UNITED NATIONS

A

General Assembly

GENERAL
Distr.
A/CN.9/469

6 January 2000
ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirty-third session
New York, 12 June-7 July 2000

REPORT OF THE WORKING GROUP ON INSOLVENCY LAW
ON THE WORK OF ITS TWENTY-SECOND SESSION
(Vienna, 6-17 December 1999)

CONTENTS

	Paragraphs	Page
INTRODUCTION	1-11	3
I. DELIBERATIONS AND DECISIONS	12-140	5
A. GENERAL REMARKS	13-20	5
B. KEY OBJECTIVES	21-31	7
C. IDENTIFICATION OF CORE FEATURES	32-124	9
1. General remarks	32-33	9
2. Discussion of Core Features	34-124	10
(a) Application of the law - individuals and enterprises (paras. 34-36)	34-37	10
(b) The relationship between liquidation and rehabilitation (paras. 37-46)	38	11

V.00-50049 (E)

Paragraphs Page

(c) Liquidation procedures (paras. 47-103) 39-62 11
(d) Rehabilitation (paras. 104-143) 63-93 16
(e) Involvement of creditors (paras. 144-147) 94-95 24
(f) Liquidators and administrators (paras. 148-153) 96-98 25
(g) The court (paras. 154-156) 99-104 25
(h) Informal insolvency procedures, including out-of-court restructuring (paras. 157-160) 105-124 27

D. FORM AND FEASIBILITY OF POSSIBLE FUTURE WORK 125-140 31

INTRODUCTION

1. The Commission, at its thirty-second session (1999), had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law.[1/] The proposal referred to recent regional and global financial crises and the work undertaken in international forums in response to those crises. Reports from those forums stressed the need to strengthen the international financial system in three areas - transparency; accountability; and management of international financial crises by domestic legal systems. According to those reports, strong insolvency and debtor-creditor regimes were an important means for preventing or limiting financial crises and for facilitating rapid and orderly workouts from excessive indebtedness. The proposal before the Commission recommended that, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that have expertise and interest in the law of insolvency, the Commission was an appropriate forum to put insolvency law on its agenda. The proposal urged that the Commission consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

2. The Commission expressed its appreciation for the proposal. It noted that different work projects had been undertaken by other international organizations such as the International Monetary Fund, the World Bank and the International Bar Association on the development of standards and principles for insolvency regimes. It noted that the broad objective of those organizations, while differing in scope and working methods as a consequence of their respective mandates and membership, was to modernize insolvency practices and laws. The initiatives taken in those organizations were proof of the necessity of assisting States to re-assess their insolvency laws and practices. Those various initiatives, however, were also in need of strengthened coordination, where appropriate, so as to avoid inefficient duplication of work and achieve consistent results.[2/]

3. Recognition was expressed in the Commission for the importance to all countries of strong insolvency regimes. The view was expressed that the type of insolvency regime that a country had adopted had become a “front-line” factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work on an international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, it was feared the work might not be brought to a successful conclusion. It was said that a universally acceptable model law was in all likelihood not feasible and that any work needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

4. To facilitate that further study, the Commission was invited by the Secretariat to consider the possibility of devoting one session of a working group to ascertaining what, in the current landscape of efforts, would be an appropriate product (such as a model law, model provisions, a set of principles or other text) and to defining the scope of the issues to be included in that product. Diverging views were expressed in response. One view was that more background work should be undertaken by the Secretariat and presented to the Commission at its thirty-third session for a decision as to whether substantive work of elaborating a uniform law or another text of a recommendatory nature should be undertaken. Another view was that the question could be referred to one session of a working group, for the purpose of exploring those various issues, with a report to be made to the Commission at its thirty-third session in 2000 on the feasibility of undertaking work in the field of insolvency. At that time, the Commission would have before it sufficient information to make a final decision on that issue. It was emphasized that preparatory work for the session of the working group would require coordination with other international organizations already undertaking work in the area of insolvency law, since the results of their work would constitute important elements in the

---

[1/] Possible future work in the area of insolvency law: Proposal by Australia, A/CN.9/462/Add.1.

[2/] Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 381-385.

deliberations towards recommending to the Commission what it might usefully contribute in that area. It was pointed out that the importance and urgency of work on insolvency law had been identified in a number of international organizations and there was wide agreement that more work was required in order to foster the development and adoption of effective national corporate insolvency regimes.

5. The prevailing view in the Commission was that an exploratory session of a working group should be convened to prepare a feasibility proposal for consideration by the Commission at its thirty-third session. Subsequently, after the Commission had discussed its future work in the area of arbitration, it was decided that the Working Group on Insolvency Law would hold that exploratory session at Vienna from 6 to 17 December 1999.

6. The Working Group on Insolvency Law, which was composed of all the States members of the Commission, held its twenty-second session in Vienna from 6 to17 December 1999. The session was attended by representatives of the following States members of the Working Group: Australia, Austria, Brazil, Cameroon, China, Colombia, Egypt, Finland, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Russian Federation, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

7. The session was also attended by observers from the following States: Canada, Costa Rica, Gabon, Guatemala, Indonesia, Ireland, Kazakhstan, Lebanon, New Zealand, Pakistan, Poland, Republic of Korea, Saudi Arabia, Slovakia, Sweden, Switzerland and Ukraine.

8. The session was attended by observers from the following international organizations: International Monetary Fund (IMF), World Bank, Asian Development Bank (ADB), European Bank for Reconstruction and Development (EBRD), European Central Bank, Organisation for Economic Cooperation and Development (OECD), European Insolvency Practitioners Association (EIPA), International Bar Association (IBA), International Federation of Insolvency Professionals (INSOL), International Women's Insolvency & Restructuring Confederation (IWIRC) and The Group of Thirty.

9. The Working Group elected the following officers:

Chairman: Mr. Wisit WISITSORA-AT (Thailand)

Vice-Chairman: Mr. Paul HEATH (New Zealand, elected in his personal capacity)

Rapporteur: Mr. Tuomas HUPLI (Finland).

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.V/WP.49) and Note by the Secretariat on possible future work on insolvency law (A/CN.9/WG.V/WP.50).

11. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the Agenda.

3. Possible future work on insolvency law.

4. Other business.

5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

12. The Working Group discussed possible future work on insolvency law on the basis of the note prepared by the Secretariat (A/CN.9/WG.V/WP.50). The deliberations of the Working Group are set forth below, with the recommendation of the Working Group contained in para. 140. References to paragraph numbers in the headings of this paper are references to the text of A/CN.9/WG.V/WP.50.

A. GENERAL REMARKS

13. At the outset, the Working Group exchanged information on the background to the proposal for further work by the Commission. It was pointed out that there was wide-spread agreement that effective insolvency systems were a critical tool in forestalling and dealing with the financial difficulty of firms. In circumstances where the entire enterprise sector was in distress, an effective insolvency regime provided the necessary legal framework for the restructuring of corporate indebtedness and the necessary conditions for the resumption of growth and employment. It could create confidence in the credit system and, if designed with the appropriate incentives and safeguards, could provide a tool that was likely to be used by debtors early in financial difficulties, thus increasing the chances of successful rehabilitation.

14. The Working Group exchanged views on current developments in regulatory issues related to insolvency. Various reports at the governmental, inter-governmental and non-governmental levels confirmed the importance being attached to insolvency law and insolvency law reform world-wide. It was reported that a number of countries had introduced recently, or were developing, legislation reforming their insolvency regimes, in some cases including provisions adopting, or based upon, the UNCITRAL Model Law on Cross-Border Insolvency. A number of international organizations were focusing upon insolvency issues and ways of developing effective and efficient insolvency regimes. The World Bank advised that it was working on the development of principles and guidelines addressing the legal, institutional and regulatory frameworks required for an effective insolvency regime. Those principles and guidelines were in the nature of core elements, rather than standards, and allowed flexibility to adapt to varying circumstances. They focused on a number of key aspects of debtor-creditor regimes, exploring the interplay between modern credit and security systems and insolvency, the process of corporate rescue through informal and formal channels, and specialized conditions such as systemic events, enterprise distress among state-owned enterprises and bank insolvencies. That work was being developed in cooperation with interested international organizations and through a series of regional conferences. Completion was scheduled for August 2000.

15. The Asian Development Bank (ADB) advised that its approach was narrower, being focused on studying 11 Asian countries, but it was aimed at the broad goal of encouraging the greater development of legal and commercial systems, practices and institutions for application in all economic circumstances (the ADB Report is referred to in A/CN.9/WG.V/WP.50). In particular, the future challenge for those countries was to strengthen corporate governance, one important part of which was insolvency law. The reform programme was being developed through a series of symposia, refining the issues for consideration and developing solutions. Recent symposia stressed the need for stronger contacts and cooperation between the judiciaries of the region, leading to proposals for judicial colloquia and education and training programmes. Completion of a final report was scheduled for early 2000.

16. The International Monetary Fund (IMF) referred to its staff report on insolvency systems (referred to in A/CN.9/WG.V/WP.50) and indicated that the report would be used by the Fund to provide a basis for its policy dialogue with, and technical assistance to, countries, with particular emphasis upon the analysis which resulted in the recommendations. The

International Bar Association indicated that its Committee J was working on model substantive insolvency provisions, but that progress was slow due to the limited time available for the project.

17. On the question of possible future work by the Commission, it was suggested that the Commission could provide direct technical guidance on the substantive laws governing insolvency procedures and focus on how existing principles could be implemented through legislative action. However, the view was expressed that statutory language by itself was not sufficient to establish a functioning insolvency regime; what was required was a strong institutional structure that was both accountable and transparent. Nevertheless, it was pointed out that while it was clear that such legislative provisions could not of themselves address the very important issue of the knowledge and skills required of those administering and using insolvency regimes, they could facilitate the establishment of widely-shared knowledge and experience on the basis of a common foundation. Moreover, undertaking further work would serve to underline the continuing importance of insolvency regimes in all phases of the economic cycle, not just in periods of crisis. The benefits of modernizing and harmonizing even some part of the existing diversity of laws relevant to insolvency was also emphasized as an important benefit of possible future work by the Commission.

18. To maximize the likelihood of success, it was suggested that the precise scope of the work should be realistically targeted. To that end, the view was expressed that the work should address companies or incorporated bodies, not consumers. Certain institutions that were subject to special regulation and might require special treatment (such as financial institutions, insurance companies, certain utilities) and insolvency institutions or supervisors also might need to be excluded. In addition, it was suggested that in order to establish common concerns and views, specific topics should be identified to limit and define the scope of the work to be undertaken. One such topic proposed was that of out-of-court restructuring.

19. With respect to the form of any future work, reservations were widely expressed as to the possibility of formulating a universal or "one size fits all" model law on insolvency. In support of that view, the complexity and diversity of insolvency law and its integral relationship with a number of other similarly complex laws, such as those dealing with corporations, securities and regulation of the financial and insurance sectors, was stressed. It was suggested that what might be feasible was the development of a more flexible, soft law option such as key principles or legislative guidelines. Another suggestion, as a further step, was that the Commission could take such principles and show, where appropriate, how they could be developed into legislation. The integral connection between subject matter and form was also stressed, with the Working Group agreeing that no decision could be taken on the issue of form until questions of content had been discussed in detail.

20. The Working Group decided to continue its deliberations by engaging in a discussion of the key objectives of an insolvency regime, as outlined in the note of the Secretariat (A/CN.9/WG.V/WP.50, paras. 24-31), before commencing a more detailed discussion of the core features.

B. KEY OBJECTIVES

21. As to objectives A (“Maximize value of assets”) and B (“Strike a balance between liquidation and rehabilitation”), the Working Group generally agreed that there was a close connection between them and that what was required was a balance between different insolvency procedures. While the emphasis might be upon providing for maximum recovery by creditors, other goals such as encouraging the development of an entrepreneurial class and protecting employment could not be ignored. A further view was that those objectives also needed to take into consideration the loss of production capacity, the loss of the operational value of the entity and the possible disappearance of the debtor and the debtor's assets. The concern was expressed that, as drafted, the objectives should not be interpreted as polarizing insolvency into liquidation on the one hand and rehabilitation on the other. What was required was provision for a more broadly phrased "arrangement" or "method" which was aimed at maximizing the return and minimizing the effects of insolvency and would include the range of possible insolvency techniques. Such a formulation would also avoid any implied preference for one technique over another as a means of achieving objective A.

22. As to objective C (“Equitable treatment”), there was agreement in the Working Group with the general formulation, subject to clarification as to whether the reference to bargains struck between debtor and creditors properly took account of the interests of all creditors, especially where those interests might arise by the operation of law, not contract.

23. In terms of objective D (“Provide for timely, efficient and impartial resolution of insolvency”), there was general agreement in the Working Group on the benefits of establishing time limits in respect of certain matters, subject to those time limits being susceptible of modification, extension and reduction by the courts or other administering body. There was support for the view that achieving general agreement on what those specific time limits might be would be difficult. The need for an overall time limit for the proceedings as a whole was questioned. In addition to the reference to resolution of insolvencies quickly and efficiently, it was proposed that the objective should also provide for the commencement of the process in the same manner. Specific suggestions for amendment of the objective included broadening the reference to the “business” of the debtor to the “activities” of the debtor; including a reference to minimizing the cost of the proceedings in addition to timeliness and efficiency; changing the reference to "tribunals" to "organs or bodies"; and broadening the notion of supervision by courts and administrative bodies to include intervention and direction. A further suggestion was that while the first sentence properly stated the objective, the remainder of paragraph 28 stated what was really in the nature of a core feature of an insolvency regime.

24. Some concern was expressed as to what might constitute "premature" dismemberment in the context of objective E (“Prevent premature dismemberment of the debtor’s assets by creditors”). Another concern expressed was that the reference to the stay should be qualified by including its purpose, such as that the stay be "of sufficient duration to enable proper examination of the debtor's situation", whether there might be exceptions to its application and modification and lifting of the stay. It was pointed out that those issues had successfully been addressed by the UNCITRAL Model Law on Cross-Border Insolvency which should serve as the standard. Furthermore, the stay should apply to enforcement measures against the debtor, but not necessarily to the commencement of <u>any</u> action against the debtor. A further suggestion was that the reference to orderly conduct of the proceedings was more properly associated with the references to efficiency in objective D and should be included there, rather than in objective E which should focus upon the stay. It was suggested that the stay of actions against the debtor should be complemented by prohibiting the debtor, subject to appropriate exceptions, from disposing of, or encumbering, its assets.

25. There was support for the view that objective F (“Provide for a procedure that is predictable and transparent and which contains incentives for gathering and dispensing information”) should focus upon transparency and predictability; the elements of gathering and dispensing information should be considered in the context of core features, rather than key objectives. It was proposed that the objective needed to more clearly distinguish between the predictability of an outcome and transparency as it related to dealing with the flow of information which would lead to the outcome.

26. The Working Group endorsed the importance of objective G (“Establish a framework for cross-border insolvency”) and adoption of the UNCITRAL Model Law on Cross-Border Insolvency as the means of satisfying the objective.

27. A number of other issues were identified as being key objectives of an insolvency regime. The first proposal was the addition of an objective of early commencement of insolvency proceedings. In support it was pointed out that if the proceedings were to be successful, whether liquidation or rehabilitation, it was important to preserve the value of the debtor’s assets. One means of facilitating that was to ensure that there were incentives to encourage management to commence proceedings while there was still value in the assets of the entity or, alternatively, to provide sanctions for failure to commence at an early stage.

28. A second proposal was related to objective F (“Provide for a procedure that is predictable and transparent and which

contains incentives for gathering and dispensing information") and concerned adding a goal of transparency in relation to information about the debtor's situation. Since that was crucial to creditors, it was suggested that an insolvency law needed to contain incentives encouraging the debtor to reveal its position or sanctions for failure to do so.

29. A further proposal was for the addition of an objective to facilitate out-of-court workouts. The view was expressed that since the way in which the insolvency law was structured determined the context in which such a procedure might occur, it was important for the possibility of out-of-court workouts to be stated as a goal. It was also pointed out that there was a close connection between laws relating to the enforcement of debts, whether secured or not, and the effectiveness of insolvency laws and accordingly, that that was an area which should be identified as requiring attention.

30. The issue of fraud was raised as being of general importance to an insolvency law, not just in the context of objective C ("Equitable treatment"). It was suggested that since fraud fell into a general category of acts detrimental to the insolvency procedure it could be included as a general objective under that description.

31. Having completed its consideration of key objectives, the Working Group continued its deliberations with identifying the core features of an insolvency regime.

C. IDENTIFICATION OF CORE FEATURES

1. General Remarks

32. The Working Group first considered the summary of questions to be resolved by an insolvency regime as indicated in paras. 32 and 33 of the note by the Secretariat (A/CN.9/WG.V/WP.50). It was pointed out that a number of additional matters had been considered in the context of key objectives and should be added to any consideration of core features. Those included: acts detrimental to creditors; transparency; information to be provided by the debtor on its situation and the disclosure of that information to creditors. Other matters to be added for general consideration included: fraud; identification of assets of the debtor and treatment of third party assets; and protection and enfranchisement of creditor rights (that would include providing for access to information and ensuring that creditors had the right to act on their own behalf in insolvency proceedings when they had a stake in a particular issue, whether the proceedings were for liquidation or rehabilitation).

33. Several proposals were made for amendments and additions to paras. 32 and 33 as drafted. Those included under para. 32: amendment of item 3 to refer to the time at which proceedings "can or must" be commenced; addition of a reference to possible supervision of the debtor in addition to displacement in item 4; under item 5, inclusion of a reference to parties other than creditors whose actions may be stayed; and in item 8, addition of a reference to other issues dealing with the treatment of creditors. Under para. 33 the proposals included adding a reference to retention and compensation, as well as possible training, of professionals.

2. Discussion of core features

(a) Application of the law - individuals and enterprises (paras. 34-36)

34. Some concerns were expressed as to what was intended to be covered by the use of certain terminology. Use of the words "companies", "firms" and "financial institutions" raised questions of definition and it would need to be made clear exactly what was included within those terms.

35. The view was expressed that future work of the Commission should be limited to bodies corporate with a distinct legal

personality. It was pointed out that if individuals and partnerships were to be included, difficulties with issues such as discharge and attachment of post-bankruptcy wages, as well as personal matters such as settlements in divorce proceedings, would arise. Another view was that if such enterprises were involved in trading activities, they should be included in the scope of work, since the focus of the Commission was upon the activity of trade. It was proposed that the focus should be upon the activity being conducted, that is trade, and the bodies through which that trade tended to be conducted. Such a formulation would accommodate the diversity of ways in which, and vehicles through which, trade was conducted world-wide.

36. With respect to highly regulated entities, such as banks and insurance companies, it was suggested that the opt-out provision of the UNCITRAL Model Law on Cross-Border Insolvency (article 1(2)) provided a good solution. An opposing view was that a simple exclusion of such entities ignored the current reality that some banking and insurance functions were commonly undertaken by general trading groups, which themselves should be included within the scope of further work.

37. With regard to state-owned enterprises, there was support for the view that there was no reason for a general exclusion from the application of an insolvency regime, although specific exclusions might be deemed necessary. Such an exclusion might include those State-owned enterprises subject to special regulation (such as a highly regulated, government-controlled utility), but not enterprises in which the State had only a partial interest or State-owned enterprises which were engaged in commercial activity.

(b) The relationship between liquidation and rehabilitation (paras. 37-46)

38. The Working Group generally agreed that what was required was a balance between different insolvency procedures, however they may be arranged in the insolvency law (such as unitary proceedings or otherwise). As noted in the discussion on key objectives, there should not be a polarization of proceedings into liquidation on the one hand and rehabilitation on the other, but the inclusion of a range of possible insolvency techniques that could be used to achieve the objective of maximizing the value of assets (see also paras. 90 and 91).

(c) Liquidation procedures (paras. 47-103)

39. As a preliminary point, it was suggested that the Working Group may need to clarify what was intended by the term "liquidation" and what steps might generally be agreed to be included within that term. It was suggested, for example, that some liquidation regimes did not contemplate the possibility that a debtor entity could continue to trade before being sold as a going concern.

40. A number of amendments and additions to the liquidation steps outlined in para. 47 were suggested. Those included: under item 3, that the independent person could also be an independent body which conducted and administered the liquidation; under item 4, the possibility of continuation of the business as an alternative to closure and possible authorization of the liquidator to continue the business for a limited purpose; a reference to possible conversion of liquidation to rehabilitation; and provision for the disclosure of information concerning the debtor's position including recent transfers, assets, debts etc.

Conditions for commencement of liquidation (paras. 48-52)

41. A number of views were expressed as to what should constitute the trigger for commencement of proceedings. Support was expressed for the general cessation of payments test, although there was some concern that that was too vague and subjective a standard. A further concern expressed was that general cessation of payments could be a symptom of extreme difficulty and thus defeat the goal of early commencement. One alternative suggestion was to adopt a liquidity test together with the balance sheet approach, which considered whether the value of debts and liabilities exceeded the value of assets and established a more objective test. Another suggestion was to assess a range of objective facts which might include cessation of important and sensitive payments such as rent, taxes, wages and social security payments, as well as other matters. In such

a scenario, cessation of payments would be only one indicator of a need to commence insolvency proceedings and would require the individual circumstances of the debtor to be examined.

42. With respect to creditor commencement, the concern was expressed as to how a creditor could gain access to information that would indicate a general cessation of payments, rather than a simple failure to pay that particular creditor's claim. If that information could only be obtained through a complex procedure, it may not be an appropriate trigger. If, however, a simple failure to pay one creditor's claim was accepted as a commencement criterion (and one procedure outlined might involve using that single failure to establish a presumption of insolvency), it could raise other problems, such as the potential for that creditor to be able to disrupt out-of-court proceedings by commencing insolvency proceedings. An alternative view was that a quick procedure for creditor commencement was not necessarily hostile to the idea of rehabilitation as the debtor was in a position to know its own situation and could, at any time, itself take steps to initiate either liquidation or rehabilitation.

43. A related issue was whether a duty to commence proceedings should be established. It was suggested that in order to satisfy the objective of early filing, the insolvency law needed to include incentives (such as protection from enforcement actions) or sanctions for failure to file. It was recognized that not only was the choice between the so-called "carrot" or "stick" approach dependent upon individual countries' situations and how insolvency regimes dealt with out-of-court processes, but that also there was a danger that the establishment of an obligation might thwart the achievement of an out-of-court settlement.

Effect of commencement - assets of the estate (paras. 54-56)

44. An issue was raised as to how third party property should be treated - was it part of the estate or did it have some other status? One view was that while it did not necessarily form part of the estate, the estate might nevertheless be responsible for protecting that property. In such cases, it might be possible for that property to be used by the estate, pending a decision as to its purchase or return to the third party. In other cases, no reservation of title was recognized once property had been used by the debtor and such property would form part of the estate.

45. It was stressed that there was a difference between unified and other types of proceedings with respect to the treatment of property. In the case of the former, since the decision as to what constituted the assets of the estate would be delayed until the decision on which procedure should be followed, protection of the estate until that time would be required. In other cases, the type of procedure followed would indicate how the estate should be treated from an early stage.

Effect of commencement - protecting the estate (paras. 57-62)

46. It was stressed that the proceedings could be divided into distinct stages to which different considerations applied, such as the period between the time a petition was filed and granted and after the proceedings had opened. It was also clear that different types of proceedings would give rise to different considerations, for example where the estate was to be sold piecemeal, the need for protection of assets and restraint of creditors was not as crucial as where the business was to be sold as a going concern or in cases of rehabilitation.

47. Two key issues identified for further consideration were the need to include secured creditors in any stay on rights of enforcement and the ability of the liquidator to obtain information relevant to preserving the assets.

The proceedings - verification of claims (para. 64)

48. There was general support for the view that the topic of verification of claims was perhaps understated as it could have a major impact upon the ability of creditors to participate in the process. It could also serve as a major point of delay in the

proceedings if all claims were required to be approved before the next steps in the process could be taken. One solution to the problem would be to allow for provisional recognition of claims for certain temporary purposes, with the claim being fully verified for the purposes of distribution. A number of other relevant issues were raised, including questions of participation of foreign currency claims; contingent liabilities; general priority claims; the impact of multiple proceedings; timing of claims and whether claims could be forfeited if made outside stipulated times or simply deferred; and whether verification was necessarily always a task of the creditor or whether there might be circumstances where it was not required, such as where it was apparent from the debtor's books that a certain claim might exist.

Powers of avoidance (paras. 70-80)

49. A view expressed widely in the Working Group was that avoidance powers should be available for use in both liquidation and rehabilitation proceedings. A related view was that the powers should be the same in both processes, since otherwise the differences in the powers might be used by a creditor as a reason for choosing the procedure most likely to lead to an outcome favourable to that creditor, rather than the procedure most suited to resolving the debtor's financial difficulties. An alternative view was that the powers should not be the same for both types of proceedings as different considerations were raised and there should be, for example, some limitation to the power to nullify objectively normal transactions in the case of rehabilitation.

50. It was suggested that the powers should not be limited to addressing fraudulent transactions, but should more generally address transactions and transfers which prejudiced creditors generally. It was stressed that that was a difficult area to regulate since the types of transactions being addressed were not generally admitted by the debtor and therefore were not necessarily readily apparent to the liquidator. In terms of the manner in which different transactions might be covered, it was suggested that some specified types of transactions, such as related-party or insider transactions, could be presumed to be prejudicial (so that the liquidator would not have to prove prejudice), while for other transactions prejudice would have to be demonstrated. In the second class of transaction, the demonstration of prejudice could be subject to challenge. It was pointed out that there might be difficulties with a general concept of what might constitute an insider transaction since national laws varied considerably on this point.

51. As to the period of suspicion, it was suggested that setting a time limit would be important, but that in principle it should not be too long as that might create insecurity. Another view was that the imposition of time limits might cause a debtor to delay commencing proceedings in order to ensure that certain transactions would fall outside the specified period of suspicion.

Treatment of contracts (paras. 81-88)

52. The view was widely expressed that, like avoidance powers, the power to continue or terminate contracts was essential to both liquidation proceedings, especially where the business was to be sold as a going concern, and rehabilitation proceedings. The choice between termination or continuation of a particular contract would be dependent upon which course of action was most profitable for the creditors. It was noted in this regard that variation of contracts, particularly termination, could have a negative financial impact upon the estate because of the need to pay compensation for termination and potentially adversely affect the success of a rehabilitation. The need for those powers in rehabilitation cases was explained as being essential to address the common situation that creditors could not expect to be fully paid, but would nevertheless receive more than they would have if the entity had been liquidated. Since full payment could not be achieved, the debtor was likely to have to breach a number of contracts which would result in the need to pay compensation; that compensation would be achieved by the less than complete payment of the debt.

53. It was noted that some types of contracts, such as labour contracts, might need to be stated as exceptions to those powers, but the benefits to be achieved by those exceptions would have to be balanced against the goal of maximization of value.

Set-off (paras. 89-91)

54. The view was expressed in the Working Group that, notwithstanding that set-off was not always permitted under national law, as a general principle it should be recognized. Another view was that while such recognition might be appropriate in the case of a pre-commencement right to set-off, that recognition could not be supported with respect to post-commencement set-off, although there might be exceptions. It was generally considered that netting arrangements (multilateral compensation schemes for financial obligations) should be recognized. It was pointed out that in some jurisdictions the right to set-off was treated in the same way as a right to security. It was suggested that if a set-off was treated as a secured claim and subjected to the stay on enforcement of rights it would give the liquidator the opportunity to address some of the social policy issues that might arise in insolvency proceedings. Another view was that permitting set-off was an exception to the equitable treatment of creditors and, in some jurisdictions, may contradict national laws, such as provisions on non-payment of wages.

Disposition of assets (paras. 92-93)

55. It was questioned whether court or creditor approval was necessary for disposition of assets. One view was that such a requirement could unnecessarily delay the proceedings, risk reducing the value of the assets and prove to be costly. That was particularly the case where the assets to be sold were perishable and required rapid sale in order to maximize their value. It was noted that in some jurisdictions liquidators were given special powers with regard to such assets. A better means of ensuring that the disposition was conducted fairly and impropriety avoided was to rely upon provisions dealing with the liability of the liquidator and the appeal or dispute procedures available to the creditors. Another view was that the experience in some jurisdictions where creditor approval was required did not show that the requirement for approval gave rise to problems; rather there were more likely to be problems with one person controlling the efficacy of the sale. Provided creditors were closely involved in the liquidation procedure and were represented by creditor committees, obtaining approval for sale of assets was not likely to cause delay to the sale process.

56. On the question of notice, one view was that the giving of notice avoided any suggestion of collusion, allowed the liquidator to get a better price since the sale would be more likely not to be the subject of a single bid and would assist in avoiding any suggestion that the assets had not been exposed sufficiently to the market.

Priorities (paras. 94-100)

57. It was reported to the Working Group that recent work on the issue of priorities had resulted in a number of recommendations which might be relevant to the consideration of that issue. The general principle was that after payment of secured creditors, the proceeds of realisation of property should be distributed equally and without preferences to remaining creditors, unless there were compelling reasons to justify giving preferential status to a particular debt. Policy factors which might be taken into account in determining whether compelling reasons existed to grant preferential status might include: existing policy factors arising under other laws outside the insolvency framework, including international obligations such as those relating to employees; the balancing of private rights should generally have priority over public interests; the need to create incentives for creditors to manage credit efficiently; the desirability of encouraging those who make credit available to fix the price of credit as low as possible; fine distinctions should be not be drawn between classes of creditors causing one class to bear a greater burden of unpaid debt; and the impact which a preferential debt would have upon transaction or compliance costs. Three tests were suggested for determining what would constitute a "compelling" interest: whether it was justified by fairness and equity; whether it intruded unnecessarily on the law as it affected property rights and securities; and whether it provided

encouragement for the effective administration of insolvency, or at least did not provide disincentives to administer insolvent estates efficiently. Consideration should be given to whether social imperatives could be met in ways other than by establishing preferences in insolvency, but where public interest grounds were found to be justified they should be articulated clearly to promote transparency in the insolvency process.

58. While there was some agreement that preferences generally should be avoided or kept to a minimum, there was also support for establishing priorities for employee claims and, in some cases, government claims such as tax. It was suggested that those issues were very closely connected with national social imperatives and might involve different rationales in different countries. It was generally agreed that it would be very difficult to reach agreement on the ranking of priorities but that, as a matter of principle, priorities should not be allowed to overwhelm the insolvency process, that other ways of dealing with the same social imperatives should be encouraged and that transparency was a desirable goal. A further suggestion was that consistency of approach should be encouraged so that different priority regimes were not established for different processes within a single insolvency law.

Discharge (paras. 101-102)

59. As a preliminary point, it was noted that the relevance of the topic would depend upon the scope of any future work on insolvency and the debtors to be covered, as well as the way in which the relationship between principal and corporate entities and their directors for the purposes of guarantees and ongoing liability for debts might be treated. It was suggested that, since some countries' trade activities were often carried out by individuals rather than limited liability corporations, the value of any future work might be affected if it excluded types of entities that might not be corporate bodies, but which were nevertheless involved in significant numbers in trade in certain countries. It was also noted that where discharge raised issues of social policy it might be difficult to reach a generally agreed approach; one particular concern was noted in respect of those jurisdictions where bankruptcy carried with it significant social stigma.

60. It was pointed out that the treatment of the topic in paras. 101 and 102 did not clearly distinguish between discharge of the debtor from debts and discharge from bankruptcy. The view was expressed that where there was fraudulent behaviour by the debtor, the proper remedy would be to pursue the fraud under appropriate criminal sanctions rather than to adopt the approach of not discharging the debtor from bankruptcy. While it might also be possible to suspend discharge in respect of those debts procured by fraud, it would be necessary to distinguish between those acts which would justify only partial refusal to discharge debts and those where complete denial of discharge would be justified.

Foreign creditors (para. 103)

61. While it was generally agreed that foreign creditors should be treated in the same way as domestic creditors, it was noted that for purposes of notification it might be necessary to set different time limits and conditions for foreign creditors. This was an issue which had been discussed in deliberations on the UNCITRAL Model Law on Cross-Border Insolvency and resulted in agreement on special notice provisions for foreign creditors under article 14 to address their particular situation.

Additional topics possibly to be considered

62. A number of additional issues were suggested for inclusion as core features of an insolvency regime. These included: the effect of insolvency on transactions occurring after commencement but before notice of the proceedings; powers and duties of the liquidator, as well as supervision, replacement and remuneration; remedies of creditors, in particular as regards disputing claims by other creditors; treatment of non-monetary claims and claims that were not yet due when the proceedings were opened; the transparency and fairness of procedures; the effect of insolvency proceedings on other pending proceedings; and insolvency of multinationals. The view was expressed that the issue of notice and its effects was generally crucial to insolvency

proceedings and could perhaps be included as a separate core feature or objective. Provision of notice to creditors was essential to their participation in the process and to the presentation of claims. The Working Group exchanged views on the ways in which notice might be given, in respect to commencement of proceedings as well as other stages of the proceedings.

(d) Rehabilitation (paras. 104-143)

Essential features (para. 104)

63. A number of issues were suggested for addition to the essential features of rehabilitation proceedings set forth in para. 104 of the note by the Secretariat (A/CN.9/WG.V/WP.50). Those included: failure of rehabilitation and conversion to liquidation, including the costs of an attempted rehabilitation and how they were to be dealt with in a subsequent liquidation; determination of the appropriate relationship between the debtor's creditors and the debtor's owners (including the continuing involvement of the owners in the entity), especially where the owners were also creditors; and the extent to which rehabilitation raised public interest issues, such as those of the local community.

64. A question was raised as to the voluntary nature of rehabilitation proceedings and whether what was intended was that the debtor's acceptance of a rehabilitation plan was to be voluntary or that the initiation of the proceedings by the debtor was to be voluntary. While it was suggested that voluntary proceedings would require the debtor to agree to commencement, it was observed that a number of jurisdictions included provisions for rehabilitation proceedings that could be imposed upon the debtor. In terms of initiation of proceedings, it was agreed that both creditors and debtors should be able to commence rehabilitation proceedings.

Commencement requirements (paras. 105-110)

65. On the question of the commencement criterion, one view was that the same test should apply to both liquidation and rehabilitation, whether that test be general cessation of payments or some other test. It was also noted, however, that the goal of early commencement suggested a test other than general cessation of payments might be more appropriate, at least in the case of debtor-initiated proceedings. Prospective illiquidity was proposed, a test that would enable a debtor to anticipate financial crisis and use the rehabilitation process to work its way out of financial difficulty, a goal consistent with key objectives agreed by the Working Group. It was suggested that prospective illiquidity might cover cases such as those where the debtor was facing the prospect of a large and successful tort liability claim. A further view, however, stressed that what was needed was a test which was sufficiently flexible to be applicable in different cases. One possibility along those lines might be not to apply a commencement test at all, provided that there were safeguards against abuse of the process; it was suggested that sometimes rehabilitation was commenced to delay the inevitable and consume what little funds were left to the debtor. One means of addressing that problem might be to provide for some type of early assessment of the debtor (which might be undertaken, for example, by the court or an independent expert) to determine which of several possible processes might work for that debtor, noting that rehabilitation was not a single process but a hierarchy of processes which ranged from a simple moratorium to complete restructuring. It was noted with respect to an assessment procedure that it might prove to be costly and delay proceedings unnecessarily. Other approaches involved creditors in the process and required them to vote on the feasibility of the rehabilitation plan within a limited time frame or required that proof of *bona fides* be made to the courts. The Working Group exchanged examples of different rehabilitation procedures and commencement criteria that were applicable under different national laws.

The stay (para. 112)

66. The Working Group generally agreed on the importance to rehabilitation proceedings of a stay on rights of enforcement and that it should apply universally to all creditors. A number of issues were discussed in relation to the questions

of to whom the stay should apply; whether it should apply automatically or by the discretion of the court; the period of its application; and relief from the stay.

67. In terms of the universality of the stay, it was noted that a universal approach avoided any dispute as to which securities would be essential to the business and which would not. It was observed, however, that certain types of security might not need to be included within the stay and could benefit from exclusion from the stay. A related issue was whether the right of the debtor to dispose of or encumber its assets should also be stayed to preserve the estate, but doubt was expressed as to whether that step really would be necessary to rehabilitate the debtor.

68. As to the automatic application of the stay, opinion was divided. It was noted that not all jurisdictions provided for an automatic stay, one rationale for that approach emphasizing that part of the creditor's bargain with the debtor was likely to be prompt enforcement of the debt with no interference. In terms of avoiding litigation through automatic application of the stay, it was observed that automatic stays were likely to give rise to applications to the court for modification, while stays which were discretionary were likely to give rise to litigation seeking their application by the court. Neither type of stay was more likely to reduce the possibility of litigation than the other; there would be a cost associated with either applying or lifting the stay in either case. In response, it was observed that while both types of stay might give rise to litigation, the litigation would occur at different stages of the proceedings. The advantage of an automatic stay was that it could be in place at the commencement of proceedings and was therefore of immediate benefit to the administrator and to the estate. It was suggested that results similar to those arising from the application of a stay (irrespective of whether it was automatic or discretionary) could be achieved by applying other techniques; requiring the debtor to negotiate with creditors, for example, would be a good test of the viability and feasibility of the rehabilitation plan and a credible plan would probably gain secured creditor’s approval. In such a case, the absence of a stay on the claims of secured creditors might not undermine the process.

69. It was generally agreed that the provision of relief from the stay (e.g. its total or partial lifting or restriction) was an important issue. As to duration of the stay, it was emphasized that an indefinite stay could adversely affect secured creditors and the value of the securities. Since the stay might only be required to allow certain steps in the process to occur, it need only be of temporary application. That concern was closely related to one of the key objectives discussed by the Working Group, that of timely and efficient resolution of proceedings. Accordingly, it might be appropriate to impose deadlines for preparation of the plan so that the stay would be of limited duration. A further issue was whether relating the duration of the stay to the size and complexity of the rehabilitation proceedings might be an appropriate approach.

Control of the debtor's business (paras. 113-116)

70. It was a widely expressed view that no general, inflexible rule could be agreed on the issue of control of the debtor's business during the rehabilitation proceedings. One suggestion was that there were a number of cases where the situation of the debtor could not be attributed to mismanagement or misappropriation on the part of the debtor and there was, therefore, no compelling reason to remove the management responsibilities. An alternative view was that since management was responsible for the financial difficulties of the debtor, the business should be completely removed from management control and replaced by an administrator. In other cases, even where there was mismanagement, the technical nature of the business might require close and continuing involvement of the former management to ensure the efficient functioning of the debtor on a day to day basis, even where outside professionals were engaged to manage the business. The appointment of the outside professional could provide the confidence necessary to reassure creditors and suppliers and instill confidence in the business. Other types of approaches could be adopted which might leave the management authorized to make decisions relating to the day to day activities of the business, but subject to supervision by an administrator or the courts or to some standby supervision that could be available through the courts should it prove to be necessary.

71. It was observed that the note by the Secretariat (A/CN.9/WG.V/WP.50) made no mention of the participation of creditors in management and monitoring of the business of the debtor, which could operate as a further check upon the activities of management. Where creditors had no confidence in the management that could be reason enough for their removal or for pursuing liquidation. It was also noted that the Secretariat note did not clearly indicate the time at which the issue of control was important. A clear distinction could be made between control of the business in the period before the plan was prepared and approved and after the plan had been approved. While an administrator might be appointed in that early interim period, the issue of continuing management was one to be addressed in the plan, in terms of costs and what might serve the best interests of the business.

Preparation and content of the rehabilitation plan (paras. 117-122)

72. Different views were expressed as to which party should be given the opportunity to prepare the plan of rehabilitation. It was emphasized that preparation of the plan was a key element of the rehabilitation and one which addressed a number of sensitive issues such as future funding of the debtor. One view on preparation of the plan was that the debtor should be entrusted with that task, since the debtor would be in the best position to understand the business and had detailed information on the business. Another view was that that approach might not achieve the best result as the debtor might tend to undervalue the business and the debtor's view of what might be necessary to rehabilitate the business might not be sound. It might be more advantageous to the outcome of the rehabilitation to allow creditors to prepare the plan, or at least to be able to participate in its preparation, prepare a counter-proposal to any proposal of the debtor or amend any proposal made by the debtor (for which a procedure might need to be established). It was observed that one problem creditors might encounter in preparing a plan was access to sufficient information about the debtor, although it was suggested that the court or supervising body could order the debtor to provide the necessary information or that such information would have been made available in the period of investigation and examination which occurred at the commencement of the rehabilitation in some systems. A further view was that while an outside professional might be in a good position to listen to the interests of different parties, the outside professional should not be solely responsible for preparation of the plan, but could provide assistance as and where required.

73. One method of dealing with the need to involve those different parties in the process might be to give the debtor an exclusive period for preparation and, in the event that the debtor failed to do so, to allow the creditors and the administrator to prepare a plan. As a general principle, it was suggested that what was required was an approach which was flexible, which did not give an exclusive right of preparation to any particular party (debtor, creditors or neutral third party such as the administrator), but which promoted consultation between the different interested parties (which might include parties such as trade unions and government agencies) and with experts as appropriate. Such a procedure was most likely to ensure the preparation of a plan that could be approved and implemented successfully.

The proceedings - approval of the plan (paras. 123-133)

74. An essential prerequisite to the process of approval of the plan was certainty as to who were creditors of the estate. Issues such as validity of claims; fraud; operation of avoidance powers; insider transactions; resolution of disputes; division into categories or classes of creditors (useful where there were creditors with distinctly different credits); calculation of percentage of value of claims (where that was a determinant of a majority vote); and general eligibility to vote needed to be addressed in order to ascertain who constituted the body of creditors and how it should be constituted for the purpose of voting on approval of the plan.

75. It was noted that no single procedure for approval of a plan could be specified since what was required varied from case to case; different majorities and different voting procedures might be required according to the content of the plan, the different types of liabilities involved and how minorities might be protected. A related issue was who could determine these issues - the courts, the administrator, an arbitrator or some other party.

76. On the question of majorities, it was noted that a system of simple majority by reference to number of creditors was likely to discriminate against large creditors, while those same large creditors might be unfairly advantaged if the only criterion was to be value of claims. Many systems adopted a combination of both number and value, but it was noted that that could also be problematic if a very small number of large creditors and a very large number of small creditors were to be involved in the same rehabilitation; one such example cited involved 29 banks representing 95% of the debt and 2,000 creditors representing no more than 2% of the debt (where the latter were able to defeat a plan agreed by the banks).

Powers of avoidance (paras. 134-135)

77. The Working Group exchanged experience on the operation of powers to avoid transactions (entered into prior to the insolvency proceedings) that unfairly favoured particular creditors. A general view was that avoidance powers were as important to rehabilitation as to liquidation, since in rehabilitation continuation of the business was the central concern and the availability of powers of avoidance needed to be maintained throughout the proceedings in order to facilitate a successful rehabilitation. By way of comparison, an example was cited in which the powers of avoidance could not be exercised in rehabilitation, but where the rehabilitation procedure was constructed in a manner which placed the burden of choosing between rehabilitation and liquidation (where avoidance powers *were* available) on creditors, and creditors in voidable transactions could be brought into the rehabilitation negotiations.

78. In some cases, powers of avoidance could be exercised by the administrator and in others the debtor in possession of the business could exercise those powers as a trustee. To avoid conflicts of interest where that debtor in possession might be reluctant to avoid transactions in which it had been closely involved, creditors or the court could intervene to compel avoidance of specific transactions.

79. Other cases were cited in which avoidance powers differed between liquidation and rehabilitation proceedings on issues such as that of timing; where liquidation followed a failure of rehabilitation, the powers of avoidance in the liquidation would allow the liquidator to avoid contracts entered into both before and after commencement of the failed rehabilitation.

Treatment of contracts (paras. 137-138)

80. A view was expressed about the propriety of termination of contracts (especially labour contracts), but it was noted that, in many cases of rehabilitation, it would be necessary to terminate burdensome contracts. At the same time, much of the value of the business to be rehabilitated might be in contracts and the ability to assume contracts, conditioned upon curing defaults, would be very valuable to the rehabilitation. It was noted that that might require a power to nullify contract clauses stipulating contract termination in case of insolvency proceedings. It was noted that many legal systems provided special treatment for certain types of contracts, including labour contracts, financial contracts and certain types of leases and licences. The special treatment of those types of contracts was generally grounded in a blend of public policy concerns, fairness and pragmatic accommodation of market concerns. As to the types of contracts which could be assumed or terminated, it was suggested that the insolvency law should adopt a flexible approach; experience with an insolvency law which required all contracts to be assumed had showed that approach to be detrimental to the estate.

81. The issue of damage was the subject of a number of comments and it was a widely held view that the exercise of powers of continuance and termination required a balancing between the benefits to be obtained for the estate and damage likely to be caused, particularly to counter-parties. Labour contracts, for example, although generally regarded as exceptions to the exercise of those powers and usually more difficult to abrogate than other types of contracts, raised questions of balance between maintaining jobs and maintaining wages, especially where the maintenance of labour contracts would threaten the success of the rehabilitation.

82. The ability to assign contracts was noted as being of particular importance where the business was to be sold and transfer of certain contracts would be central to the sale. That power of transfer did not necessarily have to be provided in the insolvency law since it might be available under general law provisions. Another issue noted as important was the time at which the option to continue or terminate arose; it was suggested that the option to exercise those powers should be maintained throughout the proceedings.

Post-commencement financing (paras. 139-141)

83. It was noted that post-commencement financing needed to address not only borrowed money credits, but also trade credits and extensions under existing contracts.

84. As to the question of what incentives could be provided to ensure that post-commencement financing could be obtained, it was observed that there were differences between the proposals set forth in paragraphs 140 and 141 of the note by the Secretariat (A/CN.9/WG.V/WP.50). The IMF Report suggested that, while priority could be given over other administrative creditors, permitting the granting of a priority over secured creditors ran the risk of undermining the value of security. The ADB Report on the other hand suggested that a "super" priority could be given to ensure that funding for necessary on-going and urgent business needs of the debtor would be available.

85. A number of different views were expressed on that important point. As a preliminary issue it was noted that before the administrator could decide how post-commencement financing could be secured, whether by way of security over unencumbered or partially encumbered assets or by the giving of a priority, it was crucial that the existing assets of the estate be valued. Another issue of a preliminary nature was the need to distinguish between finance needed before the rehabilitation plan was approved and finance needed for implementation of the plan. It was noted that funding for the latter would generally be addressed in the rehabilitation plan and would therefore involve negotiation with existing creditors. Some of those creditors might agree to make the plan viable by providing the necessary funding through a number of different arrangements which may not require the giving of any priority.

86. Where finance needed to be obtained before the plan was approved, a number of restrictions were identified as being necessary. One suggestion was that that type of finance should be approved by the court, although it was noted that in some jurisdictions the court tended to rubber-stamp the application of the administrator because it lacked the necessary expertise to make what was essentially a commercial decision. Another view was that, while the giving of super priority might be important in some cases, the applicant for the super priority should be required to show that the finance was not obtainable in some other way and that adequate protection for other creditors was provided. It was suggested that the powers of administrators with regard to such priorities should be limited strictly, with consideration given to involving banks and creditors in the decision. In one system, the administrator was made personally liable for assets of the estate during the administration period and therefore needed to be particularly careful on the issue of giving securities and priorities.

87. It was pointed out that, in practice, creditors were generally involved in negotiations with administrators on such issues and that often there was a single large creditor which supported the rehabilitation and was prepared to put forward credit which could later be accounted for in the rehabilitation plan. On the issue of super priorities generally, the view was expressed that such priorities conflicted with the protection of creditor interests; the policy choice to be made required an evaluation of broader social issues, such as balancing and protecting of rights *in rem* and employment. Another suggestion was that if the goal of early commencement could be achieved, so that the value of the assets was likely to exceed creditor claims, there would be room to provide security for new money. If, however, the general practice was to commence at a late stage, problems with new funding would always arise because of the lack of excess value; the general issue related to the culture of using rehabilitation processes in different countries.

Pre-packaged and pre-negotiated rehabilitation (paras. 142-143)

88. The Working Group exchanged views about the availability of pre-packaged and pre-negotiated forms of rehabilitation, the extent of their use where they were available and how successful they could be considered to be. It was observed that in a number of cases where such procedures were available, they worked extremely well and provided an alternative to formal rehabilitation that was typically less expensive, less complex, less intrusive on the debtor's business (and therefore less disruptive) and capable of providing a quicker result.

89. In some types of cases, however, such procedures were not always successful, such as where there were unliquidated claims or numerous small claims. Those procedures were useful where the major lenders had reached agreement, but a few creditors refused to agree and prevented the required unanimity being achieved. In such cases the combination of the out-of-court procedure with an insolvency procedure provided the means of dealing with lack of unanimity and facilitating resolution of the rehabilitation, without losing the benefit of agreements reached under the pre-packaged procedure. It was pointed out that an important feature of such proceedings was the willingness of the courts to recognize agreement which had occurred before commencement of the application for approval, although it was noted that in some cases the court might have difficulty fulfilling the approval function where it had not been involved in the pre-packaged proceedings or was not sufficiently experienced in commercial matters. The issue of remuneration of professionals in such proceedings was raised as an issue for consideration.

Conversion from rehabilitation to liquidation

90. The Working Group discussed the effect of a failure to approve a plan of rehabilitation and whether the proceedings could or would then be converted to liquidation. While the laws of a number of countries did make provision for automatic conversion to liquidation in those circumstances, it was pointed out that the question was generally determined by the nature of the insolvency regime and whether proceedings were unitary or separate.

91. In the case of an insolvency regime with separate proceedings, efficient coordination between the proceedings was desirable, in particular in relation to the rules of the different proceedings and how the rules of, for example, rehabilitation might impact upon a subsequent liquidation. Issues of conversion between liquidation and rehabilitation were generally managed by the courts, which in some cases permitted conversion in both directions, in others only from rehabilitation to liquidation. In addition, conversion was permitted not only where there was a failure to approve a plan, but also at a later stage if there was a failure in implementation of the plan (see also above, para. 38).

Additional topics possibly to be considered

92. Following discussion of the core features of rehabilitation proceedings, the Working Group considered other issues which might be included as core features of an insolvency regime. The issue of insolvency of affiliated companies was raised and, in particular, the desirability of allowing petitions to be filed and considered in one court, rather than in different courts in the locations of the different parts of the company, leading in some cases to cross-border issues. It was suggested that, in practice, although insolvency law tended to focus upon individual entities, entities were often arranged in groups and that coordinated insolvency proceedings or a consolidated insolvency proceeding would have a number of advantages. Very often one entity was highly dependent upon the value of another within the group and insolvency proceedings in a single court would not only facilitate easier identification of creditors, determination of claims and assessment of value, but allow the overall situation of inter-company obligations to be comprehensively considered. It was noted, however, that the insolvency of affiliated companies raised the important question of piercing the corporate veil; in some countries this was permissible in order to include affiliated companies in the insolvency proceedings, while in others it was not.

93. It was suggested that the topic of insolvency of affiliated companies might be appropriate for future consideration by the Working Group.

(e) Involvement of creditors (paras. 144-147)

94. The view was expressed that it was important, as a general principle, to support the involvement of creditors in both rehabilitation and liquidation proceedings. This was noted as being of particular use where the debtor might have greater powers, as in rehabilitation, so that creditors could monitor the activities of the debtor and provide any necessary checks. It was suggested, however, that the general principle supporting creditor involvement needed to be balanced against a number of factors. Those factors might include: the cost of ensuring creditor participation and how those costs should be met; ensuring that any powers which creditors might have to participate or intervene in the proceedings did not unnecessarily interrupt the progress of the rehabilitation; issues of governance and duties with respect to, for example, treatment of commercially confidential material, as well as procedural issues such as formation of creditors' committees and voting; and how questions of self-interest and *mala fides* could be addressed.

95. In support of creditor involvement it was pointed out that creditors could perform both an advisory role and an advocacy function. Their involvement in the process might include providing expert assistance in realizing the assets of the estate, providing a check against fees and expenses charged against the estate and in relation to actions brought by the liquidator against third parties, as well as a supervisory function. Where creditors' committees were required, the time at which they should be formed was important, as well as whether in some cases it might be important to consider remunerating creditor representatives. Where the rehabilitation involved affiliated entities and different groupings of interests, the manner in which creditors could best be represented was a difficult issue and might require the establishment of separate committees.

(f) Liquidators and administrators (paras. 148-153)

96. At the outset of the discussion, it was observed that the availability of properly trained professionals had a major impact upon the achievement of orderly and efficient insolvency proceedings. To develop and maintain the experience and knowledge of such professionals it was essential to develop appropriate training and continuing education programmes.

97. Different qualifications were required of liquidators and administrators in different jurisdictions, with a trend towards setting higher standards being clearly evident in a number of countries. Both public and private practitioners were used, depending upon the type of proceedings being pursued. In some cases, for example, the administration of estates with minimal or no assets was undertaken by the public sector, while in others it might be undertaken by the private sector, either on a rotation basis or a no fee basis. In other cases, liquidators were only appointed from the public sector, while administrators could be private professionals. The qualifications of the professional appointed to a particular case might depend upon whether accounting, legal or business skills were relevant to the proceedings being pursued. In some countries, licensing schemes were employed to regulate those professionals, with sanctions for improper conduct including deregistration. In addition, insolvency laws might require the liquidator or administrator to post a bond to guard against him or her absconding with assets or impose personal liability for protection of the value of the estate. Appointment of liquidators and administrators was often controlled by the court, with or without the involvement of creditors.

98. The remuneration of insolvency professionals was an issue of some concern in a number of countries, with various solutions being explored. In some cases, remuneration might be on an hourly basis, in other cases fees might be fixed, while a third possibility was to allow contingency fees. It was suggested that the latter might provide an incentive for the administration of apparently assetless estates, where the size of the fee would be dependent upon what assets the trustee could recover.

(g) The court (paras. 154-156)

99. The Working Group exchanged views about the role of courts in a number of different insolvency systems. The issues discussed included the core functions of the court in the insolvency proceedings; the type of courts that might be needed; and the experience and knowledge of judges and other relevant insolvency professionals, including issues related to training and continuing education.

100. On the first question of the core functions of the court, it was clear that a number of different functions were required, depending upon how the insolvency regime was structured and the emphasis placed upon court supervision. A distinction was to be drawn between court involvement in the liquidation process and in the rehabilitation process. With respect to overall supervision of the rehabilitation process, for example, it was suggested that that could be entrusted to an administrative body, with creditors having a significant input to a consultative process by which decisions were made. Only where problems were encountered in the process would the court become involved and perform a supervisory function.

101. Where the proceedings were unitary proceedings, the court might perform a supervisory role at an early stage before the opening of proceedings, with the emphasis changing to the creditors after the proceedings had been formally commenced. In terms of liquidation proceedings, it was generally expected that the court would perform a supervisory function, but the level of intervention differed between systems. In some cases, a high level of direct intervention was expected, while in others the court provided support to the process, serving as an arbiter to interpret the law, to impose sanctions and to assist in the recovery of assets on application.

102. A number of different views were expressed with regard to the types of court that might be required to facilitate the conduct of efficient and effective proceedings. In some jurisdictions, insolvency courts were specialized courts which operated with a high degree of centralization, enabling the development of considerable expertise in insolvency matters and facilitating the speedy and efficient treatment of cases and predictability of the outcome. In other cases, insolvency matters were handled by general commercial courts, some of which might have special insolvency chambers. Concerns expressed with regard to the establishment of specialized courts related to the integration of those courts (and their judges) within the general court systems; the domestic importance of insolvency law in comparison to other areas of law; and the satisfaction of a range of priorities and demands (some of which might be political), not just those of insolvency, within domestic legal systems as a whole.

103. What was emphasized was not so much the type of court which handled insolvency matters (and the need for specialized courts), but rather the availability of experienced and knowledgeable judges and insolvency professionals and a clear definition of the extent to which those judges and other professionals were expected to be involved in making what were essentially business judgments. At a broader level, it was suggested that the proposal for the establishment of specialized courts was really an expression of the need for certainty, predictability and transparency in the outcome of insolvency proceedings. Those qualities were needed not just to facilitate domestic proceedings, but might be of particular importance where issues relating to foreign investment were involved. As such, there was a need for a healthy court system in general, not just healthy insolvency courts, and the establishment of specialized insolvency courts was unlikely to resolve relevant issues in isolation from the court system more generally. What was required was the integration of training and continuing education solutions into the court system as a whole.

104. On the question of training, it was noted that judges and other insolvency officials and practitioners required not just a knowledge and expertise of insolvency law, but of commercial and financial laws more generally. In some countries, particularly federal jurisdictions, judges dealing with insolvency issues were typically required to address a range of matters that might be covered by the laws of separate jurisdictions (i.e., both state and federal laws) and therefore might require a broad level of practice and expertise. Functions of insolvency judges also often raised questions of the separation of the powers of the executive and the judiciary, particularly in terms of what might be characterized as administrative or judicial functions for

the purposes of the structure of an insolvency law. It was noted that fostering cooperation and the exchange of views between judges from different jurisdictions could perform a valuable role in developing knowledge and expertise. In particular, it was suggested that practice statements addressing the mechanism of cooperation might be developed through judges' colloquia, such as those which had been organized jointly by INSOL International and UNCITRAL.

(h) Informal insolvency procedures, including out-of-court restructuring (paras. 157-160)

105. At various stages of the discussion, references were made to the fact that frequently an insolvent debtor and its creditors engaged in out-of-court collective negotiations with a view to finding an agreed solution to the debtor's financial difficulties. It was noted that such negotiations (which might include, e.g. fresh financing and restructuring of the debtor's operations), in order to be successful, had to include all creditors or at least creditors representing the critical part of the debtor's total obligations.

106. It was noted that such voluntary out-of-court arrangements were often the lowest-cost way of resolving an insolvent company's financial difficulties. They provided an important opportunity to preserve the ongoing business enterprise, preserve employment and, by preserving the going-concern value of the business, frequently maximized the value available to all interested parties. Out-of-court restructurings also avoided many of the costs, delays and difficult distributional issues faced in the context of plenary, court supervised, insolvency proceedings.

107. It was further observed that fast growing companies in developing economies often had numerous lenders based in different countries. When those companies encountered financial troubles, it was often difficult for them to organize a productive out-of-court resolution with their multinational creditors from diverse commercial cultures. Voluntary arrangements were also impeded by the ability of individual creditors to take enforcement action and by the need for unanimous creditor consent to alter the repayment terms of existing classes of debt. In the context of complex international transactions it was especially difficult to obtain agreement from all the relevant parties. For those reasons, it was stated, existing non-binding measures designed to facilitate voluntary arrangements had been implemented with only limited success.

108. It was suggested that, in light of those considerations, an internationally developed mechanism for binding creditors could assist greatly in facilitating voluntary out-of-court arrangements. The view was expressed that the Commission could be instrumental in developing a legal mechanism that could be used in connection with voluntary arrangements. It was proposed that discussion might be confined to major cross-border insolvency situations and to financial indebtedness (i.e., banking and other financial loans), thus leaving aside creditors such as suppliers of goods or services and employees. The purpose of such a mechanism to be elaborated might be to set out conditions under which a solution agreed upon by a majority might be imposed on the minority, to provide for a stay of actions and executions by the creditor group covered, and to ensure that the minority group was treated fairly.

109. However, it was observed that financial loans were sometimes extended through banks in the debtor's country and that, therefore, the proposed mechanism should cover major financial indebtedness insolvency situations even if the creditors were from the same country as the debtor.

110. Comments were made that the strongest incentive to engage in such out-of-court negotiations was the imminence, effectiveness and credibility of proceedings to enforce private claims and securities and of involuntary court supervised insolvency proceedings and the desire of both debtor and creditors to avoid the disruptive and stringent consequences of those proceedings. When such court proceedings were not credible or effective (e.g. because of court delays or because they did not ensure equitable treatment of creditors), the debtor might not be willing to engage in out-of-court negotiations. Even the prospect of fresh financing linked to an informally negotiated solution might not be sufficient incentive for the debtor inasmuch

as ineffective court proceedings allowed the debtor to delay having to meet its obligations. Furthermore, experience had shown that leverage was needed over some creditors who might hold out for full satisfaction of their claims.

111. Reservations were expressed regarding the proposition of elaborating a mandatory legislative mechanism designed to promote out-of-court negotiations. It was said that the informal process of out-of-court negotiations might be disturbed by the formality of the proposed mechanism. It was also said that the proposal was likely to encounter opposition, in particular in the banking community, and that therefore any further work should be preceded by consultations with the banking community. Furthermore, any such legislative concept might have to be tailored to conditions in various regions and, therefore, universal solutions were difficult to obtain. It was suggested that, to the extent formality was desirable, an institution instigating and promoting out-of-court negotiations could be useful, but such institutional arrangements did not lend themselves to internationally harmonized solutions. Concerns were also expressed about whether the court was an appropriate body to give rulings on what were essentially matters of business judgment.

112. However, opinions were also expressed that, while realizing potential difficulties and pitfalls involved in a mandatory legislative framework for out-of-court negotiations, the proposal should not be abandoned because a well thought out mechanism might offer significant benefits. It was added that if the role of the court in informal negotiations was limited to the approval of the fairness of the outcome, that might be widely acceptable and would not be overly intrusive.

113. Noting the divergence of opinions, the proposal was left to be further considered at a later time during the current session of the Working Group.

114. The considerations continued in the context of the discussion of "informal insolvency procedures", which the Working Group found worthy of including among the core features of an insolvency system to be worked on by the Commission.

115. Views were expressed that the envisaged out-of-court negotiation mechanism might include a non-judicial forum that would be empowered, by agreement of the parties, to evaluate whether the arrangement negotiated between the debtor and the majority of creditors was fair and, if it was found to be fair, to bind the minority of non-consenting creditors.

116. In response to questions, it was suggested that the debtor and creditors would join out-of-court negotiations out of their own interest or pursuant to their contractual obligations, and that any legislative mechanism to be prepared should not establish a statutory duty for the debtor or creditors to participate in the negotiations.

117. In response to a further question as to why the process was limited to financial creditors and did not include creditors who had supplied goods or services to the debtor, statements were made to the effect that experience showed that financial creditors often shared the same or similar interests and therefore more easily organized themselves for negotiations with the debtor, which was not the case with trade creditors. Furthermore, the focus and goal of the out-of-court negotiations was typically the reorganization of the capital structure of the debtor and the provision of fresh financing, which was more easily addressed by providers of finance than by trade creditors. Moreover, the terms of agreement reached with the debtor often allowed trade creditors to "ride out" the debtor's crisis and be paid in full or make a smaller sacrifice than the providers of finance.

118. Several cautionary opinions and reservations were expressed about the proposed work. They included the following: there was a danger that large and influential creditors might use the mechanism

to impose their views without taking due account of the interests of small or dissenting creditors; the proposed process lacked transparency, which was potentially troublesome in view of the fact that the result was to be binding on the dissenting creditors; the envisaged mechanism should only be allowed to operate to the extent the negotiations were not covered by the laws and regulations in the debtor's country or by international treaties; it was essential that the envisaged mechanism should ultimately be subject to court control; the mechanism, in particular if it involved a non-judicial forum such as arbitration, was likely to be costlier than the mechanism involving court supervision and that the negotiations might take place at a place distant from the debtor's place of business, which might, for that reason, impose a substantial burden on the debtor and some creditors. In response, it was stated that experience with out-of-court restructuring showed that such proceedings were less costly and more efficient than court supervised rehabilitation proceedings.

119. It was considered that it was necessary to elaborate substantive criteria and rules under which minority creditors could be bound by an arrangement negotiated by the majority of creditors and that proper balance had to be found between the need to maintain confidentiality of certain types of information divulged during negotiations and the need for transparency of the process.

120. Statements were made, and the Working Group agreed, that much of the expertise and experience regarding out-of-court negotiations and arrangements rested in organizations such as the International Monetary Fund, the World Bank, The Group of Thirty, INSOL International and the International Bar Association and that any work in the Commission should be carried out in close cooperation with those organizations and with the financial sector.

121. After discussion, it was found that there was sufficient support in the Working Group for proposing to the Commission that it include in its agenda out-of-court arrangements between financial creditors and the debtor that included also the possibility of binding dissenting creditors.

Additional topics possibly to be considered

122. Following the completion of its discussion on issues related to rehabilitation and informal out-of-court procedures, the Working Group considered issues which might be added to its possible future work on insolvency proceedings in general. Suggestions for additional topics included: transactions requiring special treatment such as multilateral netting (which might be relevant in areas such as funds transfers, securities clearance and settlement, currency swaps and derivatives transactions); special categories of institutions such as banks, insurance companies, and security broker and dealer arrangements; state-owned enterprises; issues of liquidity where, for example, there was a need for a mechanism to facilitate trading of claims to provide capital (exit capital) to assist in rehabilitation; issues of corporate governance, such as the power to undertake new investments and raise new capital which in some countries was permitted, but in others might be restricted or limited by personal liability of management; sectoral issues where the focus would be upon specific industries and the insolvency issues peculiar to those industries (e.g. transportation and some manufacturing industries); international processes, including the implications of electronic commerce and computer-based information systems (e.g. in relation to the provision of notice and the facilitation of negotiations between geographically distant parties); issues relating to the administration of assetless entities and the giving of priorities, in particular the extent to which creditors should attain priority if they provided funds for ongoing rehabilitation; the insolvency of multinationals and the impact of insolvency on related entities; and issues associated with "phoenix" companies, where the management of an insolvent entity reappeared managing a similar entity with similar problems.

123. Following discussion, it was suggested that issues relating to transactions requiring special treatment and special categories of institutions should not be included in the list of possible additional topics because they demanded resources and

expertise which might not be available to the Working Group (see para. 36). It was noted that a number of the other suggested issues were already addressed in other topics which it had been broadly agreed should be included in core features of insolvency regimes: state-owned entities had already been discussed as requiring inclusion (see para. 37); international processes and particularly electronic commerce might not be separate topics and could be discussed under relevant substantive issues; and liquidity issues could be included within the scope of the discussion on claims. "Phoenix" companies also raised a number of issues which would fall within those already discussed for inclusion, particularly fraud (see paras. 30, 60), corporate governance and group insolvencies (see paras. 92-93) . On the issue of state-owned enterprises, it was suggested that a further issue for consideration might be those enterprises which operated on funding provided by the State and the extent to which they could agree to writing down of their loans.

124. At various stages of the discussion, mention was also made of the role of security interests in insolvency proceedings (e.g. treatment and priorities of secured creditors, the need to provide effective security for post-commencement financing). It was stated in that connection on behalf of the Asian Development Bank that one of its Regional Technical Assistance projects covered modernization of security interests law. It was suggested that, in light of the growing importance of security interests for the development of trade, it might be useful for the Commission to consider the topic at a future session. It was noted with approval that the Secretariat was preparing a note for the thirty-third session of the Commission that would discuss the work of various international organizations in the area of security interests and the issues that have been left outside harmonization efforts so as to allow the Commission to consider whether any further work by the Commission was warranted.

D. FORM AND FEASIBILITY OF POSSIBLE FUTURE WORK

125. In terms of the way in which the Commission could address possible future work, it was observed that there were a number of different possibilities, some of which were introduced briefly in paras. 161-168 of the note by the Secretariat (A/CN.9/WG.V/WP.50).

126. The simplest form of instrument which the Commission could prepare might be something in the nature of a comparative study, which examined how different issues were addressed in different legal systems. Another possibility was a guide which would outline practices and policy choices, setting out the advantages and disadvantages of the different choices and their implications for different systems.

127. An instrument at a higher level of complexity might be a legislative guide; the legislative guide currently being prepared by the Commission on the topic of privately financed infrastructure projects was mentioned. That instrument offered a guide for legislators to what might need to be modernized or changed in legislation on particular topics, by reference to comparative studies of different laws and practices and explanation of the various issues. It also included legislative recommendations, many of which were similar to model provisions or could be used to draft legislation.

128. A further type of instrument might be model statutory provisions on some specified topics within the field of insolvency. Flexibility could be built into such an instrument by the inclusion of options, which might be reflected by a number of techniques, such as exemplified by the UNCITRAL Model Law on Procurement of Goods, Construction and Services or the footnotes included in a number of model law texts prepared by the Commission. Flexibility could also be provided by way of a guide to enactment or other explanatory material.

129. A further possibility would be to provide a blue-print or route map which could include treatment of a number of the socio-economic choices that might need to be made.

130. It was observed that each of these types of instrument might not, itself, completely satisfy the requirements of each and every topic that might need to be addressed and that what might be required would be a combination of different approaches, each addressing specific topics.

131. The Working Group exchanged views on possible future work on insolvency law. A widely expressed view was that the Commission should be involved in future work on insolvency law in view of its universal representation and the successful conclusion of its work on the Model Law on Cross-Border Insolvency. It was observed that the working methods of the Commission could contribute to the acceptability of a text by taking into account a broad range of views, by consulting with and involving different classes of possible addressees for the text being developed and by conducting the process of negotiation of the text in the six languages of the United Nations.

132. In addition to those reasons, it was noted that further work by the Commission would serve to keep the issue of insolvency reform on the international agenda. It was also noted that the development of a common foundation for insolvency law could facilitate the development of expertise and sharing of knowledge on an international level. It was observed that the problems being faced around the world were similar, that a number of countries were looking for guidance in the solution of those problems and that the discussion in the Working Group had indicated various available approaches which could be used to resolve those issues.

133. Views were expressed as to the vehicle which could most appropriately be the subject of possible work by the Commission. There was general agreement that a universal, one-size-fits-all model law would not be feasible or desirable. As to other potential types of instrument, one view was that it would be premature to decide in favour of model provisions or some other instrument that could serve all purposes, but that, as far as possible, a legislative approach should be followed. A concern was expressed that if something less than a concrete legal text was to be pursued, it might not be a task to which the time of a working group appropriately could be devoted. A note of caution was expressed against deciding upon a work product that might not ultimately prove to be achievable or useful.

134. As an alternative to a single approach, it was suggested that it might be necessary to consider a combination of approaches such as model provisions or legislative recommendations, perhaps with options, as well as some principles, with policy choices discussed in explanatory material. While there was an appreciation of a number of common problems, there were several possible solutions and different environments in which different solutions would be appropriate. It was pointed out that, while the Working Group had discussed a number of topics related to insolvency law in which there were clear differences of approach, nevertheless, in a number of instances, those approaches could be reduced to one or more fundamentals which would lend themselves to treatment in model provisions or legislative recommendations. Other issues were more complex and might involve social policy issues which did not lend themselves to treatment in the same manner. In such cases, it might be possible to reach common ground on principles that could be adopted.

135. A further concern was expressed as to the timing of possible work by the Commission. It was pointed out that work currently being undertaken in a number of international organizations was not scheduled to be completed before the second half of 2000. It would be essential for the Commission to have the opportunity to consider the outcome of that work, to take it into account and to build upon it in any future work it might itself undertake.

136. The Working Group considered a tentative proposal which indicated that:

(i) Discussions by the Working Group demonstrated its ability to enhance and augment the work of these international organizations and to broaden the perspective of the work to include the views and requirements of its members and observers. For example, members of the Working Group suggested that the key objectives of an insolvency regime included: controlling fraud in the insolvency context; developing an effective infrastructure to administer and implement the insolvency regimes; encouraging early initiation of proceedings; not discouraging entrepreneurial

activity; integrating the insolvency regime into a modern commercial law framework that balanced global economic considerations and the social and economic policy choices of each State; and encouraging an efficient out-of-court restructuring alternative to deal with debts to financial institutions for borrowed money, possibly limited to situations with cross-border implications. The Working Group recognized that a number of different insolvency systems operated throughout the world which each had the confidence of the credit community, but reflected the interests of all parties and the emphasis of each State on particular key objectives.

(ii) In considering the core features of an insolvency regime, the Working Group again demonstrated its ability to build on the valuable work of other international organizations by identifying issues of concern to many States and recording suggestions or alternatives for addressing such issues in an insolvency law. By offering insights into the existing or proposed laws of their countries, delegates illustrated various possibilities for legislative treatment of particular core elements and noted the benefits and detriments of the different approaches. The Working Group also suggested the need to consider, as additional core elements, whether the law should be limited to juristic persons or include natural persons engaged in business; the powers and duties of liquidators and administrators; the engagement and compensation of liquidators, administrators and advisers who would be paid by the estate; the relationship of insolvency laws to those dealing with debt collection and enforcement; the treatment of affiliated persons and entities; and the issue of flexible versus fixed time periods in rehabilitation proceedings.

(iii) Based upon the exploratory session of the Working Group, it was clear that the Commission could make a positive contribution to the development of strong insolvency, debtor-creditor regimes which would have the confidence of all participants in the insolvency process. Different insolvency systems could serve this goal and the Commission could elaborate the key objectives, core features and alternative structures and components of such systems. Importantly, the Commission could take the work of the several organizations whose work has informed the Working Group's deliberations, expose it to further consideration by the Working Group and produce a final product which reflected the views of the Commission's broad and balanced group of members and observers. Such a product would provide a sustainable improvement to existing insolvency systems and not be simply a response to short term crises.

138. The Working Group generally welcomed the proposal and heard a number of observations. It was suggested that, in addition to the matters indicated as being core features of an insolvency regime, there should be added the issue of the linkages between the different processes, one example being where there was a failure of rehabilitation the proceedings might be converted to liquidation. A general concern was expressed that possible future work by the Working Group should not be constrained by too specifically describing possible elements of that work at this stage. Another concern was that any work to be undertaken on out-of-court restructuring, while encouraging the use of such procedures, should clearly recognize the close connection between those types of procedures and the formal insolvency regime into which those procedures would have to be fitted. The focus of the Working Group could thus be upon strengthening formal insolvency regimes and encouraging, or at least not discouraging, the use of alternative, less expensive out-of-court procedures.

139. A suggestion was made that the macro-economic factors that had made insolvency a very topical and important issue in recent years might need to be set forth in order to clarify the need for future deliberations of the Working Group. Relevant factors would include: the maximization of credit and business opportunities, both domestically and internationally (involving a consideration of insolvency as an integral part of credit and financial opportunities in most countries); enhancing the efficacy of mechanisms for recycling economic assets; minimizing the assumption of sovereign debt (noting that efficient debt workouts and recycling keeps private debt private); and that the operation of those factors might lead to a reduction in systemic risk. It was added that the Working Group should not overlook, in its further deliberations, the central importance of structural, social and political factors in developing effective and efficient insolvency regimes.

140. After deliberation, the Working Group adopted the following recommendation:

"The Working Group recommends that the Commission give it the mandate to prepare: a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring; a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches. A legislative guide similar to that being prepared by the Commission for privately financed infrastructure projects would be useful and could contain model legislative provisions, where appropriate.

"Should the Commission decide to undertake such a project, the Working Group should be mindful in carrying out this task of the work underway or already completed by other organizations, including the International Monetary Fund, the World Bank, the Asian Development Bank, the International Bar Association and INSOL International. The Working Group should seek their collaboration in order to benefit from the expertise these organizations can provide and to build on their efforts and should commence its work after receipt of the reports currently being prepared by the World Bank and the Asian Development Bank."