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Date: 25 November 2019

Re: **CERIL STATEMENT 2019-3 on A
Reply to UNCITRAL's Model Law
on Enterprise Group Insolvency**

Reporters: Nora Wouters, Esq., and
Professor Stephan Madaus¹

CERIL highlights the recent work of UNCITRAL on a Model Law on Enterprise Group Insolvency (MLG). Following a consultation earlier this year on a draft of the MLG – to which CERIL and the European Law Institute (ELI) made a joint contribution – this report analyses the amendments made in the final text, as adopted by UNCITRAL's Commission in July 2019. In line with recommendations made in the CERIL-ELI Report 2019-1, multiple amendments were incorporated contributing to a more effective functioning of the UNCITRAL Model Law on Enterprise Group Insolvency.

Introduction

Together with the European Law Institute (ELI), CERIL was involved in February/March 2019 in providing comments and recommendations on the draft UNCITRAL Model Law on Enterprise Group Insolvency. This resulted in the CERIL-ELI Report 2019-1 on UNCITRAL's Draft model law on enterprise group insolvency.

As a background: in 2010, UNCITRAL adopted Part III of the Legislative Guide, which specifically addressed the treatment of enterprise groups in insolvency (Legislative Guide). In 2013, UNCITRAL Working Group V (Insolvency law) agreed to continue its work on the cross-border insolvency of multinational enterprise groups by developing provisions (i.e. draft legislative provisions) on a number of issues. The interest in the topic of group insolvencies was premised on the fact that the UNCITRAL Model Law on Cross-Border Insolvency (1997) did not touch upon the

¹ CERIL would like to express its sincere gratitude to Ilya Kokorin, LL.M, PhD student at the Department of Financial Law at Leiden University and Associate researcher of CERIL for the preparation of the preliminary document on which this statement is based. The CERIL Working Party was led by Nora Wouters (Belgium) and Stephan Madaus (Germany) and consisted of Michał Barłowski (Poland), Giorgio Corno (Italy), Prof. Tuula Linna (Finland), Prof. Renato Mangano (Italy), Dr. Paul Omar (UK), Stephen Taylor (UK), Prof. Ignacio Tirado (Spain), Jean-Luc Vallens (France), Prof. Reinout Vriesendorp (The Netherlands), Prof. em. Bob Wessels (The Netherlands), and Gert-Jan Boon (The Netherlands; Adjunct-Secretary of CERIL).

issue of enterprise group insolvency. The reason is that at the time this Model Law was debated, groups were regarded as a “stage too far” (Legislative Guide, p. 84).

In 2018, it was decided that a new model law would be preferable to separate legislative provisions. Upon finalization by Working Group VI, the Secretariat invited comments on the resulting draft Model Law on Enterprise Groups in Insolvency (Draft MLG).

In July 2019, at the 52nd session of the UNCITRAL Commission, the final text of the Model Law on Enterprise Group Insolvency (MLG) was adopted.²

The MLG expresses that it seeks to “provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group.” It offers a regime in some respects similar to that of the European Insolvency Regulation (recast) (EIR Recast). It introduces concepts, such as group planning proceedings, group representative, synthetic and reverse synthetic proceedings, and provides detailed rules on cooperation and communication in group insolvency proceedings.

CERIL involvement

In 2019, the ELI was asked by the Secretariat of UNCITRAL to comment on the draft. Together with CERIL, a working party was formed to provide comments, which was chaired by **Nora Wouters** (Dentons Europe LLP, Belgium) and Prof. **Stephan Madaus** (Martin Luther University, Germany). **Ilya Kokorin** (PhD candidate, Leiden University, The Netherlands) served as an Associate Researcher.

The working party presented 17 recommendations on the improvement of the Draft MLG. These were shared with UNCITRAL on 15 March 2019,³ and were published as a CERIL Statement 2019-1 and CERIL-ELI Report 2019-1.⁴

CERIL Recommendations

It is notable that some of the recommendations made by CERIL-ELI on the draft MLG and the draft Guide to Enactment have been followed in the final texts of the MLG and its Guide to Enactment.

Below, we list a few of such recommendations:

1) Group representative

The draft Guide to Enactment clarified that the insolvency representative can later become a group representative – a person or body authorized to act as a representative of a planning proceeding. CERIL-ELI advised against this approach (Recommendation 9). The CERIL-ELI Report 2019-1 noted that overlapping roles (i.e. insolvency representative in one enterprise group member and group representative for the whole/part of the enterprise group) may add confusion and undermine trust in the figure of group representative by the participating enterprise group members.

² This text is available here: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi - advance pre-published version - e.pdf>.

³ Available at: <https://undocs.org/en/A/CN.9/989>.

⁴ Available at: www.ceril.eu.

This concern has been addressed in the most recent version of the Guide to Enactment, which now accepts that “[i]t may be desirable to separate the functions of insolvency representative and group representative in certain situations, in particular in order to avoid a possible conflict of interests.”⁵

2) Synthetic proceedings

The MLG adopts the concept of synthetic proceedings, similar to that found in Article 36 EIR Recast. Article 29 MLG permits the court to stay or decline to commence non-main proceedings, if an insolvency representative or a group representative from another country in which a main proceeding is pending, has given an undertaking.

In the CERIL-ELI Report 2019-1 it was emphasized that Article 29 of the draft MLG was confusing to the extent that it allowed the court to “[a]pprove the treatment to be provided in the foreign main proceeding to the claims of creditors located in this State”. Instead, in the report it was suggested that the court should be able to approve “the treatment to be provided in the foreign main proceedings to the claims that could be brought by a creditor of the enterprise group member in this State” (Recommendation 14). This recommendation was followed in the MLG.

Article 29 MLG now allows courts to “[a]pprove the treatment to be provided in the foreign main proceeding to the claims that might otherwise be brought in a non-main proceeding in this State.”

3) Cooperation and communication

The MLG encourages cooperation and active and direct communication between courts, presiding over insolvency cases of enterprise group members. There are a number of soft law guidelines in this respect. The draft Guide to Enactment of the MLG included a reference to the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, drafted by the Judicial Insolvency Network (JIN Guidelines; 2016). The draft Guide to Enactment cited the JIN Guidelines as an example of “international guidelines”.

For the purposes of having a more balanced overview of soft law instruments in this area, the CERIL-ELI Report 2019-1 advised adding also other guidelines, such as the European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007; a revision is currently being prepared),⁶ ALI-III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2012)⁷ and the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (2014).⁸ In the most recent version of the Guide to Enactment, the reference to JIN Guidelines has been altogether removed.

4) Appointment of a group representative and relief available

Finally, in the CERIL-ELI Report 2019-1 it was noted that the title of Chapter 3 of the draft MLG – “Relief available in a planning proceeding in this State” – did not

⁵ The most recent version of the Guide to Enactment is available via: <https://undocs.org/en/A/CN.9/WG.V/WP.165>.

⁶ Available here: <https://www.insol-europe.org/download/documents/1113>.

⁷ Available here: https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf.

⁸ Available here: http://www.ejtn.eu/PageFiles/16467/EU_Cross-Border_Insolvency_Court-to-Court_Cooperation_Principles.pdf.

precisely reflect its content. For instance, the appointment of a group representative, referred to in Article 19 of the draft MLG, could not be considered relief in itself. This concern was resolved in the final text of the MLG, in which the title of Chapter 3 was changed to “Appointment of a group representative and relief available in a planning proceeding in this State.”

CERIL is proud that it has, with its unique independent perspective, been able to contribute to long-term improvements in restructuring and insolvency. The conferees of CERIL thank those leading the drafting of the MLG for the opportunity to participate in this important initiative.

The full Report 2019-1 and the Statement 2019-3 are available on CERIL’s website www.ceril.eu. This website also contains information about the organisation of CERIL and its activities.

In the meantime, professor Reinout Vriesendorp, secretary of CERIL (info@ceril.eu), or the Reporters, Nora Wouters (nora.wouters@dentons.com) and Prof. Stephan Madaus (stephan.madaus@jura.uni-halle.de) welcome the opportunity to further inform you about CERIL or the contents of Report 2019-1 and Statement 2019-3.

On behalf of the CERIL Executive,

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