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Report of Working Group V (Insolvency Law) on the work of its thirty-second session (New York, 14-18 May 2007)

Contents

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I. Introduction

1. At its thirty-ninth session, in 2006, the Commission agreed that the topic of the treatment of corporate groups in insolvency was sufficiently developed for referral to Working Group V (Insolvency Law) for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems the Working Group would identify under that topic.

2. At its thirty-first session, held in Vienna from 11 to 15 December 2006, the Working Group agreed that its current discussion of the treatment of corporate groups in insolvency suggested the need for further work; that the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross Border Insolvency provided a sound basis for the unification of insolvency law; and that the integrity of those texts should be maintained in any future work. It was also agreed that the current work was intended to complement those texts, not to replace them (see A/CN.9/618, paragraph 69).

3. On that occasion, it was suggested that a possible method of work would entail the consideration of the provisions contained in these existing texts that might be relevant in the context of corporate groups and the identification of those issues that required additional discussion and the preparation of additional recommendations. Other issues, although relevant to corporate groups, could be treated in the same manner as in the Legislative Guide and Model Law. It was also suggested that the possible outcome of that work might be in the form of legislative recommendations supported by a discussion of the underlying policy considerations (see A/CN.9/618, paragraph 70).

II. Organization of the session

4. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-second session in New York from 14 to 18 May 2007. The session was attended by representatives of the following States members of the Working Group: Canada, Chile, China, Colombia, Croatia, Fiji, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Jordan, Kenya, Lithuania, Madagascar, Mexico, Morocco, Nigeria, Pakistan, Poland, Qatar, Republic of Korea, Russian Federation, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

5. The session was also attended by observers from the following States: Denmark, Egypt, El Salvador, Holy See, Ireland, Malaysia, Netherlands, Philippines, Romania, Senegal, Slovenia, Sudan and Yemen.

6. The session was also attended by observers from the following international organizations:

(a) **Organizations of the United Nations system**: International Monetary Fund (IMF) and the World Bank;

(b) **Intergovernmental organizations**: Asian-African Legal Consultative Organization (AALCO), Asian Development Bank (ADB), European Central Bank (ECB) and the European Commission (EC);

(c) **International non-governmental organizations invited by the Working Group**: American Bar Association (ABA), INSOL International, International Bar Association (IBA), International Insolvency Institute (III) and International Women's Insolvency & Restructuring Confederation (IWIRC).

7. The Working Group elected the following officers:

Chairman: Mr. Carlos Sánchez Mejorada y Velasco (Mexico)

Rapporteur: Mr. Adam Ożarowski (Poland)

8. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.75);

(b) A note by the secretariat on the treatment of corporate groups in insolvency (A/CN.9/WG.V/WP.76 and Add.1 and 2).

9. The Working Group adopted the following agenda:

1. Opening of the session;
2. Election of officers;
3. Adoption of the agenda;
4. Consideration of the treatment of corporate groups in insolvency;
5. Other business;
6. Adoption of the report.

III. Deliberations and decisions

10. The Working Group began discussion of the treatment of corporate groups in insolvency on the basis of documents A/CN.9/WG.V/WP.76 and Add.1 and 2, and other documents referred therein. The deliberations and decisions of the Working Group on this topic are reflected in section IV below.

IV. Treatment of corporate groups in insolvency

11. The Working Group commenced its deliberations with general observations on the form that the work on corporate groups might take. It was emphasized that the work should build upon the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross-Border Insolvency without unnecessarily restating those texts and adding additional material only where supported by the Working Group. It was suggested that any decision on the form of the work should be taken at a later stage to fully reflect the outcome of the Working Group's deliberations.

A. Glossary: definition of corporate group

12. The Working Group considered the definition of "domestic corporate group" and "international corporate group" as set forth in paragraph 3 of document A/CN.9/WG.V/WP.76. Some concerns were expressed with respect to the generality of the definition proposed and the consistency of the use of that definition throughout the document. Concerns were also expressed with respect to the contractual element of the definition. It was agreed that further refinement of the definition should take place after deliberations on the substantive issues, with the existing definition sufficing as a preliminary and provisional working basis for those deliberations (see paragraphs 77-84 below).

B. The onset of insolvency: domestic issues

1. Commencement of proceedings

Debtor application for commencement

13. Concerns were expressed on various aspects of the commencement of insolvency proceedings, including the question of solvent entities being the subject of applications for commencement of insolvency proceedings; the extent of creditor applications and, in particular, the ability of a creditor to apply for commencement of insolvency proceedings with respect to a group member, of which it was not a creditor or to a solvent member of which it was a creditor; and the scope of requirements for the giving of notice in a group context, particularly with respect to members of a group that were not the subject of an application for commencement. It was also suggested that the need to differentiate between liquidation and reorganization in the case where applications for both were made against members of a group should also be considered.

Recommendations 1-4

14. Those concerns, in so far as they related to solvent members of a group were also expressed with respect to draft recommendations 1-4 and in particular, the extent to which those recommendations indicated a departure from recommendations 15 and 16 of the Legislative Guide by allowing an application to include a solvent member of a group. It was agreed that such a possibility raised serious concerns for the stakeholders of the solvent group member, including lenders, creditors and shareholders, as well as issues of unfair competition. A further concern related to issues of jurisdiction and determination of the court competent to consider the proposed joint application. The prevailing view was that draft recommendations 1-4 could not be supported in the suggested draft form, although the view was also expressed that they could provide the basis for further discussion (see paragraphs 19 and 20 below).

15. To focus on the complexity of the different questions raised by the proposal for joint applications, the Working Group agreed to an approach that would examine the issues layer by layer, starting with the simplest hypothetical case. Such an approach would facilitate a clear definition and understanding of the issues at stake at each stage of the insolvency process, both in a domestic context and internationally, and the acceptability of possible solutions.

16. The first example considered was that of two or more members of a corporate group both meeting the commencement standard of recommendation 15 of the Legislative Guide and located in the same jurisdiction. It was generally agreed that those two members should be permitted to apply together for commencement of proceedings. It was added that such an application would not affect the separate identity of the applicants. Where the two members were situated in different jurisdictions, reference would be made to the relevant treatment of jurisdictional issues in the Legislative Guide and to domestic law.

17. The second example raised the question of an application that included a solvent member of the group. It was agreed that that example was much more complex, touching upon the relationship between the solvent and insolvent members, including financial arrangements, management and so forth, as well as the terms of recommendation 15 of the Legislative Guide. With respect to the latter, it was noted that since paragraph (a) of recommendation 15 included the possibility of imminent insolvency, it would also apply in the corporate group context. If, for example, the insolvency of the parent of the group was likely to cause the financial failure of other members of the group, that situation would potentially be covered by recommendation 15.

18. It was pointed out that, as previously discussed, the possibility of including solvent entities in reorganization under the protection of the insolvency law raised fundamental issues of unfair competition and could not be supported. In addition, such an approach would have a direct impact on the provision of finance and credit based upon the separate identity of individual business entities. It was further suggested that a distinction needed to be drawn between including a solvent entity in an application for commencement of proceedings and extending proceedings already commenced to additional entities on the basis of a thorough investigation that could include the views of relevant stakeholders and would involve the application of relevant safeguards under insolvency law. While the former could not be supported; the latter possibility would need to be considered at a later stage.

19. On that basis, some support was expressed in favour of considering the substance of draft recommendation 3 of A/CN.9/WG.V/WP.76 in the context of commencement of insolvency proceedings, rather than in the context of an application for commencement, as the conditions specified would be relevant to determining whether, for example, the proceedings should be jointly administered.

20. After further discussion, the prevailing view was that draft recommendation 1 should be retained and draft recommendations 2-4 deleted, noting the potential relevance of the conditions set forth in draft recommendation 3 to the discussion of joint administration.

Creditor application for commencement

21. On the question of a creditor application for commencement of insolvency proceedings, the Working Group considered whether a creditor could make a joint application against two or more insolvent group members of which it was a creditor. The view that that situation was adequately covered by recommendation 16 of the Legislative Guide received some support. However, there was also support for the view that a recommendation to that effect might be useful, and the secretariat was requested to prepare a draft for future consideration by the Working Group.

Debtor application: notice to creditors

22. With respect to draft recommendation 5, there was support for deleting the words in the second set of square brackets, on the basis that such a requirement was too onerous. Different views expressed were that it would be useful for all creditors of the group to be aware of the commencement of insolvency proceedings and that due process required that all parties whose interests were likely to be affected by the commencement of insolvency proceedings should be informed. It was recalled that recommendations 22-25 of the Legislative Guide addressed several issues relevant to the provision and content of notice on commencement of insolvency proceedings and that those recommendations would apply equally in the corporate group context. As a general matter of drafting, it was suggested that while it would not be necessary to restate the content of the recommendations of the Legislative Guide in this work, it would nevertheless be useful to clearly indicate the connection between this work and the relevant recommendations of the Legislative Guide and clarify that the draft recommendations of this work built upon those of the Legislative Guide. The connection between draft recommendation 5 and recommendation 24 of the Legislative Guide was questioned, especially in the light of the proposal to delete the words in the second set of square brackets. It was observed that while recommendation 24 addressed notification of creditors of the debtor, draft recommendation 5 went further and required creditors of one group member to be given notice of the proceedings commenced against another group member. After discussion, it was agreed that draft recommendation 5 should be retained with deletion of the words as noted above.

23. Support was expressed in favour of retaining draft recommendation 6, with further consideration to be given to its placement in relation to other draft recommendations addressing joint administration.

Creditor application: notice to the debtor

24. It was agreed that draft recommendation 7 should be retained, but that the words "[all members of the corporate group]" should be deleted on the same basis as the deletion of similar words from draft recommendation 5 was agreed.

Joint administration

25. It was noted that since draft recommendation 8 addressed the issue of joint administration it should be discussed in the context of the treatment of assets on commencement of insolvency proceedings.

2. Treatment of assets on commencement of insolvency proceedings

(a) Joint administration and appointment of an insolvency representative

26. The Working Group discussed joint administration and appointment of an insolvency representative on the basis of the considerations set forth in paragraphs 32 and following of document A/CN.9/WG.V/WP.76.

Definition of joint administration

27. It was suggested that the definition of joint administration contained in document A/CN.9/WG.V/WP.74, part I, letter (j) needed further refining. In

particular, it was indicated that in the context of corporate groups joint administration could refer to varying levels of integration of proceedings, namely:

(a) Coordination of two or more separate insolvency proceedings regarding members of the same corporate group, each having its own insolvency representative;

(b) Appointment of a single insolvency representative in two or more separate insolvency proceedings regarding members of the same corporate group;

(c) Appointment of a single insolvency representative in single insolvency proceedings regarding two or more members of the same corporate group; and

(d) Pooling of assets and liabilities of two or more members of the same corporate group (substantive consolidation).

28. It was indicated that the purpose of joint administration was to promote cost efficiency and procedural convenience, for instance, through knowledge sharing and preservation of the integrity of the various economic units of the corporate group. Examples of those benefits could be found, for instance, in the possibility of streamlining notice formalities and of holding joint creditors' meetings. It was stressed that the effect of joint administration should be limited to administrative aspects of the proceedings and should not touch upon substantive issues. It was further suggested that joint administration should not prevent the possibility of returning to separate administration of each insolvency proceeding at a later stage.

29. Concerns were expressed with respect to the possibility that joint administration might interfere with rules on jurisdiction in those cases where, under those rules, different courts would have competence over the various members of the corporate group. In response, it was indicated that domestic procedural law might effectively deal with the matter. It was agreed that jurisdictional issues should be considered at a later stage of the work, possibly in conjunction with the discussion of the centre of main interests.

30. The Working Group agreed that, in light of the intended goals, it was desirable that a definition of joint administration should encompass the cases outlined in (a) and (b) of paragraph 27 above. It was further agreed that the cases outlined in (c) and (d) of paragraph 27 above went beyond an acceptable notion of joint administration.

31. It was suggested that joint administration should be permitted both in the case of a joint application by two or more members of the same corporate group and in the case of multiple separate applications. It was added that joint administration should be granted exclusively at the discretion of the court.

Recommendations 8, 9, 10 and 11

32. The Working Group agreed that draft recommendation 8 was acceptable in light of the definition of joint administration and of the additional explanations referred to above. The secretariat was requested to revise the material on joint administration in the light of that discussion. It was also suggested that the bracketed words "in the same court" should be substituted with the words "in different courts or in the same court" to ensure that joint administration would be permitted in both cases.

33. It was suggested that the term “should” be replaced by the term “may” in draft recommendation 9.

34. It was also suggested that draft recommendation 10 should permit the appointment of one or more additional insolvency representatives, in appropriate circumstances.

35. Support was indicated for the inclusion in draft recommendation 11 of practical examples of the manner in which cooperation to the maximum extent could be achieved, along the lines of the examples offered in paragraph 36 of document A/CN.9/WG.V/WP.76.

(b) Application of the stay: recommendation 12

36. In the light of the Working Group decision that solvent group members could not be included in insolvency proceedings, it was suggested that draft recommendation 12 was not appropriate. It was added that it would negatively affect the interests of creditors of the solvent group member. It was also pointed out that membership of a corporate group of which some members were insolvent was not a sufficient basis for such relief to be ordered with respect to a solvent member of the same group and that the availability of such relief would negatively affect access to credit for solvent members of a corporate group and would also raise issues of unfair competition. A different view was that in certain limited circumstances, such as to protect an intra-group guarantee as mentioned in paragraph 31 of document A/CN.9/618, the relief provided in draft recommendation 12 should be available at the discretion of the court. After discussion, it was agreed that draft recommendation 12 should be deleted.

(c) Use and disposal of assets

37. The Working Group considered the question posed in paragraph 53 of document A/CN.9/WG.V/WP.76 concerning the use of assets of a solvent member of a group to support the reorganization of insolvent members.

38. It was noted that although recommendation 54 of the Legislative Guide addressed the use of third-party-owned assets, the reference to a third party would usually be understood as being to a party external to the group. Accordingly, it was suggested that it might be useful, in the corporate group context, to address the situation of a special purpose entity (see A/CN.9/WG.V/WP.74, paragraphs 17-19) established for the purpose of holding assets such as intellectual property that were key to the continuation of the activities of the insolvent entities. It was recalled that the Working Group had discussed that matter at its previous session (A/CN.9/618, paragraph 33), and the concerns expressed at that time were reiterated. The view that no recommendation was required to address the issue received support. It was also suggested, however, that the question of the use of those assets might be addressed in the context of a reorganization plan and it was agreed that the issue should be further considered in that context.

(d) Post-commencement finance: recommendations 13-19

39. The Working Group emphasized the importance of post-commencement finance to both liquidation, especially in the case of sale as a going concern, and

reorganization, and the desirability of including recommendations on the issue to provide information and guidance to those States not familiar with the issue.

40. It was noted that, in the corporate group context, the question of post-commencement finance raised a number of issues that were different to those relating to a single entity, including: in the situation of a single insolvency representative for several members of the group, the possibility of conflict of interest between the needs of the different debtors with respect to ongoing finance; the involvement of solvent members of the group, especially in cases where that member was controlled by the insolvent parent of the group; the use of the assets of a solvent special purpose entity with a single creditor for the purposes of obtaining finance for other insolvent members of the group; balancing the interests of individual members of the corporate group with the reorganization of the group; and the desirability of maintaining, in insolvency proceedings, the financing structure that the group had before the onset of insolvency, especially where that structure involved pledging all of the assets of the group for finance that was channelled through a centralized group entity with treasury functions.

Recommendation 13

41. The view was expressed that since a corporate group did not have legal identity as such, draft recommendation 13 should only refer to the provision of post-commencement to individual members of the group, but not to the corporate group itself. With that revision, the substance of draft recommendation 13 was supported.

Recommendation 14

42. It was noted that draft recommendation 14 was based upon recommendation 63 of the Legislative Guide, with the addition of the alternative texts in square brackets and the specific references to members of a corporate group. It was suggested that the decision on draft recommendation 13 with respect to the references to the group should be reflected in the drafting of recommendation 14. To that end, it was proposed that the language in the first set of square brackets should be deleted and the alternative text retained; that the words following “survival of the business” in the first sentence should be “of that member”; and that the second sentence should refer to the provision of post-commencement finance “for any member of the group”. After discussion, those proposals were supported.

43. Several additional proposals were made with respect to the words “the preservation or enhancement of the value of the estates of one or more members of the group” including: that the reference should be to the value of the corporate group as a whole since the group may have more value than the sum of the members taken separately; that the reference should be limited to the member receiving the post-commencement finance; and that it should be cumulative, referring to both preservation and enhancement of value. After discussion, it was agreed that the text should be retained as drafted.

44. It was also proposed that draft recommendation 14 should be revised to take into account the general agreement of the Working Group that restatement of the recommendations of the Legislative Guide should be avoided and the elements

specific to the corporate group context that required addition to or departure from the provisions of the Legislative Guide should be clearly indicated.

45. With respect to the powers of the insolvency representative to obtain post-commencement finance, the view was expressed that, contrary to the language of draft recommendation 14, that power should not be unfettered, in particular because of the potential for conflict of interest in the case of a single insolvency representative in a joint administration of multiple insolvency proceedings. On that basis, it was suggested that approval of the court or of creditors referred to in the second sentence should be a requirement of the insolvency law. A different view was that, as the insolvency representative would be subject to specific duties and liability for actions taken, there was no need to circumscribe the ability of the insolvency representative to obtain post-commencement finance by requiring court or creditor approval. After discussion, the prevailing view was that the second sentence of draft recommendation 14 should be retained as drafted.

46. After discussion, the Working Group agreed to the substance of draft recommendation 14, with the drafting suggestions noted above.

Recommendation 15

47. A number of clarifications were sought as to the meaning of draft recommendation 15 and in particular the phrase "debtor-guarantor" and the tests included in paragraphs (a)-(c), in so far as they referred to concepts such as comparable benefit and economic harm.

48. The question was also raised as to which creditors were referred to in paragraph (b): it was suggested that if the reference was to all creditors, the proposed requirement of seeking consent might prove not only unworkable, but also costly.

49. It was proposed that the requirements contained in paragraphs (a)-(c) should be cumulative rather than alternative in order to ensure the appropriate level of protection. In response, it was suggested that to do so would set a standard so high that it could almost never be met and would defeat the purpose of facilitating post-commencement finance. It was observed that the provision of guarantees in a corporate group context was a common mechanism for financing and what needed to be considered was how that normal practice was affected by the onset of insolvency and the safeguards that were required.

50. In discussing the possible scope of draft recommendation 15, the Working Group considered separately the questions of whether an insolvent group member could provide a guarantee to another insolvent group member and whether a solvent group member could provide a guarantee to an insolvent group member.

51. With respect to the first question, it was observed that that might be prohibited in some States as constituting, for example, a preferential transaction. It was also pointed out that in the context of a single insolvency representative administering multiple insolvency proceedings, a conflict of interest was likely to arise with respect to the provision of such a guarantee.

52. With respect to the second question, it was indicated that to permit such a guarantee to be given would amount to a transfer of the assets of that solvent entity to the insolvent entity to the detriment of the creditors and shareholders of the

solvent entity, and in the context of joint administration would raise a potential conflict of interest. Such an approach could not be supported. In response, it was pointed out that the solvent entity would be acting on its own authority under company law in a commercial context and should not be required to seek additional authority from its creditors to provide financial support to another member of the group if management so wished. It was also suggested that different types of solvent entities, such as special purpose entities with few liabilities and many assets, could be involved in providing such a guarantee; that the solvent group member might have an interest in the financial stability of the parent or of other members of the group, depending upon the specific circumstances; and that the interests of the group as a whole might be a consideration. In the specific context of draft recommendation 15, it was noted that the court was required to assess whether the various safeguards set forth in paragraphs (a)-(c) were met before the guarantee could be provided.

53. It was proposed that many of the difficulties associated with the question might be solved if addressed in the context of a reorganization plan, in which the solvent group member, as well as finance providers, could participate on a contractual basis. While acknowledging that there might be situations where that approach could be appropriate, it was pointed out that very often post-commencement finance was required at any early stage of the insolvency proceedings and before a plan could be negotiated. A further observation was that post-commencement finance might also be required in situations, such as liquidation on a going concern basis, where there would not be a reorganization plan.

54. The Working Group requested the secretariat to reconsider and revise draft recommendation 15 for future consideration, taking into account the different issues raised in the discussion and the need to provide greater clarity with respect to the various elements.

Recommendation 16

55. The Working Group agreed to the substance of draft recommendation 16 with the following revisions: deletion of the reference to a corporate group in the first set of square brackets and amendment of the reference to the ordinary unsecured creditors of “each” member of the group to “that” member of the group.

Recommendation 17

56. The Working Group agreed to the substance of draft recommendation 17 with the following revision: “provided to the group [or member of the group]” substituted with “provided to another member of the group”.

Recommendation 18

57. It was agreed that the two texts in square brackets should be retained with the square brackets removed. A further suggestion was to clarify which secured creditors were concerned by adding the word “affected” to the words “existing secured creditors”. With respect to the alternative at the end of the draft recommendation permitting either consent of the existing secured creditors or adherence to the procedure in draft recommendation 19, the view was expressed that only the consent of the existing creditors should be required. It was observed that to

proceed without that approval might raise constitutional issues and constituted a "cram-down", which might be acceptable only in exceptional cases such as where a creditor unreasonably withheld its consent. Another view was that draft recommendation 18 had to be considered together with draft recommendation 19, which provided the necessary safeguards to existing secured creditors.

58. After discussion, the substance of draft recommendation 18 was approved with the revisions noted above.

Recommendation 19

59. The Working Group agreed to the substance of draft recommendation 19 with the deletion of the second alternative text in square brackets in paragraph (b) and removal of the square brackets from the first alternative.

60. It was noted that the headings of recommendations 13-19 would need to be revised to reflect the agreements on the substance of each recommendation.

(e) Avoidance: recommendations 20-21

61. At the outset of the discussion, several observations of a general nature were made concerning issues underlying the concepts being discussed. Those included: the question of how a creditor could identify that it was dealing with a member of a corporate group, noting that that question would be of particular importance if the rules applicable to the corporate group context were different to those applicable to single corporate entities; the need for clearer definition of what constituted a corporate group, as well as other concepts and assumptions; and the need to clarify whether the work proceeded from an assumption of corporate separateness and an identification of the circumstances, if any, that might justify a departure from that assumption. The Working Group agreed that those issues needed to be considered.

62. With respect to avoidance, it was recalled that the Legislative Guide addressed that issue in some detail, both in the commentary and the recommendations (part two, chapter II, paragraphs 148-203). The recommendations with respect to related person transactions, however, addressed only the issue of the suspect period (recommendation 90) and the need for specification of the categories of persons to be treated as persons related to the debtor (recommendation 91). The issue for consideration by the Working Group, it was suggested, was whether further treatment was required to address transactions occurring in the group context.

63. A number of questions were raised with respect to the goal of avoidance in the corporate group context, noting that the involvement of parties both internal and external to the group in transactions that might be subject to scrutiny suggested the need to consider whether treatment different to that of the Legislative Guide was required. In particular, it was questioned whether the desired goal should be protection of intra-group transactions based upon the notion of a corporate group as a whole or particular scrutiny of those transactions on the basis that each group member was a separate entity and transactions between them should be considered as related person transactions, within the meaning of the definition of that term in the Legislative Guide (Glossary, paragraph (jj)). Some support was expressed in favour of the latter approach.

64. Support was also expressed in favour of the approach adopted in draft recommendations 20 and 21, which was to draw attention to the fact that transactions occurring in the group context raised special considerations that might need to be addressed in the insolvency law. It was suggested that the possibility of fraud should be included as a basis for avoiding transactions occurring in the group context.

65. After discussion, the substance of draft recommendations 20 and 21, with the addition of a reference to fraudulent transactions, was approved.

(f) Subordination

66. The Working Group considered the question raised in paragraph 17 of document A/CN.9/WG.V/WP.76/Add.1. Limited support was expressed in favour of the need to address the issue of subordination by way of recommendation.

3. Remedies

Consolidation: recommendation 22

67. The Working Group emphasized that consolidation should be available as a remedy only in very limited and appropriate circumstances and that that approach should be clearly reflected in draft recommendation 22.

68. It was observed that the criteria indicated in paragraphs (a)-(c) of the draft recommendation would generally become apparent only after the commencement of insolvency proceedings and that that point should be more clearly reflected in the drafting.

69. It was suggested that paragraph (a) of draft recommendation 22 might also include a reference to intermingled debts.

70. Some concern was expressed as to the scope of paragraph (b) and the difficulties associated with ascertaining what was in the mind of creditors at the time they entered into transactions with members of a corporate group, as noted in paragraph 27 of A/CN.9/WG.V/WP.76/Add.1. For that reason, it was suggested that the test in paragraph (b) should refer to a majority or significant number of creditors.

71. A further suggestion was that the criterion of benefit to all creditors set forth in paragraph (c) should be regarded as the key factor in ordering consolidation and, as such, would resolve any potential ambiguity in draft paragraph (b). To indicate the significance of that factor, it was agreed that reference to that criterion should be moved from paragraph (c) to the chapeau of the recommendation and that paragraph (c) should be deleted accordingly.

72. It was agreed that a further factor to be considered in ordering consolidation would be the existence of fraudulent schemes or fictitious structures, which should added as paragraph (d).

73. The substance of draft recommendation 22 was approved with the drafting revisions noted above.

4. Reorganization

Unified reorganization plan: recommendations 23-24

74. With respect to draft recommendation 23, it was proposed that the reference to "proposal" of the plan should be revised to "approval" of the plan; that it should be made clear in the draft recommendation that such a plan would recognize the interests and rights of the creditors of the different group members included in the plan; and that it might be more appropriate to refer to a "joint plan" rather than to a "unified plan". The substance of the draft recommendation was approved with those revisions.

75. With respect to draft recommendation 24, the view that a solvent entity could not be included in a reorganization plan by order of the court, because it was not subject to the insolvency law and not part of the insolvency proceedings, was widely supported. Nevertheless, recognizing that there would be circumstances in which such inclusion was appropriate and that it was not unusual in practice, the Working Group agreed that a solvent entity could be included in a reorganization plan on a voluntary basis in order to aid the reorganization of other members of the same corporate group, provided the shareholders and creditors of that solvent entity agreed in accordance with applicable corporate rules. The secretariat was requested to draft a new recommendation to that effect for future consideration.

5. Other issues

76. The Working Group deferred its consideration of the issues raised in paragraph 49 of document A/CN.9/WG.V/WP.76/Add.1 to a future session.

6. Definition of "corporate group"

77. The Working Group discussed a possible definition of "corporate group" in the context of insolvency proceedings on the basis of the text provided in paragraph 3 of document A/CN.9/WG.V/WP.76, as well as of the considerations expressed in paragraphs 7 and following of document A/CN.9/WG.V/WP.74.

78. It was indicated that a number of definitions of corporate groups existed in different areas such as tax, accounting and stock exchange regulations. It was further indicated that such a definition existed also in certain insolvency laws, such as, for instance, Colombia, where that definition was built around the two key ideas of unity of purpose and of unity of decision-making of the members of the corporate group.

79. A concern with respect to the concept of "corporate group" as set forth in paragraph 3 of document A/CN.9/WG.V/WP.76 was the need for third parties to be able to identify their commercial partners as members of a group. As noted above with regard to consolidation, it was indicated that determining the level of awareness of third parties about the existence of the corporate group might entail difficulties. It was added that establishing such a requirement might require a publicity or registration system, and that such a system might not be easy to administer at the cross-border level and would potentially require sanctions for non-compliance.

80. It was suggested that a possible definition of "corporate group" should be built on the basis of certain core elements common to all jurisdictions. Those core

elements could be identified in: plurality of enterprises having assets in different jurisdictions; control over the members of the corporate group expressed in the unity of its managerial direction; and actual exercise of that control. It was added that other elements, such as publicity of the membership of a corporate group and third parties' awareness of the existence of the group, could be added for consideration by individual States.

81. It was further indicated that the Working Group might wish to consider different notions of "corporate group" depending on the context and the scope of the relevant provision. For instance, it was explained that a broad notion of corporate group might be desirable for the purpose of joint administration and a narrow definition for avoidance.

82. With respect to the definition contained in paragraph 3 of document A/CN.9/WG.V/WP.76, it was observed that the reference to unincorporated enterprises was necessary as those enterprises were subject to insolvency proceedings in a number of States. It was added that that approach was in line with recommendation 8 of the Legislative Guide. Similar remarks were made with respect to the inclusion of a reference to natural persons in that definition.

83. It was further suggested that, while the reference to contractual arrangements in the draft definition of "corporate group" should be maintained, those contracts, such as franchising agreements, which did not entail any control between contract parties, should be excluded.

84. After discussion, the Working Group requested the Secretariat to prepare a new draft definition of "corporate group" in light of the comments expressed above.

C. International issues

1. Jurisdiction to commence insolvency proceedings: centre of main interests (COMI)

85. The Working Group deferred its discussion of the topic of jurisdiction on the commencement of insolvency proceedings to a future session.

2. Treatment of assets on commencement of insolvency proceedings

(a) Joint administration

86. The Working Group agreed to discuss joint administration of insolvency proceedings in the international context at a later session, in conjunction with consideration of the revised recommendations on joint administration in the domestic context.

(b) Post-commencement finance: recommendations 25-33

87. With respect to post-commencement finance, the Working Group noted that some of the revisions agreed with respect to the recommendations on post-commencement finance in the domestic context (see paragraphs 39-60 above), such as the references to the corporate group obtaining such finance, would need to be reflected also in recommendations 25-33, since it would be desirable to have the same rules in both contexts.

88. It was noted, however, that a number of issues arising in the international context did not apply domestically, in particular the issue raised by draft recommendation 27 and the transfer of value between members of the corporate group. It was added that those issues might require the adoption of an approach different from that taken in the domestic context. It was suggested, for example, that the movement of assets in the group context might be governed by economic considerations that would lead to the adoption of a more flexible approach and to a greater willingness to permit those transfers. It was also suggested that the need for greater flexibility should be reflected in the draft text.

89. It was further observed that the recommendations should focus upon the conditions under which post-commencement finance might be available.

90. Concern was expressed with respect to draft recommendation 26 on the basis that it was not clear from the current draft which insolvency representative would be in a position to obtain finance in a corporate group context and on behalf of which entity that finance would be obtained. It was noted in response that the answer to that question might depend upon whether there was a joint administration of the group members or individual insolvency proceedings of those members, each with a distinct insolvency representative.

91. After some preliminary discussion, the Working Group agreed that further discussion of those recommendations should take place at a later session when the revised recommendations on post-commencement finance in the domestic context could be further considered.

3. Remedies: substantive consolidation

4. Reorganization: unified reorganization plans

5. Other issues: conflict of laws

92. The Working Group noted that issues relating to substantive consolidation, unified reorganization plans and conflict of laws raised a number of complex questions in the international context and deferred their consideration to a later session after further discussion of those issues in the domestic context.

D. Form of future work

93. The Working Group agreed that at this stage a decision on the form of its work was not possible. It was generally agreed that the Legislative Guide should form the starting point for that work, and that the issues raised by the treatment of corporate groups in insolvency should be carefully analysed and specific provisions should be developed where required for that context.

94. It was further agreed that working papers in the format of A/CN.9/WG.V/WP.76 and its addenda facilitated the deliberations of the Working Group on the various issues relating to treatment of corporate groups in insolvency, and that that approach should be continued.