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Report of Working Group V (Insolvency Law) on the work of its twenty-eighth session (New York, 24-28 February 2003)

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I. Introduction: Summary of the previous deliberations of the Working Group

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. That proposal had 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 for the discussion of insolvency law issues. 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. 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, the fear was expressed that 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.

3. To facilitate that further study, the Commission decided to convene an exploratory session of a working group to prepare a feasibility proposal for consideration by the Commission at its thirty-third session. That session of the Working Group was held in Vienna from 6 to 17 December 1999.

4. At its thirty-third session in 2000, the Commission noted the recommendation that the Working Group had made in its report (A/CN.9/469, para. 140) and gave the Group 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, and 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.[1]

5. It was agreed that in carrying out its task the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), INSOL International (INSOL) (an international federation of insolvency professionals) and Committee J of the Section on Business Law of the International Bar Association (IBA). In order to obtain the views and benefit from the expertise of those organizations, the Secretariat, in cooperation

with INSOL and IBA organized the UNCITRAL/INSOL/IBA Global Insolvency Colloquium in Vienna, from 4-6 December 2000.

6. At its thirty-fourth session in 2001, the Commission had before it the report of the Colloquium (A/CN.9/495).

7. The Commission took note of the report with satisfaction and commended the work accomplished so far, in particular the holding of the Global Insolvency Colloquium and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, in particular with respect to the form that the future work might take and interpretation of the mandate given to the Working Group by the Commission at its thirty-third session. The Commission confirmed that the mandate should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide. In order to avoid the legislative guide being too general or too abstract to provide the required guidance, the Commission suggested that the Working Group should bear in mind the need to be as specific as possible in developing its work. To that end, model legislative provisions, even if only addressing some of the issues to be included in the guide, should be included as far as possible.[2]

8. The twenty-fourth session of the Working Group on Insolvency Law (New York, 23 July to 3 August 2001) commenced consideration of this work with the first draft of the legislative guide on insolvency law. The report of that meeting is contained in document A/CN.9/504. Work continued at the twenty-fifth (Vienna, 3-14 December 2001), twenty-sixth (New York, 13-17 May 2002) and twenty-seventh (Vienna, 9-13 December 2003) sessions of the Working Group. The reports of those meetings are contained in documents A/CN.9/507, A/CN.9/511 and A/CN.9/529 respectively.

9. At its twenty-seventh session, in response to a request by the Commission at its thirty-fifth session in 2002 that the Working Group make a recommendation as to the completion of its work,[3] the Working Group stressed the need to finalize the Guide as soon as possible and recommended that while the draft Guide may not be ready for final adoption by the Commission in 2003, nevertheless a draft should be presented to the Commission in 2003 for preliminary consideration and assessment of the policies on which the legislative guide is based. Such an approach would facilitate the use of the legislative guide as a reference tool before final adoption in 2004 and would allow those countries that have not participated in the Working Group an opportunity to consider the development of the guide. It was noted that the Working Group might require a further session in the second half of 2003 and possibly even the first half of 2004 to refine the text for final adoption.

II. Organization of the session

10. Working Group V (Insolvency Law) which was composed of all States members of the Commission, held its twenty-eighth session in New York, from 24-28 February 2003. The session was attended by representatives of the following States members of the Working Group: Austria, Cameroon, Canada, China, Colombia, Fiji, France, Germany, Italy, Japan, Kenya, Lithuania, Mexico, Morocco,

Paraguay, Russian Federation, Singapore, Spain, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

11. The session was attended by observers from the following States: Australia, Belarus, Bulgaria, Denmark, Ireland, Jordan, the Libyan Arab Jamahiriya, Marshall Islands, Philippines, Republic of Korea, Switzerland, Turkey, United Republic of Tanzania, Venezuela and Viet Nam.

12. The session was also attended by observers from the following international organizations: (a) organizations of the United Nations system: International Labour Office (ILO), International Monetary Fund (IMF), the World Bank; (b) non-governmental organizations invited by the Commission: American Bar Association (ABA), American Bar Foundation, Center for International Legal Studies, Groupe de Réflexion sur l'Insolvabilité et sa Prévention (GRIP 21), International Bar Association, Committee J (IBA), International Federation of Insolvency Professionals (INSOL), International Insolvency Institute (III).

13. The Working Group elected the following officers:

Chairman: Mr. Wisit WISITSORA-AT (Thailand)

Rapporteur: Mr. Luis Humberto USTARIZ GONZÁLEZ (Colombia)

14. The Working Group had before it a Note by the Secretariat: Draft legislative guide on insolvency law (A/CN.9/WG.V/WP.63 and addenda 1-17). Those documents, which set forth the text of the commentary of the Guide together with recommendations, had been revised in the light of the discussion of the Working Group at its twenty-fifth and twenty-sixth sessions. At its twenty-seventh session, the Working Group completed consideration of A/CN.9/WG.V/WP.63, addenda 3-9 (up to and including recommendation (77)).

15. The following background materials were also made available: Possible future work on insolvency law: Note by the Secretariat A/CN.9/WG.V/WP.50; Reports of the Secretary-General A/CN.9/WG.V/WP.54, A/CN.9/WG.V/WP.54/Add.1-2; A/CN.9/WG.V/WP.55; A/CN.9/WG.V/WP.57; A/CN.9/WG.V/WP.58; A/CN.9/WG.V/WP.59; A/CN.9/WG.V/WP.61 and Add.1; Report on the UNCITRAL/INSOL/IBA Global Insolvency Colloquium (2000) A/CN.9/495; Report of UNCITRAL on the work of its thirty-fourth session (2001) A/56/17 and thirty-fifth session (2002) A/57/17; Report of Working Group V (Insolvency Law) on the work of its twenty-second session (December 1999) A/CN.9/469; twenty-fourth session (July/August 2001) A/CN.9/504; twenty-fifth session (December 2001) A/CN.9/507; twenty-sixth session (May 2002) A/CN.9/511 and twenty-seventh session (December 2002) A/CN.9/529.

16. The Working Group adopted the following agenda:

1. Scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legislative guide on insolvency law.
5. Other business.
6. Adoption of the report.

III. Summary of deliberations and decisions

17. The Working Group reviewed the draft legislative guide on insolvency law commencing with document A/CN.9/WG.V/WP.63/Add.9, recommendation (77) and continuing through Addenda 10 to 14 (recommendation (165)). For lack of time, the Working Group was not able to complete its consideration of the remaining part of A/CN.9/WG.V/WP.63/Add.14, and Adds.15, 16, 17, 1 and 2. The deliberations and decisions of the Working Group with respect to the various addenda considered are set forth below.

18. The Working Group reviewed its progress with consideration of the draft legislative guide in the light of the decision taken at its twenty-seventh session that a draft of the legislative guide should be presented to the Commission in 2003 for preliminary consideration and assessment of the policies on which it is based,[4] and adopted the following recommendation to the Commission:

> "After five sessions (between July 2001 and February 2003) of extensive study, analysis and deliberation, the Working Group advises the Commission that it has completed its review of the core substance of the draft legislative guide on insolvency law (as set forth in document A/CN.9/WG.V/WP.63 and Addenda 1-17) and recommends that the Commission:
>
> 1. Approve the scope of the work undertaken by the Working Group as being responsive to the mandate given to the Working Group 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, and 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";
>
> 2. Give preliminary approval to the key objectives, general features and structure of insolvency regimes as set forth in the introductory chapters of Part One of the legislative guide;
>
> 3. Direct the Secretariat to make the current draft of the legislative guide available to all United Nations member States, relevant intergovernmental and non-governmental international organizations, as well as the private sector and regional organizations for comment;
>
> 4. Continue to work collaboratively with the World Bank and other organizations working in the field of insolvency law reform to ensure complementarity and avoid duplication and take into consideration the work of the Working Group VI on secured transactions; and
>
> 5. Direct the Working Group to complete its work on the legislative guide and present it to the Commission in 2004 for approval and adoption.

19. The Working Group noted that it would require further sessions in the second half 2003 and potentially in the first half of 2004 to complete its consideration of the legislative guide. Reservations were expressed as to the ability of the Working Group to reach a satisfactory conclusion on A/CN.9/WG.V/WP.63/Add.17 on conflicts of laws without an appropriate opportunity for discussion and deliberation and as to the time that may be needed to undertake that discussion and deliberation

without taking away from the time currently available for completion of the legislative guide or requiring an extension of the completion date of the legislative guide. It was suggested that the Working Group could examine those issues at a future session in order to assess the likelihood of being able to reach agreement on the text proposed in A/CN.9/WG.V/WP.63/Add.17. To facilitate its consideration of the draft legislative guide, it was proposed that the Commission should be apprised of the work on the legislative guide that had been completed and the work that was still to be undertaken.

IV. Preparation of draft legislative guide on insolvency law

Part Two. Chapter III. Treatment of assets on commencement of insolvency proceedings

E. Avoidance proceedings (A/CN.9/WG.V/WP.63/Add.9)

Recommendations

20. Having concluded its discussion on recommendation (76) at its twenty-seventh session in December 2002, the Working Group resumed its deliberations on the draft Guide at recommendation (77).

21. The Working Group agreed that the word, "may", in the second last line of recommendation (77) be replaced by words to the effect that the law should specify a time period for commencement of avoidance actions, although some difference of opinion was expressed as to whether such a time limitation should be included in the insolvency law or in general procedural law. A further suggestion was that the phrase, "of which the insolvency representative is aware", was superfluous and could be removed from the recommendation.

22. The Working Group discussed two key points regarding recommendation (78). Firstly, the Working Group agreed that of the two bracketed terms, "excessive" should be removed from the brackets and retained, and "unjustifiable" deleted. It was also agreed that a footnote should be added to explain that "excessive" costs referred to an appraisal of the costs and benefits of an avoidance action, and an implicit rule that if the costs of a proceeding would exceed the benefits to the estate, that proceeding should not go ahead. Secondly, the prevailing view was that, of the proposed options in the second sentence of the recommendation, paragraphs (a) and (c) should be deleted. In support of the agreed change, it was noted that avoidance actions could be highly detrimental to the success of rehabilitation proposals, warranting a balanced consideration of the merits of an action by a non-creditor party before it be allowed to proceed. A different view, which received some support, was that paragraph (a) provided a necessary incentive in those situations where an insolvency representative had a strong case for taking an avoidance action but lacked the necessary funding, and that, in any event, recommendation (78) was discretionary and simply indicated different approaches that might be taken. It was also pointed out that the Guide should make a clear distinction between the funding of proceedings and the party that may commence an action (which was addressed in recommendation (76)). As a matter of drafting, it was suggested that the requirement for a justification of the insolvency representative's decision not to

pursue an avoidance action be removed and the word, “either”, in the first sentence of the paragraph be replaced with the words, “for example”.

23. After discussion, the Working Group agreed to retain recommendation (79) with the word, “possible” in relation to defences, to be replaced by the word “specific”. Although some concern was expressed that the provision was not necessarily a component of insolvency law and could be left to the general law, it was pointed out that it was closely linked to recommendation (70) and for reasons of clarity and certainty should be included in the insolvency law. That approach received some support.

24. The Working Group agreed to retain recommendation (80) with some drafting changes. It was proposed that the reference to “classes of person” should be deleted as all that was required was the reference to certain specified persons and the example of related persons. It was noted that that issue was discussed in paragraph 172 of the commentary. It was suggested that a useful addition to the recommendation might be words to the effect that whatever evidentiary presumptions might apply should be clearly stated in the law. A drafting suggestion which received some support was to replace the phrase, “the avoidance of certain transactions occurring within”, with the word, “clearly”. In response to a suggestion that the recommendation might usefully refer to suspect periods in respect of related persons, it was pointed out that that issue was addressed in recommendation (72).

25. In the course of discussion, it was noted that recommendation (81) contained at least two distinct propositions which, it was suggested, could be separated into different recommendations, that is, the effect of avoidance of a transaction in terms of orders against the counterparty and the sanction for failure of the counterparty to comply with those orders. It was observed that the usual consequence of avoidance of a transaction would be setting aside of the transaction and execution of the court order against the counterparty, not the consequence suggested in the second sentence of the recommendation. It was recognized however that the insolvency law may provide an additional consequence that the counterparty could not participate in any distributions. After discussion, a suggestion to delete the second sentence of the recommendation received some support. A different view was that the sentence should be retained and redrafted to provide for those circumstances where the counterparty has acted in good faith but was unable to return the preference received. With regard to the first sentence of recommendation (81), the Working Group agreed that the term, “material benefits”, was too wide and should be replaced with the wording used in paragraph 188 of the commentary, that the counterparty be required to return “the assets obtained or make a cash payment for the value of the transaction to the insolvency estate”.

F. Set-off, netting and financial contracts

Recommendations

26. A number of different views were expressed with respect to the scope and drafting of recommendations (82) to (88). It was suggested that the recommendations needed to clarify a number of points including: the existence of rights of set-off at commencement of insolvency proceedings as opposed to the exercise of those rights by reference to the time of commencement of insolvency

proceedings; whether the rights arose under separate contracts or under a single contract and the distinctions to be made between those rights, including in terms of the application of the stay and the consequent treatment of those rights; the netting of non-financial obligations; and any exceptions that might be required, in respect of certain types of contracts, from the operation of the insolvency law (e.g. automatic stay, avoidance provisions and automatic contract termination clauses).

27. In respect of recommendation (82) it was observed that as drafted it simply preserved a right of set-off that arose under general law and could be exercised irrespective of the commencement of insolvency. On that basis it could be supported.

28. In respect of recommendation (83), it was noted that while some laws did not permit post-commencement set-off unless the conditions for set-off were present before the commencement of insolvency proceedings, other laws did permit post-commencement set-off. It was suggested that what was required was specification of those conditions in addition to the requirement that the mutual claims arose under the same agreement. Those conditions should include that the debtor seeking to invoke the set-off had the right to do so and that the exercise of the set-off be subject to a decision by the insolvency representative or the court.

29. With respect to recommendation (84), it was suggested that the definition of "financial contracts" needed careful consideration. One view was that it should be limited to transactions which formed part of a master agreement providing for settlement between transactions. Another view was that the definition based upon article 5 (k) of the UNCITRAL Convention on the Assignment of Receivables in International Trade was too narrow and did not include, for example, transactions occurring both through an exchange or outside of an exchange.

30. It was suggested that what the Guide should make clear was the volatility of the financial markets in question, the problems of systemic risk and the consequent need to provide exceptions to the normal rules of insolvency, as proposed in recommendations (85) to (88). On that basis, one proposal was that the Guide should not attempt to address the very complex and difficult issues raised by such contracts, but rather focus on the ordinary on issues of set-off. A different view was that the Guide should focus on the need to preserve financial markets and the special rules required to do that. In respect of the exceptions proposed in recommendations (86) to (88), one view was that all were required for financial transactions and should specifically be included in section F and aligned with recommendations on exceptions already agreed to be included in previous chapters on the stay, treatment of contracts and avoidance. With reference to avoidance, one view was that avoidance would only be relevant in the case of actual fraud. A different view was that financial transactions should be subject to avoidance provisions in the same way as other transactions.

31. The Working Group considered a proposed revision of the recommendations concerning rights of set-off as follows:

> **"(82) The insolvency law should protect a right of set-off existing under general law that was validly exercised prior to the commencement of insolvency proceedings [except as set forth in (82 A)].**

(82 A) The exercise of set-off rights prior to commencement of insolvency proceedings should be voidable under the following circumstances:

[add any exceptions to (82)]

(83) The insolvency law should permit, without stay, the post-commencement exercise of valid set-off rights existing, but not exercised, at the time of commencement of insolvency proceedings where the mutual obligation arose in respect of the same transaction.

(83 A) The insolvency law should stay the exercise of set-off rights arising out of obligations in respect of separate transactions, subject to exceptions for certain financial contracts as set forth in paragraph (84).

[(83 B) A creditor whose claim is subject to valid set-off rights existing at the time of commencement of insolvency proceedings, the exercise of which have been stayed pursuant to paragraph (83 A), should be treated as having a secured claim to the extent of such valid but unexercised set-off rights, including the ability to obtain relief from the stay.]

(84) The insolvency law should permit the termination, close-out and set-off or netting of obligations under financial contracts, whether exercised pursuant to the respective contracts, related agreements or otherwise applicable law, and the exercise of the non-debtor party's rights in respect thereof (including the realization upon security in respect thereof) should not be stayed under the insolvency law.

(85) Obligations in respect of financial contracts and transfers of property in respect thereof should not be voidable under the insolvency law [except in the case of transfers intended to delay, hinder or defraud creditors].

(86) [add definition of financial contracts]".

32. The revised recommendations sought to separate the subject matter into three key issues. Different opinions were expressed on the approach that the recommendations should take to those three issues.

33. On the first issue, regarding rights of set-off existing prior to insolvency as set forth in recommendations (82) and (82 A), strong support was expressed for a formulation to the effect that the insolvency law should protect a right of set-off under general law that was validly exercised prior to the commencement of insolvency proceedings, subject to the application of the avoidance provisions.

34. On the second issue, regarding rights of set-off following commencement of insolvency proceedings as set forth in recommendations (83) to (83 B), there was some support for providing for the right to set-off to be stayed subject to exceptions, but the Working Group was not able to reach agreement relating to further detail. In particular, some concern was expressed as to the treatment of the creditor referred to in recommendation (83 B) as a secured creditor, and it was noted that a number of approaches to that issue were adopted by different laws.

35. On the third issue, regarding rights of set-off concerning financial obligations as set forth in recommendations (84) to (86), there was some support for adapting the draft proposal to recommend a statement along the lines of, "In order to protect the integrity of the financial markets, the insolvency law should address how the

commencement of insolvency proceedings will affect [existing] mutual financial obligations between the debtor and the creditor".

36. It was agreed that the definition of financial contracts was central to recommendations (84) and (85). It was observed that a number of different definitions were used in different laws and although that might make it difficult to reach a single definition, those definitions might nevertheless inform the discussion in the Working Group.

37. It was proposed that because the subject matter required further discussion by the Working Group before an agreed position could be reached and because the time for that discussion might not be available at its current session, the revised text should be placed in square brackets for consideration by the Working Group at a future session. It was observed that, because of the importance of the issue of set-off in insolvency practice, it was of key importance to the usefulness of the Guide and should be addressed in as detailed a set of recommendations as possible.

Part Two. Chapter IV. Participants and institutions

A. The debtor (A/CN.9/WG.V/WP.63/Add.10)

Recommendations

38. The Working Group agreed that with the deletion of the text in square brackets the purpose clause was generally acceptable.

39. The Working Group agreed generally that recommendation (89) was acceptable. It was suggested that to ensure consistent use of terminology in the Guide either the phrase "insolvency proceedings" or a reference to "both liquidation and reorganization proceedings" should be used. It was noted that since under some insolvency laws the right to be heard could be modified in cases where the debtor was not operational and could not be heard, or where shareholders and owners of the debtor could not expect to participate in distributions, that approach should be reflected in the commentary, but that the recommendation should not include any qualifications. That view was supported.

40. With respect to recommendation (90), the Working Group agreed that although the second sentence should be deleted, the content of the sentence should be reflected in the commentary. A concern was expressed that the right to request information should not be used to delay or frustrate proceedings and should therefore be restricted to information specified by the insolvency law or to information relating to the proceedings and to rights and obligations of the debtor. Those suggestions to include a limitation received support.

41. The view was expressed that recommendation (91) needed to be aligned more closely with recommendation (29), to ensure that the right to retain assets related only to the assets excluded by the insolvency law.

42. A number of suggestions were made with respect to recommendation (92) including: the addition of an obligation to prepare a list of debtors as well as of creditors; deletion of the words in square brackets in paragraph (a) together with the addition of that idea to the commentary; and addition of references to information

on transactions in general, not just those occurring in the suspect period, to information on assets, liabilities, income and disbursements, as well as a reference to the need to provide the information at the commencement of proceedings, subject to allowing the debtor the time necessary to collect the relevant information. It was proposed that paragraph (e) should be amended to a provision requiring the debtor to provide notice if it should propose, or was forced, to leave its habitual place of residence. That proposal was supported. A further suggestion was that the recommendation should also address the movement of the headquarters of a legal person, which should require consent of the court or the insolvency representative. That suggestion was also supported.

43. In respect of paragraph (c) of recommendation (92), the Working Group agreed that it was not appropriate to refer to the debtor surrendering control of foreign assets to the insolvency representative, since in many cases the debtor may not be able to satisfy this obligation because of the law applicable in the foreign jurisdiction. Rather, the debtor should be required to facilitate, or cooperate in, the recovery by the insolvency representative of assets located abroad. It was recalled that, in previous deliberations, the Working Group had agreed that any definition of the property of the estate should be consistent with the Model Law on Cross Border Insolvency so as to include property of the debtor wherever located.

44. The Working Group agreed with the objective of recommendation (93), but noted that the obligation applied equally to the insolvency representative and creditors, and therefore might be more appropriately included elsewhere in the Guide. It was noted that there was a potential inconsistency between the obligation of confidentiality and the obligation to provide information contained in recommendation (92) which should be taken into account in revising the recommendation. As a matter of drafting it was suggested that the words, “commercially sensitive”, were not clear and could be replaced by the phrase, “subject to obligations”.

45. After discussion, the Working Group agreed to retain the current text and all three approaches outlined in recommendation (94), with some minor amendments. It was observed, with some support, that the bracketed language in the chapeau was not necessary and might be deleted. Alternatively it was suggested that the text might be replaced with the words “during insolvency proceedings”. It was observed that the recommendation might be improved if the clauses were reordered with (c) and (b) appearing first in order to address reorganization, followed by (a) which was relevant in the liquidation context. Other drafting suggestions included changing the title of the recommendation to refer to the right of the debtor to continue its business, and deleting from (c) the words, “with no insolvency representative appointed”.

46. In discussing recommendation (95), the Working Group agreed that a distinction needed to be drawn between the level of liability of the debtor and the consequences of its failure to comply with its obligation, which should be fully discussed and cross-referenced in the commentary. It was noted that the issue of the invalidity of transactions entered into by the debtor was addressed by the recommendations on avoidance (specifically recommendation (68)) and could be deleted from (95). In discussing who the sanctions might apply to, wide support was expressed in favour of including in any definition of the debtor any responsible person who might generally be described to be in control of the debtor and should

include any directors or management where the debtor was a corporation. Drafting suggestions included deleting the words, "whether a natural person or commercial entity", and replacing the word, "invalid" with the phrase, "no legal effect".

B. The insolvency representative (A/CN.9/WG.V/WP.63/Add.10)

Recommendations

47. The Working Group agreed that the substance of the purpose provision was acceptable.

48. With regard to recommendation (96), the Working Group agreed that the word, "may", be replaced by "should", and that the grounds that might exclude a person from being appointed as an insolvency representative should be discussed in the commentary. Suggested grounds included that the individual had been bankrupt, removed from a position of public administration or convicted of fraud. It was also suggested that the commentary could discuss positive qualities such as integrity and good management. It was noted that a law other than the insolvency law might provide the occupational regulation of insolvency representatives.

49. After some discussion, the Working Group agreed that recommendations (97), (98) and (105) might be redrafted to better explain the relationship between appointment and remuneration of the insolvency representative. In reaching that decision, the Working Group noted that the substance of recommendation (97) as currently drafted was acceptable, although it was suggested that the opening words might be amended to, "where an insolvency representative is to be appointed, the insolvency law should establish …", to ensure consistency with recommendation (94) (c). A general drafting suggestion was that the term, "assetless insolvency estate", should be used instead of "assetless estate" and should be defined in the Glossary.

50. While the Working Group agreed substantively on the need to disclose any information regarding a conflict of interest, as currently required by recommendation (99), it was recalled that the Working Group had not reached a view on the extent to which a conflict should disqualify an individual from being appointed as an insolvency representative, as insolvency laws adopted different approaches to that issue. It was suggested that those different approaches should be discussed in the commentary. Some support was expressed in favour of the proposal that where a conflict of interest affected the independence or impartiality of the insolvency representative, then that individual should not be appointed or, if the conflict arose in the course of the proceedings, disqualified from continuing. It was agreed that such a rule should apply to employees, or potential employees, of the insolvency representative, and that that should be reflected in any revision of the recommendations. Drafting suggestions included revising the current repetitious text in recommendation (99), and inserting words at the beginning of the recommendation to the effect that it would be undesirable for a person who disclosed a material conflict of interest to be appointed as insolvency representative. It was also suggested that the Guide should indicate the party to whom a conflict of interest should be disclosed. The connection between recommendations (99) and (102) was noted, and it was suggested that the two provisions might be combined. It

was further suggested that the Guide should clearly state that the obligation to disclose should be ongoing throughout the insolvency proceedings.

51. With respect to recommendation (100), it was recalled that the Working Group, at previous sessions, had considered two different approaches to that recommendation—including placing the list of the insolvency representative's duties and functions in the recommendation or in the commentary—and support had been expressed in favour of both approaches. After further discussion, it was agreed that the examples listed in paragraphs (a) to (n) of the recommendation should be included in the commentary, with some additions including a duty to observe confidentiality and to maintain an updated list of the claims verified and admitted. It was noted that inconsistencies between the different duties and functions, such as between paragraphs (a) and (g) of the recommendation, and between the examples given in paragraph 242 and those in the recommendation could more easily be explained if the list was to be included only in the commentary. On the basis that recommendation (94) (c) referred to the debtor-in-possession as a possible approach in reorganization, it was suggested that in revising the list of duties and functions to be included in the commentary, those specifically affected by the debtor-in-possession approach could be identified. In revising the recommendation, the Secretariat was requested to consider the addition of some words after "duties and functions" to elaborate the focus of those duties and functions, along the lines of "in respect of the administration of the proceedings and preservation and protection of the insolvency estate".

52. In view of the Working Group's decision in respect of recommendations (99) and (100), it was agreed that the references to those recommendations in recommendation (101) should be deleted. While it was noted that there was a problem of drafting in the first sentence in relation to the "consequences … arising from … the insolvency representative's performance of its duties", there was agreement that the sentence should address the ideas of non-performance of, and failure to properly perform, the insolvency representative's duties and the possible liability arising in each instance. A suggested addition was a reference to the possibility that in certain cases the insolvency representative would not be personally liable, for example, under certain insolvency laws there would be no personal liability for environmental damage caused by the debtor prior to the appointment of the insolvency representative.

53. It was proposed in respect of recommendation (102) that paragraph (b) should include a reference to qualifications in addition to the reference to competency. A further proposal was to include a reference to circumstances where the function of the insolvency representative changed, such as where proceedings were converted from liquidation to reorganization. That conversion might require the existing insolvency representative to be replaced on the basis of qualifications or competency or, as in the case of a debtor-in-possession in reorganization, to be removed and not replaced. Those proposals received some support. It was suggested that where the insolvency representative was sued in its official capacity the Guide should discuss the need for that suit to be considered by the same court as had appointed the insolvency representative in order to avoid uncertainty and confusion.

54. As matters of drafting, it was agreed that recommendation (103) should commence with the words, "The insolvency law should include a procedure for removal of the insolvency representative …"; and that the word "but" be replaced

by “and”. It was also agreed that the recommendation should provide the insolvency representative with the right to be heard in any instance where it was to be removed, whether at the instigation of creditors or by a decision of the court, on the basis that removal was a sanction and the insolvency representative would always have the right to present its case.

55. It was suggested that since some insolvency laws required the resignation of the insolvency representative to be approved by the court, that possibility should be reflected in recommendation (104). It was agreed that the recommendation should not specifically require that approval, but could refer to the need for the insolvency law to indicate whether or not approval might be necessary.

56. In respect of recommendation (105), it was suggested that the priority be specified to be an administrative priority. In response, it was recalled that the reference to the level of priority was not specific in order to accommodate the different views on that matter that had been expressed in previous sessions of the Working Group.

C. Creditors (A/CN.9/WG.V/WP.63/Add.11)

Recommendations

- Classes of creditors

57. With respect to the purpose clause, the Secretariat was requested to prepare a draft based upon lines 5-12 of paragraph 261 of the commentary, incorporating the ideas of equal treatment of similarly situated creditors, and to consider the placement of the topic in the Guide.

58. The Working Group agreed that the text in square brackets at the end of recommendation (106) should be moved to the commentary and the examples expanded to include other provisions of the insolvency law that provided different treatment on the basis of classes of creditors.

- Participation of creditors

59. With respect to the purpose clause, it was suggested that paragraph (b) was too narrow and would not accommodate those situations where a creditor committee was not required or was not appropriate. It was also suggested that the focus should be upon facilitating the participation of creditors, which could be achieved through the mechanism of a creditor committee. To reflect those suggestions, it was proposed that paragraphs (b) and (c) be combined along the following lines: “(b) to provide a mechanism for the appointment of a creditor committee where to do so would facilitate the participation in the insolvency proceedings of the general body of creditors”. That proposal was accepted.

60. While the Working Group agreed that the general body of creditors should be required to approve a reorganization plan under paragraph (a) of recommendation (107), some concern was expressed as to the intended interpretation of paragraph (b). It was suggested that the creditors should be able to determine the matters on which they wished to advise the insolvency representative (rather than those matters being determined by the insolvency representative) and that the issues on

which they could advise should be generally formulated as "relating to administration and property of the estate". Another suggestion was that the creditors should have the right to make decisions on a number of matters included in paragraph (b) in addition to providing advice. It was recalled that recommendation (107) was intended to establish a minimum standard and on that basis the chapeau to the second sentence might be redrafted along the lines of "Those powers and functions could include", which would be followed by paragraph (a) and a more general formulation of paragraph (b). The detail of paragraph (b) could be included in the commentary. The Secretariat was requested to prepare a revised draft based on those considerations.

61. With respect to recommendation (108) it was proposed that the reference to voting requirements was too narrow and eligibility requirements should also be included.

62. A proposal that recommendation (109) be reformulated along the lines of "The insolvency law should specify matters on which creditors should have the individual right to be heard in the insolvency proceedings" was supported. The specific matters to be included in the insolvency law should then be discussed in the commentary.

63. A number of views were expressed on recommendation (110). Some support was expressed in favour of the use of the word "may" where it appeared in square brackets in the first and second sentences and for amending the words "claim is secured" at the end of the second sentence to "claim is unsecured". Some concern was expressed that the Working Group might not have a common understanding of the word "participation"; in some cases it might be understood to include the right to appear, to be heard and to vote while in others it might only include the right to vote. To overcome any possible differences in interpretation, it was suggested that the recommendation should clearly indicate what "participation" was intended to encompass. As a matter of drafting it was observed that there were several possible interpretations of the words "limit their participation" in the second sentence of the recommendation and an amendment to "permit their participation" was proposed. To ensure the right of secured creditors to be heard and to participate it was suggested that in addition to the changes proposed for recommendation (110), recommendation (109) should refer to "all creditors, whether secured or unsecured". With respect to the last sentence of recommendation (110), it was suggested that the participation of secured creditors should be limited to the extent that their interests were prejudiced under the reorganization plan and that the words "restructured under" should be amended to "affected by". Another suggestion was that secured creditors should be required to participate in reorganization proceedings in order to ensure the best possibility of success of the proceedings. A different view was that that participation could not be expressed as a requirement. A further suggestion was that that issue was addressed elsewhere in the Guide and the last sentence of the recommendation could therefore be deleted. After discussion, the prevailing view was that the word "may" in the first and second sentences was preferred; that the reference to participation in the second sentence should be limited to the extent the claim was unsecured; and that the words "restructured under" in the last sentence should be amended to "affected by". It was recalled that the issues addressed in recommendation (110) had been discussed in the context of the first joint session of Working Groups V and VI (document A/CN.9/535, paras. 15-16) and it was agreed that the text should be aligned with the decisions of that meeting.

64. As a matter of drafting it was suggested that the order of recommendation (111) should be amended along the following lines: "The insolvency law should provide that the court, the insolvency representative or creditors holding (*specify a percentage of the value of*) unsecured claims." In terms of substance, it was suggested that the recommendation should distinguish between several different ideas; firstly, between the party that may call for a meeting to be held (which could be the creditors, the insolvency representative or the court on its own motion) and the party that would be responsible for advising creditors of the meeting (which generally would not include creditors), and secondly, between a first meeting of creditors (which it was noted was a requirement of some insolvency laws but not of others) and other ad hoc meetings of creditors which might be requested by the parties noted above. To reflect the second distinction, it was proposed that an additional recommendation should be included along the lines of: "The insolvency law may provide that there be a first meeting of creditors" or "The insolvency law should set forth the circumstances in which a meeting of the general body of creditors is convened. Those circumstances may include: […]." The Working Group agreed that the recommendation should reflect those different ideas and the Secretariat was requested to prepare a revised version on that basis.

65. In respect of recommendation (112), some support was expressed in favour of removing the square brackets from the text in the first sentence. As a matter of substance, there was general agreement that the participation of creditors should be facilitated and encouraged and that some mechanism, such as a creditor committee, was desirable, although it was recognized that there were other possible mechanisms. To recognize the use of other mechanisms, it was proposed that the words "or other representative" could be added at the end of the first sentence.

66. A proposal to replace the words "provides for" in the first sentence of recommendation (113) with the word "permits" was supported. Some support was also expressed in favour of the view that the second sentence of recommendation (113) be deleted and the content included in a footnote, or discussed in the commentary. It was observed that one of the checks and balances that should apply in the case of a debtor-in-possession in reorganization was provided by a creditor committee and that a cross-reference to recommendation (94) and the associated footnote would be appropriate. It was also observed that dispute resolution mechanisms might be a matter more appropriately left to States and the Guide should refrain from discussing the issue in detail.

67. With regard to recommendation (114), the Working Group agreed that the opening sentence might be simplified. Drafting suggestions included to separate the two points made by inserting a full stop after the words, "to the committee", and to redraft the opening words to read, "The insolvency law should specify which creditors are eligible to be appointed to the committee". It was pointed out that since "related person" was a defined term it did not need further clarification in the recommendation. Preference was expressed in favour of retaining "may" in the second sentence rather than "should", and replacing the examples of related persons with words to the effect of "others who for any reason might not be impartial".

68. The substance of recommendation (115) was agreed to be acceptable.

69. After discussion, support was expressed for strengthening the functions of the creditor committee in recommendation (116), while noting that the list included was

not exhaustive. The Working Group affirmed the right to be heard in (116) (c) and noted the need for alignment with recommendation (109). Support was also expressed in favour of clarifying that the right of creditors to require information from the insolvency representative extended to the creditors committee. A number of drafting suggestions were made including removing the opening words in (116) (a) up to, and including, "function"; adding the words, "and the debtor-in-possession" at the end of (a); replacing the word, "supervisory" in (b) with "participatory"; after the word, "matters" in paragraph (b), inserting the text, "in which their class has an interest"; and adding at the end of (c) the words, "by the insolvency representative or the court". It was also suggested an additional clause (d) could be added to provide a right for the creditor committee to hear the insolvency representative at any time. It was agreed that the right of the creditor committee to act independently of the insolvency representative should be included in the commentary in respect of both recommendations (116) and (107).

70. In recommendation (117), the Working Group agreed that the approval required was that of the court, and that the reference to the general body of creditors be deleted. It was also agreed that the approval should relate not only to selection and employment, but also to remuneration. A question was raised as to whether or not the insolvency representative could have a role to play in that regard, but no views were expressed on that issue. It was agreed that although recommendation (117) covered both employment and remuneration, those issues should be addressed as drafted because of the links between them and that compensation and payment should be further addressed in the commentary. It was observed that the relevance of the employment of professionals depended upon the mandate given to the creditor committee in any particular State.

71. So as not to provide a disincentive to participation in the creditors committee but to ensure that members of the committee should not be entirely exempt from liability for failing to act honestly and in good faith, it was agreed that recommendation (118) should refer to fraudulent and [wilful] misconduct, rather than negligence, as the only grounds for liability, and that discussion of the need for the exemption be included in the commentary. It was suggested that that discussion should include what might be required for compliance with a standard of acting honestly and in good faith. It was also suggested that the commentary might note that, in terms of liability, creditor committee members could be distinguished from the insolvency representative on the basis that they were not insolvency professionals and were not remunerated. It was agreed that the words "for example" be deleted.

72. The Working Group agreed that the examples in recommendation (119) should be deleted and discussed the commentary with the additional grounds of independence and conflicts of interest. It was also suggested that the commentary point out that the exercise of the power to remove members of a creditor committee depended upon the method of appointment adopted.

73. While noting that recommendation (120) was generally useful, the Working Group agreed that it should be deleted as a recommendation, but included in the commentary.

D. Institutional framework (A/CN.9/WG.V/WP.63/Add.11)

74. It was agreed that the current drafting of the commentary covered the relevant issues and that recommendations were neither necessary or appropriate. It was suggested that the importance of the institutional framework could be better emphasized by including the discussion in the opening chapters of the Guide.

Part Two. Chapter V. Reorganization

A. The reorganization plan (A/CN.9/WG.V/WP.63/Add.12)

Recommendations

75. A number of suggestions were made with respect to the purpose clause. With respect to paragraph (a) it was proposed that the principal purpose of rescuing businesses should be to maximize the value of the insolvency estate for the benefit of all creditors, as noted in paragraph (b), rather than the protection of investment and the preservation of employment as noted in paragraph (a). With respect to paragraph (c) it was suggested that the use of the word "approved" should be clarified in terms of court or creditor approval. In response it was observed that "approval" was used with respect to creditors and "confirmed" with respect to the court, and it was suggested that a reference to confirmation needed to be added to the purpose clause. A contrary view was that since other recommendations left open the issue of whether or not court confirmation was required, it should not be added as a requirement to the purpose clause. It was also suggested that the words "an approved" could be deleted in reference to the plan in paragraph (c). An additional suggestion was to add a reference to the purpose of the provisions being to identify those businesses that were salvageable and, by implication, those that were not.

76. With respect to recommendation (121), support was expressed in favour of the word "proposed" being used rather than "prepared" or "filed". Support was also expressed in favour of revising the recommendation to accommodate timing issues that would arise where the proceedings were converted to reorganization from liquidation and where unitary proceedings were commenced, as well as to take into account those cases where no reorganization plan might be required.

77. The substance of recommendation (122) was found to be generally acceptable, with a preference being expressed for the phrase "permitted to propose".

78. The substance of recommendation (123) was found to be generally acceptable, provided the words in square brackets in both the chapeau and paragraph (b) were deleted and both issues were discussed in the commentary, and the word "should" in paragraph (a) was adopted.

79. Some concern was expressed as to the need for both recommendations (124) and (125). In response it was recalled that the Working Group had agreed on the need for both recommendations on the basis that they performed different functions, and that that approach should be maintained. In response to a query concerning the meaning of the phrase "debtor's charter" in recommendation (124) (c) (iii), it was noted that that phrase was intended to be a reference to an organic document of the company, such as the company charter or statute (however generally described), that

may need to be modified in order to give effect to proposals contained in the reorganization plan. To ensure flexibility, it was suggested that the chapeau should provide that the plan "may" include the information set forth in paragraphs (a) to (d).

80. Support was expressed in favour of describing the statement in recommendation (125) as a disclosure statement. With respect to the underlined text in the second sentence of the chapeau, some concern was expressed as to the requirement that the statement and the plan be prepared by the same party, on the basis that it might not always be appropriate depending upon who prepared the plan or to accommodate preparation by a professional adviser. Retention of the underlined text, however, received support, and it was noted that that matter was satisfactorily addressed in the commentary. To accommodate the situation where the insolvency representative did not prepare the plan or the statement, it was suggested that the insolvency representative could usefully be required to provide its view on the plan proposed. That proposal received support. With respect to paragraph (d), it was proposed that the words following "effect of the plan" be replaced by the words "adequate provision has been made for satisfaction of all obligations provided for in the plan". An alternative suggestion, which received support, was that the reference to matured debts should be deleted and the square brackets removed from the alternative text, and that the words "and the debtor will have" be amended to "and the debtor is expected to have".

81. The substance of recommendation (126) was found to be generally satisfactory, subject to expanding the parties to whom the statement and plan should be submitted to include other interested parties, such as shareholders. It was noted that that change would also need to be made to other recommendations in the chapter.

82. With respect to recommendation (127), support was expressed in favour of the following drafting changes: in the second sentence, changing "address:" to "specify"; "creditors who are required" to "creditors who are entitled"; and the vote "can be conducted" to "will be conducted". A suggestion was made that the disclosure statement referred to in recommendation (125) could usefully include information on voting mechanisms. Another suggestion was that the reference to "general body of creditors" in the last line should refer to the general body of "unsecured" creditors on the basis that it would be difficult to see how creditors with different legal rights could be included in a single voting body. In response, it was suggested that since the phrase "general body of creditors" had a particular meaning in the text, that that proposal required some further consideration. The Secretariat was requested to take that suggestion into account in revising the recommendation.

83. Several views were expressed in respect of the reference in the third sentence of recommendation (128) to the majority of creditors "actually voting". One view was that it was inappropriate, in view of the prevalence of creditor apathy, to allow what might amount to a very small, unrepresentative group of the total number of creditors to decide the course to be followed. In response, the acceptability of the contrary approach of allowing those not participating in the process to effectively disenfranchise those creditors who did participate and vote was questioned. It was observed that in practice requiring the approval of a majority of creditors would make it very difficult to obtain approval of a reorganization plan. It was also noted

that the use of proxies and electronic means of voting made it increasingly easy to vote without having to physically attend a meeting of creditors. A number of different approaches to the manner in which insolvency laws treated creditors not voting were noted. After discussion, the prevailing view was that the reference to the majority of creditors actually voting should be retained. A further suggestion was that the first sentence should include the possibility of voting on the plan by the general body of creditors in addition to classes of creditors. The view was expressed that the recommendation needed to be more flexible in order to provide for the possibility that the plan presented to creditors for approval might be negotiated with creditors in the course of approval and ultimately not be exactly the same as the plan submitted for approval. As a matter of drafting, it was suggested that the word "supporting" in the second sentence be replaced with "approving" or "voting in favour of".

84. Concerns were expressed as to the current formulation of recommendation (129) and the difficulty of applying it in practice, given the need to recognize the different priorities and rights of creditors. In response to a suggestion that the Guide note the need to address the issue and cite possible approaches, it was observed that the issue was of particular importance and required the provision of specific guidance. That guidance might be provided either by requiring all classes of creditors to approve the plan or adopting a more complicated formula which took into account the different priorities and interests of creditors. The Working Group decided to delay its consideration of the issue to a later time.

85. The substance of recommendation (130) was agreed to be acceptable.

86. The Working Group discussed the relationship between recommendations (131) and (133) and the question of whether the grounds for challenge should be the same in each case. It was recalled that the Working Group had originally decided to adopt separate recommendations with different criteria, but some support was expressed in favour of reconsidering that decision and amalgamating the two recommendations. In that regard, it was proposed that (131) could be expressed as a paragraph of (133) to address those cases where the law did not require confirmation of the plan. It was also suggested that the recommendations should make it clear that creditors could object to a plan (and that that objection be made to the court) notwithstanding the majority support of the class to which they belonged. It was observed that there was a potential problem in relation to recommendation (131) with the timing of the objection being required to be made before the plan "otherwise [became] binding", especially where it was the approval of the plan that established its binding effect. A ground of objection suggested for addition to recommendation (131) was that a particular creditor had been treated very badly by the majority of creditors. That addition was supported. In revising the recommendations, the Secretariat was requested to take account of the proposal to amalgamate recommendations (131) and (133) as discussed.

87. The Working Group agreed that it needed to undertake further discussion at a future session with the aim of consolidating and elaborating upon the treatment of cramdowns and related issues in this section of the Guide. It was suggested that recommendations (131) and (133) should refer to the fair and equitable treatment of creditors and it was agreed that a new paragraph (d) be added to both (131) and (133), as amended, to the effect that the treatment of the plan must conform to the ranking of claims as set out in the insolvency law, with a discussion of the priorities

of creditors and issues of discrimination to be included in the commentary. A suggestion was that the Guide might need to address what would occur where the plan was not approved by the requisite majority.

88. Support was expressed for retaining the words, "specified in the plan", in recommendation (132) without the brackets. Drafting suggestions included retaining the term, "stakeholders", but defining it in the Glossary; clarifying in the second part of the recommendation that the plan was binding because it had either been approved by majority vote or confirmed by the court; and noting the effect the plan would have on third parties.

89. Regarding recommendation (134), the Working Group agreed that the insolvency law should provide for amendment of the plan after approval by creditors, and before and after confirmation (where required) in certain circumstances. It was agreed to remove from the recommendation both instances of the qualification "limited" and the grounds or examples detailed in the second sentence and to place that discussion in the commentary, noting that those grounds should be limited. A further suggestion was that the order of (134) and (133) be reversed.

90. There was strong support for requiring in recommendation (135) the provision of notice to affected creditors and an indication as to the party responsible for providing notice. It was also observed that if the original plan had to be approved by the court, it would be appropriate for any amendment also to be so approved and for a requirement for disclosure of information relevant to the amendment. It was also suggested that recommendation (135) be expanded to discuss what consequences would follow from the rejection of a proposed amendment to the plan.

91. After extensive discussion, it was agreed that the drafting of recommendations (131), (133) and (136) needed to be reconsidered to provide a structured response to the issues raised in the Working Group, and in particular the distinction to be drawn between an approach requiring approval of the plan by creditors and confirmation by the court on the one hand and the approach which required only approval by creditors on the other. While recommendations (131) and (133) appeared to address, in turn, the requirements for creditor approval and court confirmation of the plan, it was agreed that the grounds and possible limitations for the recommendations needed to be coordinated. While recommendation (136) might apply to both of these situations, it would be distinguished from recommendations (131) and (133) by allowing, in limited circumstances, a post-approval challenge to the plan. In recommendation (136), there was support for substituting the word "should" for "may", and deleting the words, "improper conduct of the approval process" and "or [other grounds]" to limit the scope of (136) to fraud. Support was also expressed for introducing a time limitation based on the discovery of the fraud, to state who might challenge the plan, that the challenge be in the court and to outline the consequences of a successful challenge. It was observed that the coordinated effect of the three existing recommendations should be that a plan confirmed by the court should only be subject to objections on substantive, or non-procedural, grounds.

92. The Working Group agreed to the substance of recommendation (137) as currently drafted, although noting that the optional nature might be appropriate in the situation of a debtor-in-possession, but that where the proceedings involved an

insolvency representative up to the point of approval of the plan, it may be appropriate to consider some form of supervision of the implementation of the plan. It was noted that insolvency laws that provided for conclusion of the proceedings once a plan had been approved did not address the possible supervision of implementation.

93. It was agreed that the grounds for conversion in recommendation (138) should be expanded to include those situations where reorganization did not maximize the value of the estate; the plan was not approved; a confirmed plan was not implemented; or there was a successful challenge to a confirmed plan. Strong support was expressed for replacing the concept of failure in the recommendation with language indicating a material or substantial breach of the terms of the plan and a material or substantial default under the plan, and replacing "should" in the second sentence with "may". It was also suggested that the words, "and the plan cannot be amended", be deleted. Strong support was expressed in favour of the conversion to liquidation not occurring automatically and requiring consideration by the court. With regard to the second sentence, it was suggested that the effect of the conversion on other matters agreed in the reorganization, such as reduction of claims ("haircuts"), be addressed in the commentary.

B. Expedited reorganization (A/CN.9/WG.V/WP.63/Add.12)

Recommendations

94. Some concerns were expressed as to the length of the purpose clause and the level of detail included. In response it was recalled that the Working Group had decided on that level of detail in order to introduce and explain a concept that was unfamiliar in many jurisdictions, but it was noted that some changes could be made to improve the drafting. Drafting changes proposed included: in paragraphs (a) to (d) to replace "out-of-court reorganization" with "out-of-court negotiation"; in paragraph (c) (i) to delete the reference to equity holders; in paragraph (c) (iv) to replace "procedural" requirements with "substantive" requirements and delete the words "for dissenting affected creditors"; and in paragraph (d) to replace the opening words "recognize that" with "suspend with appropriate safeguards". Some support was expressed in favour of those amendments. It was also suggested that in order to shorten the purpose clause some of the detail, such as in paragraph (d), could be reconsidered and placed in the commentary. A proposal of a substantive nature was that the Guide should consider addressing two types of procedure: firstly, a procedure which provided expedited access to reorganization proceedings based upon the approval conditions of the insolvency law (which would be appropriate for those systems which had developed effective reorganization laws) and secondly, a procedure which established special approval conditions for those systems which did not have effective reorganization laws. It was proposed that the Working Group defer its consideration of the purpose clause until it had revised the substantive recommendations.

95. With respect to recommendation (139), support was expressed in favour of the expedited procedure being available to debtors who were natural persons. Suggestions as to drafting were to replace the words "will be unable to pay" with "is likely to be unable to pay" and to delete the reference to equity holders. Those

proposals were supported. With respect to the commencement criteria, it was observed that they should be the same as those generally applicable to reorganization proceedings as contained in revised recommendation (18 A). A different suggestion was that the procedure needed to encompass both debtors who were insolvent and debtors who were in financial difficulty, but not yet insolvent. After discussion, the prevailing view was that the recommendation should address debtors who were unlikely to be able to pay their debts and debtors eligible under revised recommendation (18 A). In terms of the voting requirements referred to in the recommendation, it was suggested that they should mirror those applicable under the insolvency law (recommendation (128)) and that that could be facilitated in recommendation (139) by deleting the words "the vote of a majority of".

96. Different views were expressed on the desirability of retaining paragraphs (a) to (g) in the recommendation, but after discussion it was agreed that they provided necessary information and should be retained. Several drafting changes were proposed: in paragraph (b) to delete the reference to equity holders; in paragraph (e) to replace the words after "creditors" with the phrase "whose rights are modified by the plan"; in paragraph (f) to delete the words after "reorganization plan" and substitute, "satisfies all applicable requirements for reorganization"; and to delete the reference to the party preparing the financial statement. Some concern was expressed as to the limitation in respect of fiscal authorities, and support was expressed in favour of their rights being capable of impairment provided they agreed. An additional proposal was to add a reference to social security authorities. A suggestion that the recommendations should be harmonized with the requirements for approval of a reorganization plan was generally supported.

97. The Working Group agreed that the chapeau of recommendation (141) should include both texts in square brackets as alternatives. In response to concerns expressed as to the need for paragraph (b), it was noted that there would be cases where a creditor committee could facilitate negotiations with a large group of creditors such as public bondholders or where a large number of banks appointed a bank steering committee and that it should therefore be retained. That proposal was supported. With respect to paragraph (c), it was suggested that it was of central importance to the type of procedure addressed in the section and should be placed above existing paragraph (a). In paragraph (a), it was suggested that the square brackets should be removed from "equity holders".

98. With respect to recommendation (142), it was agreed that the reference to equity holders in the chapeau should be retained and a new paragraph (d) added to include the impact of the plan on equity holders. A further addition proposed was a paragraph addressing the time and procedure for submission of an objection to the amount of claims made by third parties. It was observed that the recommendation on notice should be coordinated with similar recommendations in other chapters of the Guide.

99. The Working Group agreed that the emphasis of recommendation (143) should be on expedited reorganization requiring judicial approval and that the general process for confirmation in expedited proceedings should be coordinated with that for conventional reorganization proceedings in recommendation (133). As a matter of drafting, support was expressed in favour of inserting the word "substantive" before the word "requirements" in paragraph (a) and for deleting the idea of "feasibility" in paragraph (c).

100. Drafting changes suggested with respect to recommendation (144) included deleting the words commencing with "who" at the end of the recommendation and substituting the words "and equity holders affected by the approved plan"; and including a reference to the debtor. It was suggested that consideration be given to how the effect of an expedited plan should or did differ from the effect of a conventional plan.

101. The Working Group discussed the rights that creditors would have in the circumstances outlined in recommendation (145) and it was generally agreed that creditors should be able to exercise the rights they would have at law, whatever they might be. It was suggested that a discussion of the different alternatives could be included in the commentary. It was also suggested that the consequences of failure of implementation of a plan should be considered and coordinated with similar provisions in respect of conventional reorganization plans (see recommendation (138)), although it was noted that there may be reasons for maintaining a different provision, for example, on the basis that the debtor under an expedited procedure was not insolvent.

Part Two. Chapter VI. Management of proceedings

A. Creditor claims

Recommendations

102. The substance of the purpose clause was found to be acceptable with the deletion of the words after "admission" in paragraph (a).

103. With respect to recommendation (146), it was suggested that the reference to a "mechanism" was not sufficient and the recommendation should establish a "requirement" for creditors to file claims. It was also suggested that "automatic" admission probably was not appropriate and the recommendation should recognize the need to minimize formalities for submission. In support of that view, it was proposed that claims that were not challenged might be admitted with minimum requirements for evidence, such as by reference to the list of creditors that was to be filed under recommendation (92) (b) (v), rather than to the books and records of the debtor. A further suggestion was that claims denoted in foreign currency should not be entitled to special treatment on that basis alone and that the reference to that effect should be deleted from the footnote.

104. After discussion, the Working Group agreed that the detail in recommendation (147) should be retained in the recommendation rather than moved to the commentary. As matters of drafting, agreement was expressed in favour of the use of the terms liquidated and unliquidated; adding a cross-reference to recommendation (59) in respect of claims arising from the rejection of contracts; aligning the terminology with the Glossary; and deleting the words "if any" from the second sentence. It was also suggested that the recommendation should include a reference to whether or not the claim was subject to a set-off. A question was raised as to whether the recommendation was limited to claims for payment by the debtor or would also include claims for payment by a third party or guarantor arising from acts or omissions of the debtor. It was agreed that an explanation should be included in a footnote.

105. It was agreed that recommendation (148) should be coordinated with recommendation (151) and the decisions of the joint session of Working Groups V and VI (Vienna, 16 December 2002).

106. After discussion, it was agreed that recommendation (149) should focus on the equal treatment of claims both in respect of the submission procedure and the processing of claims, and that the references to similarly situated creditors should be retained.

107. Concern was expressed with respect to the first phrase of recommendation (150) (b) "at any time prior", and its deletion was supported. It was observed that the recommendation should clarify what was meant by the word "consideration" in paragraph (b). Preference was expressed in favour of retaining the second bracketed text regarding the giving of notice of commencement.

108. The substance of recommendation (151) was generally found to be acceptable with the deletion of the words after "specified time".

109. In respect of recommendation (152), general support was expressed for including a discussion of whether it was necessary to require claims denoted in foreign currency to be converted and the reasons for requiring conversion, e.g. for purposes of determining voting rights. Support was also expressed in favour of the need to determine a specific time for conversion, with some preference expressed for commencement, but it was also noted that there could be different national approaches and that there may be a need to adopt special measures to address situations of high currency instability.

110. The substance of recommendations (153) and (154) was generally found to be satisfactory.

111. In respect of recommendation (155), the Working Group agreed that there was a need to provide for claims to be disputed before they are admitted and to clearly identify who may dispute a claim, including whether a creditor could dispute the claim of another creditor. It was agreed that the recommendation should focus on disputes arising in the context of the insolvency proceedings and disputes already in existence at the time of commencement would be affected by that commencement (e.g. the stay) and addressed elsewhere in the law.

112. A proposal was made to amend the last phrase of recommendation (156) along the lines of "could take into account any question relating to set-off". After consideration, it was agreed to defer the Working Group's deliberations on the recommendation in light of the decision already taken to defer consideration of chapter III. F on set-off to a future session.

113. The substance of recommendations (157) and (158) was found to be generally acceptable.

114. The substance of recommendation (159) was found to be generally acceptable, provided it was clear that the admission of a claim would entitle a creditor to participate in the proceedings more broadly than provided in paragraph (a) and that the issue of admission would not operate to limit the right to be heard.

115. With respect to recommendation (160), some concern was expressed that the use of the phrase "for example" should not be interpreted to be exhaustive and that the terms "undercapitalization" and "self-dealing" might not be sufficiently clear

and warranted further explanation. It was also suggested that restriction of voting rights should occur only in limited circumstances and that the possibility of subordination of claims should not be eliminated, and should be possible in cases other than those involving related persons.

B. Post-commencement finance

Recommendations

116. The substance of the purpose clause was found to be generally acceptable.

117. Drafting changes agreed in respect of recommendation (161) were that the word "permit" should be changed to "facilitate"; and that the reference to "creditors" be broadened to include the creditor committee since that body may also have powers of authorization on that issue.

118. Support was expressed in favour of retaining the words in square brackets in recommendation (162), although it was acknowledged that those assets would not generally be relevant. It was suggested that the commentary should note that frequently the only unencumbered assets available for securing post-commencement finance were assets recovered through avoidance proceedings. It was also suggested that the commentary should clearly address the difference between obtaining security and giving priority and note that security was only relevant where assets that were not totally encumbered were available.

119. With respect to recommendation (163), the view was expressed that the rule on priority may be contained in law other than the insolvency law and the recommendation should accommodate that possibility. In response, it was suggested that the rule should be in the insolvency law or at least referred to in the insolvency law. As a matter of drafting, it was suggested that it was unnecessary to include a notice requirement, since the obtaining of consent would necessarily imply the giving of notice.

120. The Working Group agreed that the first sentence of recommendation (164) should be discretionary and "should" therefore be replaced with "may". As a matter of drafting, support was expressed for retaining the word "creation"; retaining "secured creditor" in paragraph (a); aligning paragraph (a) with recommendation (163) in terms of the giving of notice; deleting the words after "unreasonable harm" in paragraph (c); redrafting paragraph (c) to refer to "protection of the secured asset over which security is given"; and amending the words "will not suffer unreasonable harm" to "will not be exposed to an unreasonable risk of harm". It was agreed that the concept of "adequate protection" should be defined.

121. With respect to recommendation (165), it was suggested that the square brackets be removed from the words "including …" and the text retained. Some concern was expressed as to the effect of the second sentence and it was suggested that, while the priority from the reorganization should continue to be recognized, it should not necessarily be of the same order. For example, it should not rank ahead of the administrative claims arising from the liquidation. It was suggested that that qualification could be added.

122. For lack of time, the Working Group completed its deliberations with recommendation (165).

Notes

[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 400-409.

[2] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 296-308.

[3] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 194.

[4] Document A/CN.9/529, para. 17.