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JUDICIAL GUIDELINES FOR COORDINATION OF MULTI-NATIONAL ENTERPRISE GROUP INSOLVENCIES

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Judicial Guidelines for Coordination of Multi-National Enterprise Group Insolvencies

Introduction

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

Despite these shared goals and common approaches, the existing international insolvency regimes have not resolved many of the problems that arise when multi-national enterprise groups fail. Most important for these Guidelines, no legislation anywhere in the

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

world explicitly governs the insolvencies of multi-national enterprise groups, nor considers where the COMI of such an enterprise is located. Multi-national enterprises are, moreover, not restricted to the regions of the world in which the existing international insolvency regimes exist. Local insolvency laws do not ensure that the value of the debtor's assets are maximized, because they have as their principal purpose the regulation and protection of local concerns. They provide only limited guidance for courts that seek to coordinate with other jurisdictions to maximize values for stakeholders around the world. In the absence of legislative guidance, national courts have struggled to address the fact-specific needs of insolvent multi-national enterprise groups, and competing claims for jurisdiction over insolvencies have arisen, putting at risk the fundamental goal of value maximization. Additional tools to achieve cooperation and coordination between courts with jurisdiction over the multiple arms of international businesses are needed to facilitate their efficient restructuring or liquidation.

These Guidelines are intended to apply to a group of companies or enterprises with operations, assets and employees located in more than one country, which companies have unified corporate governance, either through common or interlocking shareholding or by contract. The principles may also be of assistance in coordinating the insolvencies of multi-national enterprise groups whose component parts operate with relative independence. The courts and enterprise groups should adopt and implement these principles before taking decisive action that may have precedential effect within a case.

DEFINITIONS

"COMI" means center of main interest, as that term is used in the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law").

Commentary

Although the phrase "center of main interest" is used in both the Model Law and in the European Council Regulation on Insolvency Proceedings, Council regulation 1346/2000, 29 May 2000, 2000 O.J. (L160) (hereafter "EU Regulation")[2], the courts interpreting COMI in different jurisdictions have reached different conclusions about how it should be identified. *See Eurofood, European Circuit of Justice, Case* C -- 341/04 [2006] ECR I-3813; Samuel L. Bufford, International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies," 12 Columbia Journal of European Law, 429 (2006); Samuel L. Bufford, "Center of Main Interests, International Insolvency Case Venue and Equality of Arms: The Eurofood Decision of the European Court of Justice," Northwestern Journal of International Law and Business 351, January 2007. Professor Westbrook questions whether the U.S. and Europe need to have the same interpretation of this central concept in "Locating the Eye of the Financial Storm," 32 Brook. J. Int'l L. 1019 (2007). But even in several insolvencies involving multi-national enterprises within the European Union, competing claims for "main" proceeding status have been made on behalf of certain members of the groups, leading to several different interpretations of the provisions in Article 3 of the EU Regulation relating to COMI and the meaning and the strength of the presumption that a debtor's COMI is where it is registered to do business. *Compare, e.g., Eurofoods IFSC Ltd.*, 2006 ECJ CELEX Lexis 777, 206 ECR 1-3813, *Re Daisytek-ISA Ltd. ors*, [2003] B.C.C. 562, ¶ 14, 2003 WL 21353254 (Ch.D). *In the Matter of Ci4net.com Inc.*, [2005] B.C.C. 277, 2004 WL 2578376, and *BenQ*, discussed in Wessels, *BenQ Mobile Holding BV Battlefield Leaves Important Questions Unresolved*, 20 Insolvency Intelligence Nr. 7, August 2007, pp. 103-108.

"Multi-national enterprise group" or "enterprise group" means a group of companies or enterprises established or centered in more than one country which are linked together by some form of control, whether direct or indirect, or ownership, by which linkage their businesses are controlled or coordinated.

[2] The EU Regulation may be found at http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,101/task,viewcategory/catid,41/

Commentary

This definition of a multi-national enterprise group is drawn from UNCITRAL's Working Group V's Legislative Guide on Insolvency law, Part Three: Treatment of Enterprise Groups in Insolvency, A/CN.9/WG.V/WP.82, ¶¶ 2-17 (September 1 2008) ("UNCITRAL Insolvency Working Group Guide") and I. Merovach, "The 'Home Country" of a Multinational Enterprises Group Facing Insolvency," ICLQ Vo. 57, April 2008, p 431. Whether a multi-national enterprise in insolvency proceedings should have a single Enterprise COMI, as defined below, will depend on the strength of its integration and its central organization.

"Enterprise COMI" means the center of main interest of a multi-national enterprise group.

Commentary

Multi-national enterprise groups are organized in many different ways. Some are administered, organized, or operated centrally, and may thus be said to have a single Enterprise COMI. Others have more diffuse organizations, and several different COMIs may be identifiable. The Enterprise COMI of enterprises with strong, centrally administered and integrated organization will presumably be a matter of public knowledge and easily identifiable by creditors of the enterprise - a factor that was justifiably of great significance to the drafters of the EU Regulation. The Enterprise COMI should, however, be the place from which the enterprise is actually operated rather than merely a registered place of business with no relationship to the real management. (The Model Law and the EU Regulations presume that the debtor's registered office is the COMI of a single debtor, but the presumption is rebuttable by evidence or proof to the contrary. There may be less reason to presume that the registered office of the parent of an enterprise is the Enterprise COMI for the enterprise as a whole. The location of the parent's registered office continues to be a relevant, but not conclusive, factor if other factors suggest that the Enterprise COMI is elsewhere.)

The concept of an Enterprise COMI provides a pathway to the coordination of proceedings involving multiple members of an enterprise group. Even in the absence of strong central organization, integration and management, a multi-national enterprise may benefit from recognition of an Enterprise COMI, in which case the courts may need to balance a number of factors arguably relevant to determination of the Enterprise COMI. It may in such cases be more appropriate to recognize multiple COMIs and to maximize value by coordination of multiple proceedings rather than administrative consolidation of those proceedings under one Enterprise COMI. A number of factors, including those listed below, may be relevant in determining (a) whether an Enterprise COMI is appropriate, and if so in what location, or in the alternative (b) whether coordination among courts with jurisdiction over multiple COMIs is more feasible.

A. The location at which high level coordinated economic decisions of the enterprise as a whole are made and from which the enterprise is managed;

B. The degree of financial integration and interdependence among the members of the group, including the existence of cash management systems, joint borrowing

arrangements and/or cross-guarantee provisions;

C. The degree of business integration and interdependence among the members of the group;

D. The location of the enterprise's assets, employees and creditors;

E. The location or locations whose local law will govern most disputes arising in the enterprise's insolvency proceedings;

F. Which of the possible Enterprise COMI courts can deliver and enforce the most pervasive relief?;

G. The extent of common ownership among members of the group; and

H. Where ascertainable, creditors' expectations as to where they would enforce their rights.[3]

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

Commentary

The Court-to-Court Communications Guidelines[4] empower a court to communicate directly with another court or with an administrator in another jurisdiction to coordinate proceedings before it with foreign proceedings. The court may also permit an administrator it has appointed to communicate with a foreign court either directly or through a foreign administrator, for the same goal. The court may receive communications from foreign courts and foreign administrators, and may respond as appropriate, either directly or indirectly. The court may communicate by sending copies of transcripts, orders or opinions or other

[3] The UNCITRAL Working Group V Guide discusses factors relevant to determining the degree of integration of a group, including "the economic organization of the group (e.g., whether the administrative structure is arranged centrally or maintains the independence of the various members, whether subsidiaries depend on the enterprise group for financing or loan guarantees, whether personnel matters are handled centrally, the extent to which the parent makes key decisions on policy, operations and budget and the extent to which the businesses of the group are integrated vertically or horizontally); how the group manages its marketing (e.g., the importance of intra-group sales and purchases, the use of common trademarks, logos and advertising programmes and the provision of guarantees for the products); and the public image of the group (e.g., the extent to which the group presents itself as a single enterprise, and the extent to which the activities of the constituent companies are described as operations of the group in external reports, such as those for shareholders, regulators and investors." UNCITRAL Working Group V Guide, ¶ 16.

[4] The Guidelines may be found at http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,790/task,viewcategory/catid,394/.

documents, by providing notice to parties in interest, by directing counsel or a foreign or domestic administrator to transmit copies of documents, pleadings, affidavits, briefs or other documents filed with the court to the other court, and by participating in telephone or video conference calls, or other electronic means of communication. Court-to-Court Communication Guideline 7 specifies the ways the telephone and video conference calls should proceed, so as to ensure transparency and fairness. It is not intended that these oral communications be *ex parte*; the courts are directed to ensure that notice is given to parties in interest so that they may participate, and that the calls are transcribed and filed as part of the record in the cases.

The Court-to-Court Communications Guidelines also suggest the possibility of jointly conducted hearings between the courts, and specify the mechanisms by which such joint hearings may be conducted.

The Guidelines have been endorsed by a number of courts and professional associations, and have been adopted in a number of cases.[5]

[5] *See* "The Development of Court-to-Court Communications in Cross-Border Cases," B. Leonard, 17 JBLP 619 at 625--27, 629.

OBJECTIVES

The objectives of these Guidelines are, and these Guidelines should be employed to, maximize the value of multi-national enterprise groups in insolvency proceedings and to minimize the cost of those proceedings for the benefit of parties in interest generally.

GUIDELINES

1. Upon the filing of a Petition for Relief by or against a debtor that is a member of a multi-national enterprise group, the court should give notice to the members of the enterprise group, and an opportunity to be heard, before determining the debtor's COMI or taking actions possibly detrimental to the enterprise group.

Commentary

The COMI decision respecting a member of an enterprise group should be informed by information, and argument where requested, respecting the member's relationship to the enterprise group, even if no other insolvency proceeding respecting the enterprise group has yet been initiated.

Where more than one insolvency proceeding has been initiated, the Court may, where appropriate, first apply Guideline 2C and defer a COMI decision to afford the parties an opportunity to develop a consensual protocol that addresses the jurisdictional and administrative issues.

The Model Law,[6] Chapter 15 of the United States Bankruptcy Code and the NAFTA Principles[7] require the debtor to provide the courts with updates on related foreign insolvency proceedings. The Court-to-Court Communications Guidelines suggest methods with which courts may communicate among themselves about cross-border matters. The court should accordingly be comfortable with the concept of obtaining and providing such communications. This Guideline contemplates that the court will require such communications even if the debtors or their representatives fail to offer them voluntarily, to ensure coordination in an insolvency proceeding of a member of a multi-national enterprise group.

Courts with jurisdiction over insolvent enterprises with multiple COMIs may wish to consider the applicability of the NAFTA Principles, and specifically those guidelines relevant to enterprise groups. The European Communication and Cooperation Guidelines for

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[6] The Model Law may be found at http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,790/task,viewcategory/catid,399/

[7] The Principles of Cooperation Among the NAFTA Countries developed by the American Law Institute, may be found at http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,1114/task,viewcategory/catid,36/

Cross-border Insolvency, proposed by a group of academics and practitioners, supported by several judges, may also be helpful.[8]

2. As soon as practicable in the conduct of a case concerning a member of a multi-national enterprise group, the court should, after (i) notice to the members of the enterprise group, and any insolvency administrators appointed for any members of the group, (ii) an opportunity to be heard, and (iii) any appropriate communication with other courts presiding over insolvency proceedings involving members of the enterprise group:

A. Determine the Enterprise COMI and grant standing to a representative of the Enterprise COMI to be heard on all matters affecting the enterprise group.

B. Where insolvency proceedings have been commenced by or against more than one member of a multi-national group, and where appropriate to advance the Objectives of these Guidelines, defer to the Enterprise COMI court, or abstain from, decisions appropriate to the Enterprise COMI court.

C. Appoint and direct a representative to negotiate with other members of the enterprise group a protocol that furthers the objectives of these Guidelines.

Commentary

The standing of the Enterprise COMI representative contemplated in Guideline 2A, the deference to the Enterprise COMI contemplated by Guideline 2B, and the coordinating protocol contemplated by Guideline 2C, are not intended to alter current law. Where current law does not otherwise allow, the standing of an Enterprise COMI representative is limited to the right to be heard. Similarly, current law may limit the court's deference to the jurisdiction and the scope of a coordinating protocol.

Multi-national enterprises are by definition subject to centralized corporate governance. Even if multiple administrators have been appointed to oversee insolvency proceedings in multiple local jurisdictions, it will be beneficial to the preservation of value for the enterprise if a single spokesperson for the enterprise is recognized in all courts with jurisdiction over the component parts of the enterprise. To be effective in facilitating the development of the protocol, the independent officer should be acceptable to the parties in interest and of a recognized stature in the international insolvency community. It may be advisable for a central listing of persons who have performed this task in the past, or who are widely recognized as capable of performing the task in the future, to be generated and maintained by one or more of the organizations concerned with international insolvencies.

[8] The text of the European Communication and Cooperation Guidelines for Cross-border Insolvency are included in an article located at http://bobwessels.nl/wordpress/wp-content/uploads/2007/09/icr-editorial-oct-07.pdf.

Recognition of the standing of such a spokesperson to be heard in all such courts, however, is distinct from a requirement that the national courts defer to a central Enterprise COMI court, if such deference is contrary to local law.

Courts and parties in interest should consider protocols as a fundamental and primary tool for facilitating cross-border multi-national enterprise insolvencies. The protocols may address procedural and administrative issues. They may also reflect consensus concerning the enterprise's corporate governance while in insolvency proceedings (see discussion below regarding the usefulness of corporate governance protocols in the context of competing Enterprise COMI decisions), and they may establish dispute resolution mechanisms. They may reflect agreement among the parties in interest on matters of substance, such as Enterprise COMI, and which courts should exercise jurisdiction over what matters and assets. Finally, they may recite agreement, made either before or after the commencement of proceedings, to submit certain trans-national issues to binding arbitration.[9]

Insolvency professionals should consider negotiating protocols with the significant parties in interest before insolvency proceedings are commenced, whenever feasible.

If multiple courts could legitimately exercise jurisdiction, as may often be the case, the parties should attempt to agree on which court should most properly exercise jurisdiction with respect to particular matters. Among the possible agreements are the following:

The national courts of the Enterprise COMI may have jurisdiction over all assets of the enterprise. In cooperation with the relevant national courts having control of asset segments, the national courts of the Enterprise COMI may apply one or more of the following choice of law principles:

(a) The court with jurisdiction over the Enterprise COMI will apply the avoiding powers of the jurisdiction with the greatest contacts to the challenged transaction;

(b) With respect to interests in property, the court with jurisdiction over the Enterprise COMI will apply, as applicable, (1) the UN Convention on Assignment of Receivables in International Trade, (2) the UNCITRAL Legislative Guide on Secured Transactions; or (3) the law of the nation where the property is located;

(c) The court with jurisdiction over the Enterprise COMI will recognize and defer to the national laws and national courts regarding taxation over assets within the national court's jurisdiction;

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(d) The court with jurisdiction over the Enterprise COMI will apply the law of the nation where employees of the enterprise are employed to issues affecting the employees;

(e) The court with jurisdiction over the Enterprise COMI will apply the non-bankruptcy law of the nation that is specified in a contract that is the subject of dispute to that dispute;

(f) The court with jurisdiction over the Enterprise COMI will determine choice of law issues, and may defer to a national court whose law applies for determinations on the merits, provided a proceeding has been instituted in that nation; and

(g) Unless necessary to preserve or enhance the going concern value of the enterprise for the benefit of all parties in interest, the court with jurisdiction over the Enterprise COMI will not consolidate value or assets from multiple locations until (i) the creditors in that forum are paid in full under the provisions of local law, or (ii) the creditors in that forum agree.

3. The court should employ the Court-to-Court Communications Guidelines to the fullest extent appropriate in order to harmonize court proceedings and rulings in furtherance of the objectives of these Guidelines.

Commentary

The Court-to-Court Communications Guidelines[10] empower a court to communicate directly with another court or with an administrator in another jurisdiction to coordinate proceedings before it with foreign proceedings. The court may also permit an administrator it has appointed to communicate with a foreign court either directly or through a foreign administrator, for the same goal. The court may receive communications from foreign courts and foreign administrators, and may respond as appropriate, either directly or indirectly. The court may communicate by sending copies of transcripts, orders or opinions or other documents, by providing notice to parties in interest, by directing counsel or a foreign or domestic administrator to transmit copies of documents, pleadings, affidavits, briefs or other documents filed with the court to the other court, and by participating in telephone or video conference calls, or other electronic means of communication. Guideline 7 specifies the ways the telephone and video conference calls should proceed, so as to ensure transparency and fairness. It is not intended that these oral communications be *ex parte*; the courts are directed to ensure that notice is given to parties in interest so that they may participate, and that the calls are transcribed and filed as part of the record in the cases.

The Guidelines also suggest the possibility of jointly conducted hearings between the courts, and specify the mechanisms by which such joint hearings may be conducted.

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[10] The Guidelines may be found at http://www.iiiglobal.org/component/option,com_jdownloads/Itemid,790/task,viewcategory/catid,394/.

4. The courts should require the parties to establish a web site on which all pleadings in all jurisdictions are available to all parties at no cost to creditors, at which news of the cases can be posted for the benefit of all creditors, and which can facilitate communication among representatives of members of the enterprise as well as among creditors. In multi-language cases the courts should require that key documents be translated.

Commentary

Translating pleadings may be expensive, but the costs will be offset by the gains in maximizing values. The courts may allocate the costs of translation among the parties as seems appropriate under the particular circumstances. It may prove efficient to coordinate the translation process so that there is common understanding of how commonly used terms will be translated throughout a case.