). The second phrase of MLIJ article 4 regarding when the issue of recognition is raised as a defence or as an incidental question could be added as a second sentence to the consolidated text of article 4, or added as a separate provision in the chapter of the consolidated text on “recognition and enforcement of insolvency-related judgments”. However, regardless of whether that phrase is included in article 4 of the consolidated text or as a separate provision in the chapter on “recognition and enforcement of insolvency-related judgments”, it must include the phrase “in which case recognition pursuant to article 17 shall not be required” to avoid the unintended result that consolidating the three model laws might have in suggesting that prior recognition of the judgment under article 17 is required when the issue is raised as a defence or as an incidental question. (See MLCBI Guide paras. 94–98; MLIJ Guide paras. 66–67; and MLEG Guide paras. 60–61.)

14. Article 5 of the MLCBI (“Authorization to act in a foreign State”) is substantially similar to MLIJ article 5, and could be combined into a single consolidated article 5 with the addition of the phrase “or with respect to an insolvency-related judgment issued in this State”. (See MLCBI Guide paras. 99–100; and MLIJ Guide paras. 68–69.)

15. Article 6 of the MLCBI (“Public policy exception”) and the MLEG are identical and could be included as a consolidated article 6. Article 7 of the MLIJ is also the same, but includes the phrase “including the fundamental principles of procedural fairness”. That additional concept could be included as a separate provision in the chapter on “recognition and enforcement of insolvency-related judgments”, or included in consolidated article 6 by adding the additional phrase. In either case, care should be taken by legislators that the addition of the phrase would not broaden the narrow construction that has usually been accorded this exception and thus inadvertently impede existing practices in cross-border cooperation. (See MLCBI Guide paras. 101–104; MLIJ Guide paras. 71–74; and MLEG Guide paras. 62–65.)

16. Article 7 of the MLCBI (“Additional assistance under other laws”), MLIJ article 6, and MLEG article 8 are substantially similar, and could be combined in a single consolidated article 7, with the addition of a few phrases specific to the MLEG scenario (i.e. adding the concepts of the “insolvency representative” and a “group representative”). Article 6 of the MLIJ differs slightly from the other two model laws in that it refers to providing “additional assistance under other laws of this State”, without specifying to whom that assistance would be provided. Specifying in the

consolidated version of article 7 that additional assistance may be provided “to a foreign representative or a group representative under other laws of this State” is not thought to unduly narrow the wording of MLIJ article 6. (See MLCBI Guide para. 105; MLIJ Guide para. 70; and MLEG Guide para. 68.)

17. Article 8 of the MLCBI and the MLIJ (“Interpretation”) are identical to MLEG article 7, and the three provisions could be consolidated into a single article 8. (See MLCBI Guide paras. 106–107; MLIJ Guide paras. 75–76; and MLEG Guide paras. 66–67. It should also be noted that the Digest may also assist in the harmonized interpretation of the MLCBI.)

#### *Chapter II. Access of Foreign Representatives and Creditors to Courts in this State*

18. Consolidation of the three model laws into a single enactment does not require any changes to be made to Chapter II of the MLCBI (articles 9 to 14), which could be included as Chapter II in the consolidated text. (See MLCBI Guide paras. 108–126.)

#### *Chapter III. Recognition of a Foreign Proceeding and Relief*

19. The title of Chapter III of the consolidated text could delete the phrase “of a foreign proceeding”, since the chapter could be broadened to include both recognition of foreign proceedings and of insolvency-related judgments. The title would need further adjustment should States wishing to prepare a more integrated text of the three model laws also include recognition of a foreign planning proceeding in this chapter.

20. Article 15 of the MLCBI (“Application for recognition of a foreign proceeding”) is similar to article 11 of the MLIJ (“Procedure for seeking recognition and enforcement of an insolvency-related judgment”) and thus may be treated in a single consolidated article 15, with MLCBI article 15 being paragraph 1, and MLIJ article 11 being paragraph 2. That change would also require a change to the title of the article, with the addition of the phrase “or an insolvency-related judgment”. Some States may wish to include MLEG article 21 (“Application for recognition of a foreign planning proceeding”) as paragraph 3 of consolidated article 15, but it may also be included as a separate provision in the chapter on “enterprise group insolvency”. (See MLCBI Guide paras. 127–136; MLIJ Guide paras. 83–92; and MLEG Guide paras. 139–152.)

21. Article 16 of the MLCBI (“Presumptions concerning recognition of a foreign proceeding”) includes in paragraph 2 a presumption that documents submitted in support of an application for recognition of a foreign proceeding are authentic regardless of whether they have been legalized. This presumption is the same as that applicable to documents submitted in support of the recognition of an insolvency-related judgment in MLIJ article 11(4) and to those submitted in support of a foreign planning proceeding in MLEG article 21(6), and the three could be consolidated into a single subparagraph. (See MLCBI Guide paras. 137–149; MLIJ Guide paras. 88–91; and MLEG Guide paras. 149–152.)

22. Articles 17 (“Decision to recognize a foreign proceeding”), 18 (“Subsequent information”), 19 (“Relief that may be granted upon application for recognition of a foreign proceeding”) and 20 (“Effects of recognition of a foreign main proceeding”) of the MLCBI may be included in the consolidated text without change. Both the MLIJ (article 12 on “Provisional relief”) and the MLEG (article 22 on “Provisional relief that may be granted upon application for recognition of a foreign planning proceeding”) contain provisions in respect of provisional relief which could be included in article 19 of the consolidated text, or as separate provisions in the respective chapters on “recognition and enforcement of insolvency-related judgments” and “enterprise group insolvency”. (See MLCBI Guide paras. 150–188; MLIJ Guide paras. 93–95; and MLEG Guide paras. 153–165.)

23. Article 21 of the MLCBI (“Relief that may be granted upon recognition of a foreign proceeding”) may be included without change in the consolidated text, except

for States wishing to include expressly MLIJ article X as a head of relief that may be granted under article 21. In that case, States may wish to add as subparagraph 1(g) the phrase “Recognizing and enforcing an insolvency-related judgment”, which reflects the content of MLIJ article X; alternatively, enacting States may wish to include MLIJ article X as a separate paragraph of article 21. However, in either case, States enacting MLIJ article X will also enact the MLIJ and the MLEG by way of the consolidation, and thus must consider the relationship between MLIJ article X and the MLEG, as well as the interaction with MLIJ article 14 (“Grounds to refuse recognition and enforcement of an insolvency-related judgment”) subparagraphs (f) and (g)(iv). For example, a requirement for protection of the interests of creditors and other interested persons (“adequate protection of third party interests”) is included in the MLCBI, the MLEG and the MLIJ, but in different situations. MLCBI article 22 requires the court recognizing a foreign proceeding to ensure that those third party interests are considered when granting, modifying or terminating provisional or discretionary relief. Similarly, MLEG articles 20, 22 and 24 (also arts. 29 and 31), in accordance with MLEG article 27 (and art. 32), require that the court exercising its powers under the MLEG must be satisfied that the interests of third parties are adequately protected. The idea underlying that MLCBI and MLEG requirement is that there should be a balance between relief that might be granted and the interests of the persons that might be affected by that relief. However, the MLIJ is more narrowly focused, and the issue of protection of third party interests is only relevant in so far as MLIJ article 14, subparagraph (f) gives rise to a ground for refusing recognition and enforcement where those interests were not adequately protected in the proceeding giving rise to judgments that directly affect the rights of creditors and other stakeholders collectively. (Where an insolvency-related judgment affects third parties only indirectly (e.g. via the judgment’s effect on the size of the insolvency estate), a separate analysis of adequate protection of third party interests would not be necessary.) Further, article 14, paragraph (g) of the MLIJ permits refusal of recognition and enforcement if the originating court did not satisfy one of the conditions in subparagraphs (i) to (iv), with subparagraph (iv) applicable to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the law of the receiving State. Consolidation of all three model laws into a single enactment will therefore require careful consideration by the enacting State of the interaction of MLIJ article X, the MLEG, and MLIJ article 14, subparagraphs (f) and (g)(iv). (See MLCBI Guide paras. 189–199; MLIJ Guide paras. 39–41, 108–115, and 126–127; and MLEG Guide paras. 124, 175, 189–190, 209, 211, 216 and 218.)

24. Articles 22 (“Protection of creditors and other interested persons”), 23 (“Actions to avoid acts detrimental to creditors”) and 24 (“Intervention by a foreign representative in proceedings in this State”) of the MLCBI could be incorporated into the consolidated text without change. (See MLCBI Guide paras. 196–208.)

#### *Chapter IV. Cooperation with Foreign Courts and Foreign Representatives*

25. Chapter IV (articles 25 to 27) of the MLCBI could be included without change in the consolidated text. MLEG Chapter II (“Cooperation and coordination”) could be included as a subchapter of a separate chapter on “enterprise group insolvency”, but many of the MLEG Chapter II provisions are similar to those found in MLCBI Chapter IV. Some States may thus wish to integrate the MLEG Chapter II provisions (particularly, MLEG articles 9, 10, 11 and 12) into Chapter IV of the consolidated text. (See MLCBI Guide paras. 209–223; and MLEG Guide paras. 69–89.)

#### *Chapter V. Concurrent Proceedings*

26. Chapter V of the MLCBI on concurrent proceedings (articles 28 to 32) could be included in the consolidated text without change. (See MLCBI Guide paras. 224–241.)

## *Chapter VI. Recognition and Enforcement of Insolvency-Related Judgments*

27. The remaining operative provisions of the MLIJ could be incorporated in a separate chapter on “recognition and enforcement of insolvency-related judgments” in the consolidated text. These provisions of the MLIJ are: article 3(2) (unless it has been included in consolidated article 3); article 4 (unless it has been included in consolidated article 4; for the reasons articulated in paragraph 13 above, regardless of its placement, it must nonetheless include the phrase “in which case recognition pursuant to article 17 shall not be required”); article 7; article 9; article 10; article 12 (unless it has been included in consolidated article 19); and articles 13 to 16. But for the exception noted in the following paragraph, all other provisions in this chapter may be included without change from the MLIJ, except for minor editing required to conform the provisions with the consolidated format. (See MLIJ Guide paras. 64–67, 71–74, 77–82, and 93–125.)

28. One important addition must be made to article 14 MLIJ (“Grounds to refuse recognition and enforcement of an insolvency-related judgment”) subparagraph (f)(ii), by adding a reference to the adequate protection of creditors and other interested persons articulated in MLCBI article 22(1) and MLEG article 27(1). As noted above in paragraph 23, enacting States must consider the relationship between MLIJ article 14 subparagraph (f) and MLCBI article 22(1) and MLEG article 27(1) (“protection of creditors and other interested persons”). Subparagraph (f) of MLIJ article 14 should be drafted by States enacting the consolidated text to ensure that relief granted that would be subject to a requirement of adequate protection under article 22, paragraph 1 of the MLCBI, or article 65, paragraph 1 of the MLEG, would also be subject to that requirement when recognized as an insolvency-related judgment. Further, adopting States should consider the relationship between MLIJ article 14 subparagraph (g)(iv) and article 21 of the MLCBI, as modified by article X, as well as its the relationship with the MLEG. (See MLCBI Guide paras. 189–199; MLIJ Guide paras. 39–41, 108–115, and 126–127; and MLEG Guide paras. 124, 175, 189–190, 209, 211, 216 and 218.)

## *Chapter VII. Enterprise Group Insolvency*

29. Except as otherwise noted in the discussion above, most of the operative provisions of the MLEG could be incorporated as a separate chapter of the consolidated text focused on “enterprise group insolvency”. In addition, the definitions in consolidated article 2 that are relevant to the MLEG could also be placed in a separate chapter along with the operative provisions. While this approach has the advantage of simplicity and permitting States to adhere as closely as possible to the original text of the MLEG as adopted, some States may wish to integrate the MLEG more fully throughout the consolidated text. (See MLEG Guide paras. 39–49, 54–61, and 68–220.)

30. MLEG articles 4, 5 and 8 to 29 (or to 32, where adopted (see MLEG Guide paras. 28–29)) could be included without change in the separate chapter on “enterprise group insolvency”, except for some minor editorial changes and adjusted cross-references to reflect the renumbering necessitated by the creation of a consolidated text. (See MLEG Guide paras. 54–61 and 68–220.)

### *Assistance in drafting legislation*

31. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the MLCBI, the MLIJ and the MLEG. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: [uncitral@un.org](mailto:uncitral@un.org); Internet home page: [uncitral.un.org](http://uncitral.un.org)).

32. In addition, as noted above, an illustration of how the MLCBI, the MLIJ and MLEG could be enacted in a single model law by following the technical guidance in this note may be found by clicking this [link](#).