

Explanatory note

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I. PREAMBLE

1. Company law addresses concerns which are mainly instrumental in nature. Its appearance and development are closely related to the achievement of objectives aiming at economic and social integration between different countries located in an area liable to become part of a common market or which may be connected by the suppression of institutional barriers, the elimination of tax and other obstacles, with a view to creating an extended economic area within which business operators can act under conditions analogous to those of a domestic market. Therefore, the matter of commercial companies constitutes, in international business law and in private international law, one of the fields most in need of codification, either through substantive uniformity or via harmonization coupled with legislative variety. Such methods aim at ensuring that the legal relationships between the commercial companies of different countries will not be damaged by the differences between the applicable legislations and at securing the recognition of the legal system applicable to a foreign company in the other countries under the auspices of a definitive *lex societatis*, all without any major difficulties.

2. In addition to the complications stemming from the different legal systems applicable to companies and to the existence of various categories or modes of commercial companies, there exists, particularly in the Caribbean region, a convergence between distinct substantive legal orders reflecting or arising from various legal systems or families of law. This has been the case beginning with civil law, in its two classic alternative forms, i.e. Romano-Germanic (for those formed under the German pandectists) and French law in the Romanist tradition (for those influenced by the Napoleonic Code) up to the common law, imported from England or the United States. Therefore, the Caribbean appears to be a mosaic of different domestic legal systems formed from the main families of law, as a result of influences from France, Spain, Holland, England or the United States.

As far as legislation is concerned, the present picture in the Caribbean reflects an obvious fragmentation of normative material, resulting from the superposition of strata from different periods, built up around various conceptions and traditions. The systematic and typological dysfunctions are obvious, both in the sphere of traditional societies and in the regulation of specific figures in the law, which are subject to blatant uncertainties as regards questions of a general nature, giving rise to gradual inadequacy in the face of the actual needs of those branches of company law that are most used in practice. As a result, the approval of an OHADAC model law relating to the international law of commercial companies (hereinafter referred to as the model law) aspires to do away with the differences existing between the various national legislations applicable to the international activities of companies, while leaving domestic activities to each substantive legal order. This aspiration contributes to a process of cooperation and purports to provide international trade operators in the Caribbean with an efficient instrument for the benefit of international business, while ensuring legal security as regards the rules

applicable to companies, as well as concerning, consequently, the expected result and the stability of cross-border exchanges, so that all of the above will reinforce the success of the transaction involved.

3. Company law and the law governing competition constitute the most dynamic and complex fields of any integration process, since both are subject to constant evolution and development. This is why a model law must be an instrument of adaptation for all national legislation, through a process of harmonization in that field. Experience shows, in view of the evolution of economic traffic over the last few years, that improvements in the governance of commercial companies and the control of the activity of directors have been achieved. They have taken place mainly not as a result of legislative reform, but under the pressure and thanks to the work of their own issuers, by designing a policy of self-regulation via the approval of internal norms, codes of conduct and compliance programs which, though mandatory, are subject to voluntary approval, integrated by recommendations and catalogues of practices which are efficient and designed especially for corporate governance. Such practices, involving the creation of a soft company law of sorts, have given rise to a new corporate culture, aimed at maximizing the value of the entity and at reinforcing the action of the decision-making body. Such work, systematized in the form of a model law, not only helps facilitate the tasks and functions of the national legislature, but also supplies corporate officers with adequate tools for the creation of their own codes and regulations.

On account of its orientation, aiming at eliminating the differences existing between the various national legislations, a Caribbean body of corporate law contributes, moreover, to ensuring that the actual economic facts will determine the terms of competition, by preventing the latter from being restricted or distorted and by thus attaining the primary objectives of any harmonization and integration process. It is in those terms that the process of legal harmonization has, since it began, taken on a well-known functional dimension, in an essentially economic perspective and in a system of competition, without, however, thereby exhausting the missions assigned to it. Indeed, whatever the results achieved by the harmonization process as regards the neutralization of certain harmful effects deriving from the legislative diversity of the member States, it is obvious that that process fosters the same ends as those pursued by integration.

II. OBJECTIVES

4. The model law is based on the premise that clear and consistent norms prove largely beneficial to economic activity and particularly to the development of the private sector. This is the case where such norms establish and clarify ownership rights, facilitate dispute resolution, allow economic interactions to be more predictable and provide contract parties with protective measures against abuse and arbitrary acts. The need for certainty is, in particular, highlighted as regards the rules governing areas of collective action, which in most cases support cross-border business relationships. The need for information regarding the rules to which the activities of companies are subject proves especially significant when the latter pursue them outside the country where they were created. The same is true when those rules do not evidence any marked discrepancies, but reflect the idea of conferring satisfactory protection on the interests involved. It is important for business operators to have norms that facilitate their cross-border activities, allow legal systems to carry out the mission entrusted to them, that is, controlling and regulating the business of companies, while not impairing the freedom which States enjoy when it comes to governing and confronting their economic and social problems. Provided that those norms are reasonably designed, so that they will be accessible and operate efficiently and transparently for the benefit of those for whom they are intended, they will be applicable with a view to inciting business operators to direct their activities towards growth and development.

5. The model law fulfils those rationalization purposes and seeks to serve the following objectives:

- clarifying and effecting legislative purification in matters of company law, by taking into consideration both the legal traditions existing in the States and territories within the OHADAC area and the more modern trends in comparative law;
- promoting legal convergence with a view to facilitating the cross-border activities of firms and cooperation between the territorial economies in the region;
- safeguarding the legitimacy of the freedom of the States and territories making up OHADAC in order to allow the latter to adopt specific restrictive measures for their own political reasons;
- advocating, at the same time, the institution of mechanisms fostering the limitation of restrictions and reciprocal information, with the aim of improving the knowledge of the legal systems in that regard.

The solutions proposed by the model law are not unaware of the progress achieved within the framework of the regional economic integration process between the countries and territories of the OHADAC area, particularly within the Caribbean Community (CARICOM). The legislative rationalization process proposed by the model law is conceived as a ground-breaking objective

which will make it possible to serve the future achievement of more ambitious goals in terms of legislative reconciliation and unification.

III. CODIFICATION TECHNIQUE AND LEGISLATIVE DRAFTING METHOD

6. The OHADAC project, as its name indicates, is understood as involving the harmonization of business law. Harmonization is a method of codification which attempts to harmonize the national legal systems of a given international area, so that the internal legal orders of the States or territories that are part of it – even in the absence of a single law governing the subject-matter targeted by the harmonization – will achieve the ultimate objective or goal pursued by international codification, as expressed by Savigny’s adage according to which “equal laws shall be applied to equal legal relationships”.

Its technique is distinct from the other method of codification, i.e. substantive uniformity, which aims at one and the same legal regulation for all States within a given international area, in other words, one and the same law for all.

The method most used for harmonization is that of the model law, which aims at having each State or territory, while maintaining its legislative independence, adopt laws identical or at the very least similar to those of the other States, without this involving the signature of an international treaty or agreement. It even admits that each State may add to, delete or modify some of the rules of the model law. Thus, each State or territory adopts its own law while adapting it to its specific circumstances, if called for. Some will turn out to be identical in all points, so that only the country, the enacting organ and the date will vary, while others will modify one or several provisions, but all will safeguard its guiding principles, as well as the objectives pursued by the codifying task of harmonization.

7. The model law uses two categories of norms for its instrumentation purposes. Each of them corresponds to different techniques and methods of regulation, one of which is indirect or conflict-related and the other direct or substantive. This normative structure is adapted to the same duality as that conferred upon the treatment of the cross-border activity of entities by a majority of legal systems in the Caribbean. The model law, however, aims at deepening and developing such methods, while clearly claiming to facilitate transactions and respect the principles and values on which such systems are based. The law forms a harmonious whole, even if each part has its own autonomy, so that each country will be able to adopt it either in whole or in part, through additions, modifications or deletions. Nevertheless, in view of the complementary nature of the design of the solutions offered, the desired effect, aiming at facilitating transactions, shall be better attained if the domestic legal systems adopt it fully.

The conflict-related category consists in a uniform regulation of the indirect norms of private international law that determine the law applicable to commercial companies, particularly to their international activities and to situations involving foreign status. The provisions belonging to that category seek to promote legal security by ordering and clarifying the legal localisation, within

one or more legal orders, of the cross-border situations liable to occur, with the intention of not making the determination of the applicable law dependent on the court or authority that is competent to verify the lawfulness of an actual transaction. The formulations adopted attempt to take into account the interests of the regulation involved, of the options in the matter of normative technique appreciated in the most modern systems of comparative law – of which the Caribbean Community is largely devoid at present –, as well as the elements of governmental or contractual origin found in the Caribbean systems, as indicated in the comments on the text of the law. Considering the lack of previous development, the norms contained in this category should not entail any significant changes in the legal system applicable to the commercial companies of the States and territories of the Caribbean.

An examination of the legislative situation existing in the Caribbean countries and territories as regards the regulation of the activity of commercial companies by conflict-related rules reveals a weaker development. Lack of regulation is the common denominator of the systems influenced by English law. As regards the systems pertaining to the Spanish tradition, various degrees of regulation may be observed. Thus, many of them, including the Colombian system and that of Honduras, do not even include any explicit regulation. Others, such as the Cuban system, benefit from some regulation, albeit succinct, providing a basis for adequate solutions (Article 12.3 of the Cuban Civil Code and Article 15 of the Cuban Commercial Code). Few are the systems with relatively developed regulations, regarding which the influence exercised by the Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, adopted at CIDIP III in La Paz, Bolivia, in 1984, may be appreciated. The impact of that Convention as regards both normative development in that area and the unification accomplished has been observed in systems such as those of Guatemala, Mexico (Article 2736 of the Mexican Civil Code), Nicaragua and Venezuela. This last country, although not a party to the Inter-American Convention, has incorporated some of its solutions into Article 20 of the 1999 Venezuelan legislation relating to private international law. Finally, adequate regulation may be found only in Panama's modern conflict of laws legislation¹ or in the draft submitted to the Congress of the Dominican Republic.²

8. The model law is premised on the fact that the existence of a systematic and complete set of rules of law applicable in order to determine the system governing the main questions raised by the cross-border activities of commercial companies constitutes a valuable contribution to legal security and can be used as an element making it possible to facilitate transactions. The rules included in this part aim at achieving legislative intervention associated with the intention of legally ordering the treatment required by the growing complexity evidenced by the cross-border situations of the laws governing commercial companies. Associated with rules whose end

¹ Code of private international law of the Republic of Panama, Act 7, Official Gazette 275308, May 2014 issue.

² Bill relating private international law submitted to the Parliament of the Dominican Republic in 2014, drawn up under the direction of Professor J.C. Fernández Rozas, full professor at the Universidad Complutense of Madrid, with the cooperation of Professor Nathanael Concepción of the *Fundación Global Democracia y Desarrollo* (global foundation for democracy and development) of the Dominican Republic, as well as of other Dominican specialists.

is the determination of its substantive field of action and its universal enforceability, the regulation, via norms incorporated by reference, extends to the determination of the law applicable to commercial companies, to the determination of the scope of application of that law, to the legal system to be taken into consideration when opening and operating places of business abroad, as well as to the effect of exceptions to lack of capacity, representation and liability based on the security of trade. As a major innovation, the model law contains a specific conflict rule for shareholders' agreements, i.e. agreements whose purpose affects the operation of companies in general, outside the scope of their bylaws. In each case, the aim pursued by the applicable legal rule is to determine the state legislation which will govern each claim. The comments on the text of the model law contain references to the problems of demarcation between systems, as well as practical examples, in order to make it easier to use for operators.

9. The substantive part of Title I contains a series of mandatory substantive norms which are directly enforceable within their subject-matter and territorial scope. The norms proposed do not purport to interfere with the company law of the States and territories of the Caribbean, by offering a complete model to be substituted for that law. Its design is less ambitious than the line followed by other international reference texts in the area of company law, particularly as regards the Uniform Act on the Law of Commercial Companies and Economic Interest Groupings adopted on 17 April 1997 and published in the Official Journal of OHADA on 1 October 1997. The proposed norms aim at regulating those aspects most related to the cross-border nature of the activities of commercial companies. In this field of action, and inspired by the common values and principles on which company law is based in the legal orders of the OHADAC environment, the proposed regulation is underpinned by the expectation of legislative clarification, facilitating the cross-border activities of trade operators. From that perspective, the model law seeks to gain the acceptance and adherence of the OHADAC States and territories.

The model law has been designed so that each of its parts can be adhered to independently. However, so as better to achieve the objective pursued by the model law, which aims at ensuring legal security and facilitating the transactions of those involved, full adherence is recommended. Moreover, in order to foster adherence, the various parts can also be adhered to autonomously. In view of the flexibility with which the OHADAC States and territories can adhere to it, the model law can be a key instrument fostering the suppression of obstacles to cross-border transactions by commercial companies in the Caribbean by facilitating their performance.

IV. CONTENT AND DEVELOPMENT

10. The provisions of the model law relate to various matters:

- A)** Title I deals with the foreign origin, operations and international development of commercial companies, with particular reference to:
 - (i) The determination of the *lex societatis* and of the rules governing foreign origin in matters of company law.
 - (ii) The recognition and pursuit of business activities by foreign companies in countries other than those of their formation: rules applicable to branches, permanent places of business, sales offices and other similar forms of operation not involving a change of nationality and/or the creation of new companies.
- B)** Title II concerns the matter of international corporate reorganizations and deals more specifically with:
 - (iii) International mergers between companies.
 - (iv) International demergers of companies.
 - (v) International transfer of a registered office: the immigration and emigration of companies, as well as changes in their nationality.
 - (vi) The role of the companies registry (or the like) in connection with international corporate reorganizations.
 - (vii) Causes of dissolution, status and treatment of a company carrying on business abroad and subject to dissolution in accordance with its *lex societatis*.
- C)** Title III, entitled “Groups of companies”, deals with:
 - (viii) The rules governing relations within groups of companies having different nationalities.
 - (ix) The rules applicable to the liability of the parent company in respect of the debts of its foreign subsidiaries.
 - (x) The obligation to submit consolidated annual accounts within the framework of groups of companies.
- D)** Title IV deals with the insolvency of companies carrying on business internationally and governs:
 - (xi) The authorities having jurisdiction in matters of insolvency.
 - (xii) The rules applicable to international insolvency.

- (xiii) The international effectiveness of decisions relating to insolvency and cooperation between authorities in that area.
 - (xiv) Insolvency within the framework of international groups of companies.
- E)** Finally, Title V sets forth some necessary transitional provisions and a final provision.

11. The international legislation governing commercial companies has been developed in the countries and territories of the Caribbean mainly through the laws governing the foreign origin of companies, which also include, whether explicitly or implicitly, the regulation of the problem of the recognition of foreign entities. This is why the model law begins by determining the *lex societatis* and the rules governing the foreign origin of companies. Indeed, the norms pertaining to that branch of law deal with the dichotomy between national and foreign status in order to determine the law applicable to foreigners. Although the criteria for the granting of national status to natural persons and to entities differ and although the consequences relating to the possession of an actual nationality are distinct, the possibility of entities' having a nationality is an unquestionable fact in the Caribbean systems, which specifically provide that foreigners and foreign entities shall be subject to certain norms by which national entities are not bound. The recognition and conduct of business activities by foreign companies in countries other than that of their incorporation are then dealt with, such as the rules applicable to branches, permanent places of business, sales offices and other similar methods of operating without a change of nationality and/or the creation of new companies. Criteria are established in order to solve the problem of the recognition of commercial companies. These norms aim not only at offering a contractual solution to the problem of recognition, but also at reducing the intensity of the controls normally associated with the verifications required so that the recognition of foreign entities may take place.

12. In Title I, Section 2 of Chapter II is devoted to the registration and local publicity of foreign companies and also proposes regulations governing their local business activity. Those regulations propose a substantive unification of the conditions that entities must meet in order to carry on their business in another country. The model law opts for substantive solutions which both facilitate business and succeed in covering the control objectives inherent in the systems of the States and territories that are members of OHADAC.

Among the matters subject to regulation, uniform criteria are proposed for the establishment of the obligation of registration, for the submission of the documents required for the completion of that process and for the publicity appropriate for corporations of this type in the country where they conduct their business permanently or through the creation of a branch. Finally, Title I ends by proclaiming the principle of assimilation between foreign corporations and national ones. In order to foster interpenetration within the economies of the countries and territories of the OHADAC area, the model law thus seeks to encourage the adoption by the legal systems of the Caribbean of the principle of assimilation between foreign companies and national ones, both in their capacity as holders of rights and in the exercise of those rights.

13. Title II concerns international corporate reorganizations, a topic which presently forms an essential part of the establishment strategy of business companies in an international environment. International mergers and demergers, as well as international transfers of registered offices, allow companies to adapt to context-related realities. Consequently, the model law offers a substantive regulation of some transactions or situations pertaining to the cross-border business of entities and companies, particularly those situations whose legal status suffers the most from the absence of a uniform framework governing such transactions. In keeping with the end pursued, the model law incorporates uniform rules for international merger, demerger and transfer operations.

14. The part of the model law devoted to international corporate reorganizations takes up three chapters, whose subject matter is: international corporate mergers, international corporate demergers and the international transfer of a registered office. As regards these three chapters, the choice was in favor of substantive regulation of such operations, but with multiple references to domestic governmental regulations. This was considered to be the best method of regulation in view of the disparity between the domestic regulations of the Caribbean region, which, moreover, reflect differentiated legal traditions. Regarding all such operations, it is important to take into account a certain articulation between various legal orders (those governing the various companies taking part in a merger or demerger in the company's States of origin and destination, as well as in cases of international transfer of a registered office). This articulation must take into account the differences between the substantive regulations and, when confronted with the latter, it must seek a balance between comprehensive substantive regulation, which would impose excessive changes in domestic legislation, and a mere reference to the rules relating to conflict of laws, which would not much help facilitate this kind of international operations involving commercial companies. In the face of this dilemma, an intermediate option was judged preferable. This could not but rely on the conflict of laws solution in matters of *lex societatis*, which has also been retained in the OHADAC model law relating to private international law. Thus, the latter provides that the law governing companies is the one under which they were formed. It also admits the international transfer of the company's formal registered office (i.e. the registered office determined by the bylaws), in which case the law of the State to which the office is transferred will govern the company after such transfer. This clear solution as regards the determination of the *lex societatis* is a fundamental element for dealing with the regulation of the various operations relating to international corporate reorganization.

15. As regards mergers, the possibility of such an operation between companies governed by different bodies of law is laid down as a principle. A clear distinction is, moreover, made between merger and demerger operations. The model law could of course have chosen joint regulation for those two operations. Nevertheless, in view of the difficulties raised by the substantive unification of the company law of different countries, the option was in favor of simpler regulation, requiring that joint merger and demerger operations be performed in succession (beginning with merger, followed by demerger, or vice versa), in order to mitigate the complexity inherent in the articulation between the different legislations involved. Merger rests on three pillars: the requirement that the merger plan comply cumulatively with the conditions laid down by all the legislation involved; distribution in the enforcement of that legislation, so that the conditions laid down for the passing of the merger resolution will be governed, in the

case of each company, by their own law; and finally coordination between the registries of all the jurisdictions involved. The necessity of considering the conditions provided by all of the legislation involved in order to prepare the merger plan is associated, as regards that plan, with minimum requirements as to content (company name, legal form, registered office, law governing the participating companies, identification of the absorbing company and effective date of the merger, provided that such date is not earlier than the registration of the operation with the registry of the absorbing company or of the new company resulting from the merger). These conditions are common to many countries of the Caribbean region, which must be taken into consideration for the legal security of the operation.

16. The merger process involves several phases: preparation of the related plan, adoption by the participating companies and registration in the register of the absorbing company or of that newly created following the operation. During that process, as previously indicated, each company will have to pass the resolution relating to the merger in compliance with the rules of its own law, and registration in the register of the absorbing company or of the new company resulting from the merger will not be possible until it is verified that the merger has in fact been entered in the registers for all the companies involved. By proceeding thus, a subsidiary control of legality at each phase of the merger is avoided (since the verification performed with each of the registers shall be deemed sufficient for the purposes of the control of the entire operation in the hands of the competent authority of the State of the absorbing company or of that resulting from the merger), and coordination between the various companies registries is fostered. Now, such coordination is essential for the legal security of the operation. The option chosen by the model law consists in preventing registrations incompatible with the merger to be entered in such registers after the registration of the passing of the merger resolution in the register for each of the participating companies. The final deregistration of the companies disappearing subsequent to the merger takes place only when the completion of the operation has been registered in the register for the absorbing company or of the company newly created on the outcome of the merger. The model law provides that the authorities of the latter register shall issue a certificate evidencing the completion of the operation, which will be used to deregister each of the companies disappearing as a result of the merger on their respective registers. The difficulties liable to be encountered, both in the event of deregistration of the companies disappearing as a result of the merger before the completion of that operation and in the event that the registration of those companies is maintained after its completion, are thus eluded. The regulations envisage, moreover, the possibility that an operation may be prevented from being completed; this is also necessary in order to put an end to the particular situation which is that of the companies which are to disappear on the outcome of the operation after the approval of the merger resolution but prior to their deregistration. If the merger cannot be completed, the participating companies will be able to revert to the situation existing prior to the operation. Finally, it was deemed necessary to indicate expressly that the company resulting from the merger or the absorbing company acquires the rights and obligations of the companies disappearing following the operation. That provision is found in several legislations and proves consistent with the basis and purpose of the

operation. Moreover, it constitutes a necessary guarantee for the benefit of the creditors of the company, who will also enjoy the protective mechanisms provided by the law of the debtor company participating in the operation, since, as mentioned previously, the substantive regulation of the model law is not exhaustive, but refers amply to the legislation of the States concerned by the operation.

17. International demergers of companies are also governed by the model law on the basis of the same pillars as in the case of international mergers: a balance between the substantive regulation of the operation and reference to domestic legislation. As indicated above, the choice made was to clearly differentiate between demerger and merger operations, after which, on the basis of that differentiation, mergers were regulated on the basis of principles which seek to ensure clarity and simplicity. After establishing the possibility of international demergers of companies, it is stated that the operation must comply with the rules laid down by the legislation involved in the operation, i.e. the law governing the demerging company and that of the States of the companies, whether existing or newly created, which will receive the demerged assets and liabilities. Concretely, the norms relating to the creation of new companies and to the legal status of the branches, if the demerger implies the creation or transformation of existing ones, must be complied with.

As in the case of mergers, coordination between the various registries is especially important when dealing with demergers. The model law provides that the registration of the operation in the register of the demerging company must necessarily precede any registrations that may be required in the registers for the beneficiary companies. Moreover, it expressly provides that when performing such registration, and independently of any provisions of legislation of internal origin, the registration of the planned merger [*sic*] is mandatory in order to inform the interested parties and to reinforce legal security. As in the case of mergers, it is provided that the registries of the beneficiary companies must issue certificates relating to the completion of the operation, which will be used to deregister the demerging company if the latter should disappear following the operation. Moreover, the model law sets forth a rule concerning the takeover of the obligations and rights of the demerging company by the beneficiaries when the operation implies the former's disappearance. This rule, which originates from the law of the Caribbean countries (liability is joint and several in relation to third parties, but as between the beneficiary companies it is proportional to their interest in the demerger) is, in any event, subsidiary in nature in relation to the stipulations of the merger plan [*sic*] or the legal provisions governing the demerging company. As is usual in many legal systems, within the framework of demerger operations, the subsidiary application of the rules relating to international corporate mergers is provided for.

18. The model law also deals with the transfer of a registered office. The references to the internal legislations of the States are less numerous as regards the regulation of this operation than in the case of mergers and demergers, which implies that its substantive regulation in the model law must be more detailed. The reason for this choice resides in the fact that such an operation, by reason of its specific nature, requires a major level of coordination as compared

with that required by a merger or demerger. Indeed, it implies – in accordance with the principles followed by the model law – the transformation of the company and a change in the law governing it, which requires a careful articulation in the enforcement of the law of the States of origin and destination of the company. The regulation of such a transfer operation must, moreover, be consistent with the conflict of laws rules relating to private international law included in the model law. The latter already provides that the transfer of the registered office of the company implies a change in the law governing the latter and that the operation is possible only if the law of the State of origin and that of the State of destination of the company allow it. These principles form the basis of the regulation offered by the model law as regards the international transfer of a registered office.

19. First of all, and consistent with conflict of laws rules, the transfer of the formal office (as set by the bylaws) alone is subject to regulation, since it alone is transcendent for the purpose of determining the *lex societatis*. Indeed, the transfer of the actual head office does not imply any change in the private law status of the company in accordance with the provisions of the model law relating to private international law. Secondly, the international transfer of the registered office as determined in the bylaws implies a change in the law governing the company; this is also a necessary consequence by virtue of the model law relating to private international law. Thirdly, a distinction is drawn between cases in which the States of origin and destination of the company have adopted the model law relating to commercial companies and those in which such an adoption has not taken place. In the latter event, the transfer can inevitably take place only in accordance with the provisions of the legislation of the States of origin and destination, as the model law will then prove ineffectual in facilitating the operation via substantive regulation failing its adoption by the two States concerned by that operation.

20. The transfer procedure begins with the preparation of a transfer plan, which must contain at least the information referred to in the model law. Nothing prevents the plan from containing more ample information in order to meet the requirements of the law of the company's State of origin or destination. Such plan will have to be published and circulated for a period of three months in order to inform both the shareholders and the creditors and competent authorities, as well as to allow the exercise, if applicable, of the right to oppose the transfer or to demand guarantees satisfying the interests of the creditors or shareholders. Upon the expiry of that three-month period, the competent corporate decision-making body may approve the transfer of the registered office. The decision will have to be passed with the same majorities as are required for the transformation of the company by its governing law. Simultaneously with such approval, the bylaws will have to be amended in order to adapt them to the new law governing the company. However, such amendment may not go beyond whatever may prove necessary in order to adapt the company to an equivalent legal identity in the State of destination. In other terms, the possibility of taking advantage of the transfer in order to introduce other substantive changes in the company is ruled out. In the event that the amendment of the bylaws should go beyond what is necessary to comply with the foregoing, it will necessarily be subject to a negative qualification on the part of the competent authorities of the company's State of origin.

21. The model law, which in this regard follows the legal orders governing the international transfer of a registered office, provides that the shareholders opposing the transfer may withdraw. The right of withdrawal shall be exercised in accordance with the provisions of the State of origin of the company. It is only at the end of a period of one month from the registration at the companies registry of the resolution relating to the transfer and after having verified that the required steps have been taken (withdrawal of the shareholders requesting it) that the corresponding certificate will be issued by the authorities of the State where the company is registered; that certificate will be used to register the transfer in the State of destination of the company and will, moreover, result in the temporary freezing of the register in respect of the company. Such certificate, issued by the authorities of the company's State of origin, will allow the registration of the transfer to be made at the companies registry of the State of destination. Nevertheless, the authority competent in relation to the latter register shall not restrict itself to ascertaining the existence of the certificate, but shall be obliged to verify that the bylaws are in accordance with its law and that the corporate assets and liabilities comply with the requirements of the host State. The idea underlying this distribution of tasks is the obligation, on the part of the authorities of each State, to verify the operation's compliance with their own law; that is why the authorities of the State of destination must be those in charge of controlling those aspects of the transfer of a registered office that are governed by their law. Moreover, those authorities will have to verify that the legal identity chosen in the State of destination does in fact correspond to the company's original one.

Coordination between the registries of the States of origin and destination is also of major importance in transfer operations, as within the framework of mergers and demergers. Coordination with regard to that reorganization is based on the same principles as those previously examined concerning the latter operations, i.e. registration with the companies registry of the State of origin entails the partial freezing of the register in respect of the company (in this case, we are dealing with temporary freezing). The final striking off will take place only once the operation has been registered in the State of destination. The certificate issued by the authorities of that State upon the completion of the operation will be used, as in the case of mergers and demergers, for the final deregistration of the company in the State of origin.

22. The model law also addresses the regulation of the international aspects of corporate dissolution. The dissolution of a company pertains solely to the authorities of the State in which its registered office, as provided in the bylaws, is located (which is the same as the State of its incorporation if there has been no transfer of the registered office) and the law applicable to the dissolution shall be the *lex societatis*, determined in accordance with the provisions of the model law relating to private international law. Such principles constitute the basis of the regulation, providing that the authorities of the company's registered office are competent to deal not only with the dissolution, but also with the resolution of any dispute arising on account thereof, and with any action initiated against the corporate resolutions relating to the termination of the company's legal personality. Moreover, the model law governs the extraterritorial effectiveness of the decisions made as regards the dissolution of the company, by establishing the mandatory

nature of their recognition and of their execution, unless they are incompatible with the public policy (*ordre public*) of the State within which the effectiveness of those decisions is alleged. The resolutions of the corporate decision-making bodies relating to the dissolution of the company shall also be recognized, subject to their having been passed in compliance with the *lex societatis*, that is, by performing a conflict of laws verification of the latter, which is necessary when dealing with decisions other than those of public authorities.

Likewise, the liquidation of the company is governed by the *lex societatis*. However, the model law provides that the company may have assets located outside the State by whose laws it is governed and, with a view to facilitating the liquidation operations, it sets forth the possibility of appointing liquidators in the State where the corporate assets are located. The appointment of such liquidators will have to be carried out in accordance with the provisions of the law of the State in which the liquidator will act. Such corporate liquidators intervening outside the borders of the State of the registered office (as defined by the bylaws) of the company will have to report to the liquidators appointed in the State of the registered office. Moreover, the assets to be distributed following the payment of the company's debts shall be allotted in accordance with the *lex societatis* and not with the provisions of the law of the State in which the liquidators appointed in States other than the place where the company owns assets are acting.

23. Title III of the model law is devoted to the regulation of groups of companies and takes up three topics relating to the relations between companies belonging to a group, but whose nationalities are distinct; it is thus limited to the business and interaction of groups of companies possessing an element of foreign status. The three topics are as follows:

- (i) The rules governing relations inside a group made up of companies having different nationalities.
- (ii) The rules applicable to the liability of the parent company in respect of the debts of its foreign subsidiaries.
- (iii) The obligation to submit consolidated annual accounts in international groups of companies.

24. Although the definition of a group of companies is a matter on which there is no unanimous agreement in comparative law, a certain international consensus does exist as regards the recognition of a group of companies as being "made up of companies which, while maintaining their independence and legal personality, come together with a view to achieving economic objectives in the market, normally under a unified economic management exercised by the entity heading the group". In general, this is a form of concentration of companies aimed at securing a better corporate dimension and at confronting the competitive challenges of a market as deep and complex as the present one, which, within the Caribbean countries, cannot escape practical problems.

Groups give rise, as regards their operation, their internal relations and their activities in relation to third parties, to highly complex legal situations or problems. However, this does not

justify their being regarded as an intrinsically harmful corporate structure. As an economic phenomenon, groups of companies have sometimes been observed from a negative perspective, due to the damage liable to be caused to the non-dominant companies and shareholders. Thus, this phenomenon may also have been judged by the commercial and tax authorities of various States from the viewpoint of the transparency of financial information, particularly on account of the possibly fraudulent intent of certain structures lending themselves to such ends. In addition to the above, the notion of groups of companies does not necessarily and generally have such a damaging nature, but appears, on the contrary, to be an adequate formula for conducting certain economic activities. As a result, the model law takes as a given the principle that a favorable position should be adopted when it comes to assessing groups of companies.

25. Like other structures well established in economic regulation, groups are a corporate reality born of economic development, which requires union, integration or cooperation between companies so as to be able to adapt their productive organization to the demand and size of their respective markets. In many territories of the continental Caribbean and Central America, groups of companies have achieved a very significant influence during the past few decades by participating in the increasing economic growth of Caribbean countries, among them Colombia, Mexico, Venezuela and Panama, which export groups of companies recognized as major investors in the region as well as in Europe and ranking as leaders in their countries of origin, under the name of “Multilatinas”. As a result, the poly-corporate firm appears to be a unitarian subject. This economic justification proves undeniable within the framework of a globalized or transnational economy, where the size of major groups reaches unimaginable proportions, thus giving rise to doubts as to their adequate legal treatment. But such doubts, as well as the certainty that any group imperils interests that are in need of protection, must not hinder the recognition of their legitimacy as a useful economic reality. Neither do they justify an undemanding approach aiming at their overall disqualification.

26. The indispensable premise when dealing with groups in the model law coincides with the position repeatedly stated by legal opinion: recognizing that we are facing a justified corporate reality, by abandoning any predisposition to view groups as organizations set up with a main intention which is fraudulent or blameworthy. This negative approach can sometimes be explained by a misappreciation of the economic logic and unquestionable legality underlying the creation of a group of companies. Such a position is based on a defective understanding of the risks and problems inherent in the existence of a group and on a lack of adequate legislative response in many countries. From a legal viewpoint, responding to the phenomenon constituted by groups has proved to be a truly difficult task. It is obviously up to the legislatures of the various countries to approach the reality of these poly-corporate firms founded in their territories. It is also unquestionable that once this reality has been faced, groups are found to make up a heterogeneous reality which is difficult to place in a uniform legal framework. Therefore, the model law does not purport to interfere with or to question the sovereignty of the local legislatures in connection with groups of companies, but aims, on the contrary, at least at identifying the problems and offering a uniform solution where one could be found.

27. A mere glimpse at the legislations of the Caribbean States or territories reveals a motley diversity of groups, as regards both their formal configuration (mainly through companies with a share capital) and their structure. Thus, we may observe, among other things, groups that are vertical or horizontal, *de facto* or contractual, cooperative and hierarchical. The terminology reflects the variety of classification criteria found in the various legislations, which in turn attempt to govern the different variants in accordance with which groups are created. The model law takes as a given that in this matter an especially prudent reconciliation is advisable, due to the diversity of the situations which must be analyzed in the face of one of the major problems encountered by groups: situations of insolvency and the existence of two or more affiliated companies having different nationalities. It must be noted that collective proceedings may lead to problems owing to the insolvency of the dominant company or of one of its subsidiaries, or even of several of them simultaneously.

Practice reveals that collective proceedings initiated against a company can frequently “infect” various companies, particularly in groups among whose members proprietary and contractual relations exist, implying that the insolvency of one will affect the others. This diversity is probably among the reasons for which local legislatures have dealt with groups in a fragmented manner, especially as regards those interests requiring reinforced protection (particularly as regards accounting, taxes and the protection of creditors in the case of some transactions). At the commercial level, the normative model existing in many OHADAC territories renews the fragmentation pattern, where all the interests requiring such legal protection are not duly regulated and, if they are, the relevant norms are scattered throughout various legislations, e.g. tax, accounting and insolvency, rather than in the commercial branch.

28. The determination of the existence of a group is the postulate underlying the enforcement of the provisions relating to some obligations (such as the requirement of tax consolidation) or prohibitions and, if called for, the rules governing sanctions in the event of a breach. The tension existing between the interest of the group and the interests of each of its companies has been pointed out as being one of the paradigmatic problems relating to the creation and operation of groups; this issue especially concerns the directors or representatives of the various companies. The point consists in admitting that all the companies that are part of one and the same group are subject to an interest in integration. This interest is not specific to the dominant company, but is common and entails benefits for the group, even at the price of harming one or more dependent companies. In that regard, one of the objectives of the model law is also to outline the main lines of the legal problems or situations arising within the framework of groups of companies concerning the relations and possible liabilities of the parent company pursuant to the debts of its foreign subsidiaries and the consideration of the parent company as controlling its subsidiaries and exercising a dominant influence on them owing to the unified and strategic management of the group, as well as concerning the protection of creditors and shareholders and situations of lifting of the corporate veil and, as previously indicated, situations of insolvency.

29. The study and treatment of the notion of the lifting of the corporate veil were among the most complex matters that came up when preparing this model law. It proved necessary to have recourse to the varied jurisprudence of the courts of the geographical zone concerned in order to arrive at a more realistic opinion of the treatment of this notion, which is not solely present in the regulations and, when it is, only in a scattered manner in many cases. The consecration of the principles of independent legal personality and of limited liability are among the most important achievements of company law and, as such, they are asserted and extolled in all the Caribbean countries, although the application of the doctrine of lifting of the corporate veil or abuse of legal personality has been rather limited. Indeed, the harmful legal and economic consequences liable to result from a disorganized application of the lifting of the veil in a geographical area which includes a large number of countries having an attractive tax system which incites and promotes foreign investment are clear, and that is also the understanding of the model law.

As a result, the model law respects those principles and attempts to insert some jurisprudential solutions into the norm, while being aware of the difficulty of establishing a sole and harmonized guide to the cases in which it is possible to dispense with legal personality. The proposal is based on the criterion mainly dealt with by a majority of legislations as postulating the lifting of the corporate veil, i.e. abuse of legal personality. Moreover, it lays down an exception to the general rule whereby, without purporting to replace what has already been asserted by the jurisprudence of various Caribbean countries, assistance may be given to the competent authorities and legal operators in order to ascertain the existence of what may be regarded as indications of abuse of legal personality, and consequently factual elements which, if stated to be admissible, might actually engage the liability of the parent company in respect of the debts of its subsidiary. The model law does not purport to set up a *numerus clausus*, but seeks to cover those indications which are most common in practice, its sole purpose being to help construct the value judgment which the competent authority will have to make on a case-to-case basis when faced with a situation of fraud or abuse committed by means of a legal person.

30. On many occasions, the approach to problems specific to groups, in any nation whatsoever, immediately results in a complexity which is due to the multi-nationality of the various affiliated companies making up those groups and having their center of business in more than one jurisdiction. It is clear that this a general circumstance of economic activity, which is precisely the *raison d'être* of the profuse efforts aimed at the international harmonization of the norms applicable to intra-group relations and to the relations of groups with third parties, to which is now added the present model law. Such a plurality of jurisdictions, inasmuch as it coincides with a diversity of laws applicable to one and the same case, may give rise to tensions which will be more or less significant according to whether the differences between the applicable systems are more or less pronounced, as is the case for the mixture of systems in the Caribbean territories.

This topic includes matters that are certainly not devoid of problems – problems with which the draft model law will be confronted, in an area where there are nations considered to be tax havens “selling” corporate confidentiality and which, by means of certain incentive mechanisms, are, generally speaking, “gardens of Eden” intended to create what are or may succeed in becoming great and powerful groups of multinational companies.

31. Title IV, relating to the insolvency of entities carrying on business internationally, takes into consideration the fact that in practice the use of insolvency proceedings is strongly rejected, even when all the elements relating to them are domestic. This rejection can be explained by various reasons, but it is not appropriate to analyze them here. Suffice it to say that the most significant of them is probably the fact that the competent authorities responsible for administering and dispensing justice in insolvency proceedings do not have the human and financial resources which would be qualitatively and quantitatively required in order to conduct such proceedings under reasonable conditions and within reasonable timeframes. When an entity is insolvent, the competent authorities must act quickly and with a thorough knowledge of trade in general, as well as of the business conducted by the insolvent entity in particular and, of course, of the law. They must be acquainted not only with the legislation dealing with collective or insolvency proceedings, but also with other matters directly related to such insolvency proceedings or concerned by the latter: property law, tax law, labor law and contract law, among others. An entity subject to insolvency proceedings cannot, for example, wait for months before resolving a dispute relating to the performance of an agreement, which may entail heavy losses if not settled diligently. Although, since the end of the twentieth century, cases of international insolvency have increased considerably, this trend does not mean that the rules governing insolvency have been adapted to diligent and efficient conduct, which is the objective pursued by Title IV of the model law. That part thus deals with the following: the competent authorities in matters of international insolvency; international cooperation between authorities in matters of insolvency; international effectiveness of insolvency decisions; rules applicable to international insolvency; and the insolvency of international groups of companies.

32. The model law considers that, although several States or territories belonging to the OHADAC area – such as Colombia, Mexico, the British Virgin Islands, the U.S. Virgin Islands – have adopted the UNCITRAL model law on cross-border insolvency (1997), the ongoing process of internationalization of trade and the crisis of these past years render the simplification of insolvency proceedings and concretely of their formalities advisable (this is, moreover, made possible by the new technologies). Such simplification must not, however, undermine the basic principles of international procedural law in matters of insolvency, some of which have been asserted since the Bustamante Code, such as the principle of universality and that of *par conditio creditorum*. These principles aim at real and effective protection on the basis of the principle of universality, not territoriality. Such simplification concerns the formalities involved, thanks to the new technologies, which allow, more than ever, the availability of coordination, communication and documentary evidence between the OHADAC States and territories, as well as between judges, court-appointed administrators, creditors and the entity subject to insolvency proceedings,

in particular. Slow justice amounts to refusal of justice. For this reason, a mechanism guaranteeing the validity and speed of the communications effected is sought. Insolvency proceedings in the case of an entity conducting business internationally requires, in most cases, the making of rapid and coordinated decisions, for the ultimate purpose of protecting the creditors; this is why the procedure must be simplified without undermining the necessary procedural guarantees. Such a change has already been observed inside the European Union (and in its overseas territories, such as Guadeloupe, Martinique or Saint-Martin, as regards France) via the proposal for a Regulation of the European Parliament and Council to amend Council Regulation (EC) no. 1346/2000 on insolvency proceedings.

33. The model law also seeks a regulation of international insolvency which will be more comprehensive as to all its elements and more suited to the factual possibilities, while avoiding, inasmuch as is possible, problems such as forum shopping or double procedures. These entail additional cost and legal insecurity to the detriment of the parties involved, and are liable to result in consequences harmful to them. As we all know, in forum shopping, as a notion of private international law, the person initiating an action tends to choose a court not because it is the most adequate to hear the case (here relating to insolvency), but because the conflict of law rules to which that court will have recourse will lead it to enforce the law most in keeping with that person's interests. Thus, the creditors will generally see their rights reduced or will even be defrauded. Consequently, the model law attempts to safeguard the *par conditio creditorum* and, as a result, to set limits to such practices, which breach the rules of international jurisdiction.

34. The so-called center of main interests of an entity subject to insolvency proceedings is appropriately defined. It is up to each State or territory to incorporate, via an annex, what must be understood by the figure of the court-appointed administrator or by insolvency proceedings. Consequently, the main OHADAC States or territories shall recognize as insolvency proceedings or as a court-appointed administrator those designated as such in the State or territory concerned. The basic principle is that the opening of insolvency proceedings shall fall within the sole and exclusive jurisdiction of the authorities of the State or territory where the center of main interests of the entity involved is located. Except in very special cases (taking into account the amount of the assets of the entity found to be insolvent in another country), the possibility of secondary proceedings is ruled out for permanent places of business. The model law here applies (by analogy) the thinking of Napoleon as regards the regulation of common law marriage by the 1804 Civil Code: "*concubines do without the law, thus the law has no interest in them*". Consequently, if the entity is not established in an OHADAC State or territory through a subsidiary, that is, a new entity with legal personality of its own, subject to its own law (*lex societatis*), the law of that country shall not take that entity into account, whatever its legal form (that is, it shall not govern it nor be applicable to it) as regards the insolvency proceedings. Therefore, that entity will be subject to the territorial law of the place in which its center of main interests is located (which may or may not coincide with the place of its formation). Also on the basis of the above-mentioned principle, in insolvency proceedings relating to several companies belonging to one and the same group, the law applicable to each of them shall be that of the place where each has

its center of main interests, unless the corporate veil is to be lifted on the grounds that the company is an *alter ego* of its parent company and does not, therefore, deserve to be considered as an independent subject in business. Nevertheless, the coordination of the various insolvency proceedings concerning several companies belonging to one and the same group must be continuous and absolute, so much so that the closure of proceedings relating to a company not considered to be a parent company through liquidation, a recovery plan, an arrangement with its creditors or some similar measure shall be the most advisable result for the benefit of the parent entity and of the rest of its group's entities.

35. Moreover, the model law has taken into consideration the fact that present-day technologies allow each OHADAC country to maintain a register of the insolvency proceedings opened on its territory, thus allowing the local creditors or those located in another country to be aware of insolvency proceedings against their debtor. Access to such registers must be free of charge and they must provide the essential information and details relating to each insolvency proceeding, identifying the creditors' rights to file their claims and to appear, if applicable, at those proceedings; such information must be systematically updated.

36. Title IV of the model law ends with a necessary exception pertaining to public policy (article 50), a norm of *ius cogens* allowing the States to safeguard their respective basic principles in the face of any effect of their application that may, at the international level, damage legitimate interests admitted as such. Finally, Title V contains the equally necessary transitional provisions governing the application of the law in time, highlighting its non-retrospective nature, as well as respect for rights acquired under the previous legislation. The normative text ends with a final provision derogating from any provisions of the previous legislation that may conflict with those of the model law.

37. In view of the foregoing, it is considered that the model law should mainly prove useful in order to provide the international relations and activities of commercial companies with legal security, which in turn should contribute to the creation of a system of cooperation, facilitate trade and develop the economy of the Caribbean region.

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