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Report of Working Group V (Insolvency Law) on the work of its thirty-fifth session

(Vienna, 17-21 November 2008)

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 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. The Working Group agreed at its thirty-first session, held in Vienna from 11 to 15 December 2006, 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 current work was intended to complement those texts, not to replace them (see A/CN.9/618, para. 69). A possible method of work would entail the consideration of those provisions contained in 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 consideration (see A/CN.9/618, para. 70).

3. The Working Group continued its consideration of the treatment of corporate groups in insolvency at its thirty-second session in May 2007, on the basis of notes by the Secretariat covering both domestic and international treatment of corporate groups (A/CN.9/WG.V/WP.76 and Add.1). For lack of time, the Working Group did not discuss the international treatment of corporate groups contained in document A/CN.9/WG.V/WP.76/Add.2.

4. At its thirty-third session in November 2007 and at its thirty-fourth session in March 2008, the Working Group continued its discussion of the treatment of enterprise groups, previously referred to as corporate groups, in insolvency, on the basis of notes by the Secretariat covering domestic treatment of enterprise groups (A/CN.9/WG.V/WP.78 and Add.1 and A/CN.9/WG.V/WP.80 and Add.1 respectively).

II. Organization of the session

5. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-fifth session in Vienna from 17 to 21 November 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Bolivia, Bulgaria, Canada, China, Colombia, Czech Republic, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Latvia, Lebanon, Malaysia, Mexico, Mongolia, Morocco, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Republic of Serbia, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Angola, Argentina, Belgium, Congo, Côte d'Ivoire, Denmark, Dominican Republic, Indonesia, Iraq, Ireland, Jordan, Kiribati, Lithuania, Netherlands, Peru, Qatar, Romania, Saudi Arabia, Slovakia, Slovenia, Togo, Tunisia and Yemen.

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

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

(b) **Intergovernmental organizations**: European Central Bank (ECB), International Association of Insolvency Regulators (IAIR), and Organization For Economic Co-operation and Development (OECD);

(c) Invited **international non-governmental organizations**: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), American Bar Foundation (ABF), Centre for International Legal Studies (CILS), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Women's Insolvency & Restructuring Confederation (IWIRC), International Working Group on European Insolvency Law (IWGEIL), and Union internationale des avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mr. Kofo Salam-Alada (Nigeria)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.81);

(b) A note by the Secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.82 and Add.1-4);

(c) A note by the Secretariat on cooperation, communication and coordination in cross-border insolvency proceedings (A/CN.9/WG.V/WP.83);

(d) An extract from the Report of Working Group VI (Security Interests) on the work of its fourteenth session (Vienna, 20-24 October 2008) (A/CN.9/667, paragraphs 129-143).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of cooperation, communication and coordination in cross-border insolvency proceedings, the treatment of enterprise groups in insolvency and the impact of insolvency on a security right in intellectual property.
5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its discussion of cooperation, communication and coordination in insolvency proceedings on the basis of document A/CN.9/WG.V/WP.83 and continued its discussion of the treatment of enterprise groups in insolvency on the basis of documents A/CN.9/WG.V/WP.82 and Add.1-4 and other documents referred therein. The Working Group also considered the impact of insolvency on a security right in intellectual property on the basis of paragraphs 129-143 of document A/CN.9/667. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Cooperation, communication and coordination in cross-border insolvency proceedings

12. The Working Group commenced its discussion of cooperation, communication and coordination in insolvency proceedings on the basis of document A/CN.9/WG.V/WP.83, the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings ("the Notes").

13. The Working Group expressed its appreciation for the completeness and comprehensiveness of the Notes and emphasized their importance in view of the current financial crisis and the increasing incidence of insolvency cases involving cross-border proceedings.

A. Format

14. The question was raised of how the Notes should be published, whether, for example, as a stand-alone publication or a complement to the UNCITRAL Legislative Guide on Insolvency Law ("the Guide") or the UNCITRAL Model Law on Cross-border Insolvency ("the Model Law"). Broad support was expressed in favour of publishing the Notes as a stand-alone publication on the basis that that approach would both recognize the important educational function of the Notes and facilitate and expedite their wide dissemination. It was observed that publication as a complement to the Model Law might unnecessarily limit the applicability of the Notes, as the Model Law had not yet been universally enacted. Moreover, care should be taken to ensure the Notes were not viewed as replacing the Model Law, but rather expanding upon articles 25-27 of that text. It was suggested that the Notes could be published in a form, for example on the UNCITRAL website, that would enable them to be regularly updated as practice with respect to cross-border agreements developed.

B. Content

15. The Working Group recalled that the Notes were based on the Commission's mandate that the Secretariat should compile practical experience with regard to the use and negotiation of cross-border insolvency agreements.[1] In that light, it was emphasized that the Notes constituted a descriptive, not a prescriptive, text.

16. The Working Group viewed the inclusion of references to individual cross-border agreements as particularly useful, as they constituted good illustrations of current practice. It was pointed out that some cross-border agreements were made between parties that might have had a vested interest in the content of the agreement and while most addressed legitimate topics, some went further, addressing substantive issues that might not always need to be included.

17. The Working Group noted that the use of cross-border agreements might vary from jurisdiction to jurisdiction, depending upon the respective powers of judges and insolvency representatives and the content of the insolvency law. The Notes only described existing practice with respect to the use of cross-border agreements and did not suggest that those practices could or should be applicable in all jurisdictions.

18. In addition it was noted that while cross-border agreements constituted informal contracts that could be freely negotiated, they were subject to applicable national law. The Notes did not suggest that an agreement could be used to circumvent national law or the obligations of the parties under that law.

19. It was observed that cross-border agreements could be used to facilitate coordination and cooperation in the case of a single debtor, as well as an enterprise group.

20. With respect to drafting, it was suggested that the language should not be prescriptive and should not offer guidance as to particular approaches. It was also suggested that the notion of comity should be broadly described to reflect the approach adopted in article 7 of the UNCITRAL Model Law. The Working Group agreed that additional sample clauses on procedural aspects of communication, drawing upon the relevant text of Part III of the Notes, should be included.

C. Title

21. With respect to the final title of the Notes, it was suggested that the possibility of referring to the text as a guide might be kept in mind. In response, it was said that since the Notes were descriptive in nature, they did not offer guidance and should not constitute a guide. The Working Group agreed to defer a decision on the title to a later stage.

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[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), subpara. 209 (c) and *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 190-191.

D. Circulation of the Notes

22. The Working Group agreed that the Notes should be circulated to Governments for comment prior to its thirty-sixth session in 2009. A revised version should be presented to the Working Group at that session, with a view to consideration and adoption by the Commission at its forty-second session in 2009. In that regard, the Working Group noted that the Commission had decided to plan the work at its forty-second session in 2009 to allow it to devote, if necessary, time to discussing the recommendations of the Working Group on the Notes.[2]

V. Treatment of enterprise groups in insolvency

23. The Working Group continued its discussion of the treatment of enterprise groups in insolvency on the basis of documents A/CN.9/WG.V/WP.82 and Add.1-4 and other documents referred to therein, commencing with international issues as set forth in Add.4.

A. International issues

1. Centre of main interests (COMI)

24. The Working Group first considered the issue of "centre of main interests" as it related to an enterprise group, and in particular the purpose for which it might be important to determine the COMI of an enterprise group and how it might be defined.

25. Various suggestions were made with respect to the purposes for which it might be useful to determine the COMI of an enterprise group. Those included: to determine the jurisdiction for commencement of proceedings with respect to insolvent members of the enterprise group; to facilitate reorganization of the assets of the group; to reduce the scope for forum shopping; to facilitate coordination and cooperation by identifying the group member that would take the lead and determine how proceedings would be coordinated and cooperation would occur; to determine the law that might govern the proceedings; to determine issues relating to the conduct and management of the proceedings, including issues such as cash control, group reorganization plans and facilitating post-commencement finance or to facilitate substantive consolidation of group members.

26. It was generally agreed that, although perhaps desirable, it would be difficult to reach a definition of an enterprise group COMI in order to limit, for example, the commencement of parallel proceedings or to facilitate coordination and cooperation of multiple proceedings commenced with respect to group members. It was emphasized that one key issue with respect to a definition of enterprise group COMI would be the extent to which that definition was accepted, widely adopted and voluntarily enforced by the courts of States affected by it in particular cross-border insolvency cases.

27. In the absence of a system such as in the European Union with respect to automatic recognition of proceedings commenced in other jurisdictions, it was noted

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[2] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 321.

that it would be difficult to avoid parallel proceedings being commenced in multiple jurisdictions, with each seeking to be main proceedings. Such a situation underlined the importance of using cross-border agreements to facilitate coordination and cooperation. It was also noted that determining an enterprise group COMI would not necessarily simplify the number of different laws that might apply in insolvency proceedings and, in particular, that the rights and protection available to creditors in jurisdictions other than the location of the COMI could not be thereby affected. A further observation was that substantive consolidation would be very difficult to achieve without the unanimous support of the courts of all States in which insolvency proceedings had commenced with respect to group members.

28. Different suggestions were also made as to how the COMI of a group might be identified and whether a single factor would be sufficient. Factors suggested included: the place from which the financial affairs of the group were coordinated; the place where group policy was set and management decisions made; the place where manufacturing occurred; the place from which the group was controlled, in accordance with the explanation of control in the glossary (A/CN.9/WG.V/WP.82); and the place of the registered office of the group, as set forth in article 16 (3) of the Model Law.

29. In response, it was observed that a single factor, such as the financial focus of the group, might be too narrow. For example, the financial parent of the group might not be insolvent and therefore not involved in the insolvency proceedings, the financial focus might be in a location different to the main business activities of the group or there might be particular reasons, such as the availability of taxation advantages, for choosing one location over another for the financial centre of a group, unrelated to the location of its business activity.

30. It was also observed that while the presumption contained in article 16 (3) of the Model Law could apply to members of an enterprise group, it could not directly apply to an enterprise group as such, since groups generally did not have a registered office or habitual residence under national law. In that regard, however, it was proposed that article 16 (3) might form the basis of a rebuttable presumption concerning the centre of main interests of the member that was determined to control the enterprise group. The factors listed in paragraphs 6 and 13 of document A/CN.9/WG.V/WP.82/Add.4 might be relevant to rebuttal of that presumption.

31. Some support was expressed in favour of that proposal, with several qualifications. Those were: that the controlling group member should be regarded only as a first among equals that could lead the coordination and cooperation and not as having a number of additional powers with respect to the conduct or management of the proceedings; that the form of any such rule should adopt the same facilitative approach as the Model Law, i.e. supporting and encouraging the identification of such a controlling party, but not going so far as to suggest that that party should automatically be recognized in all jurisdictions; and that the factors that might be relevant to rebuttal of that presumption should be regarded collectively, rather than individually. The view was expressed that the use of the factor of third-party perception could create difficulties in practice.

32. The Working Group concluded: that the presumption contained in article 16 (3) of the Model Law was not directly applicable in the context of

enterprise groups; that providing a rule on the COMI of an enterprise group could be useful to facilitate coordination of multiple insolvency proceedings with respect to group members; and that that rule might establish a rebuttable presumption along the lines of article 16 (3) for determining the seat of the controlling group member, with the factors relevant to rebutting that presumption being based upon those factors set forth in paragraphs 6 and 13 of A/CN.9/WG.V/WP.82/Add.4. Those factors should be considered collectively. The Secretariat was requested to prepare the draft text of a commentary and recommendation based upon the discussion in the Working Group.

2. Post-commencement finance

33. It was widely agreed that post-commencement finance was crucial to the reorganization of enterprise groups and, although raising issues of contractual law, should be addressed by the insolvency law.

34. The Working Group discussed whether it could formulate recommendations on post-commencement finance, perhaps on the basis of draft recommendations 10-13 on the provision of post-commencement finance in the domestic context as set forth in document A/CN.9/WG.V/WP.82/Add.2, or whether it should address the subject only in the commentary. Broad support was expressed in favour of developing a recommendation to enhance predictability and provide the necessary authorization.

35. One view was that since the international context was different from the domestic situation, any recommendations addressing the former would have to depart from the approach of draft recommendations 10-13. It was observed, for example, that benefit to the creditors in the borrowing jurisdiction might cause prejudice to creditors in the lending jurisdiction. On that basis, coordination between the different jurisdictions was required and might involve agreement of all affected parties. A recommendation might provide that where such agreement was reached, the insolvency law should provide the necessary authorization for the parties to proceed. It was recalled that the recommendations of the Guide sought to provide that necessary authorization.

36. Another view was that draft recommendations 10-13 neither implicitly nor explicitly excluded post-commencement finance in the international context and needed only to be made subject to conflict of laws rules. The Working Group agreed to revisit the issue of a recommendation after discussion of draft recommendations 10-13.

37. It was suggested that the Working Group should, in addition to considering post-commencement finance, consider the question of post-application finance.

3. Coordination and cooperation

38. With respect to coordination and cooperation, the Working Group was of the view that while it might be possible to include in the work on enterprise groups a recommendation encouraging legislators and courts to draw inspiration from the Notes, it would be difficult to reach agreement on any specific text at the current session. It was agreed that that question should be considered at a future session. There was support for including a recommendation promoting the adoption of the Model Law.

4. Other issues

39. The Working Group agreed to take up the international aspects of procedural coordination, substantive consolidation, appointment of a single insolvency representative and a single reorganization plan at the same time as it considered the recommendations on the domestic treatment of those issues.

B. Domestic issues

40. The Working Group continued its consideration of the treatment of enterprise groups in insolvency proceedings in the domestic context as set forth in A/CN.9/WG.V/WP.82 and Add.1-3.

41. The Working Group agreed that the introduction to enterprise groups as set forth in A/CN.9/WG.V/WP.82 provided very useful background to the topic and should be retained in the final work product.

1. Glossary (A/CN.9/WG.V/WP.82)

42. With respect to the terms and explanations set forth in the glossary, the Working Group made the following suggestions.

(a) "Enterprise group"

43. (i) The last phrase should read "ownership and control" rather than "ownership or control", but if the disjunctive were to be retained some explanation or reference to the significance of the level of ownership (e.g. "majority" or "substantial") required should also be included.

(ii) The reference to "ownership" should be deleted, as ownership was only one example of how control might be obtained.

44. After discussion, the Working Group agreed that ownership should be retained in the disjunctive, but should be qualified by adding the word "significant".

(b) "Enterprise", "control" and "procedural coordination"

45. The Working Group approved the substance of the explanations of "enterprise", "control" and "procedural coordination" as set forth in paragraphs (b)-(d).

(c) "Substantive consolidation"

46. (i) The explanation should refer to the "treating" of assets as if they were part of a single insolvency estate, rather than to assets being combined to create a single insolvency estate.

(ii) To address partial substantive consolidation, the explanation should refer to "some or all of" the assets and liabilities.

47. The Working Group approved those two suggestions.

2. Joint application (A/CN.9/WG.V/WP.82/Add.1)

48. The Working Group discussed the application and commencement of insolvency proceedings of enterprise groups in the domestic context on the basis of draft recommendations 1 and 2.

Purpose Clause

49. The Working Group considered the revised purpose clause and approved it in substance. The Working Group further agreed to clarify in a footnote that each group member would preserve its separate legal entity in the context of a joint application for commencement of insolvency proceedings consistent with paragraph (a) of the purpose clause of the recommendations on substantive consolidation (A/CN.9/WG.V/WP.82/Add.3).

Recommendation 1

50. A request for clarification was made as to whether under draft recommendation 1 (b) the creditor making a joint application had to be a creditor of all group members included in the joint application. In response, it was confirmed that that was the intention of draft recommendation 1 (b) and there had to be a direct relationship between a creditor and the concerned group member. After discussion, the Working Group requested the Secretariat to revise draft recommendation 1 to clarify that, in order to make an application, a creditor had to be a creditor of all group members included in the joint application.

Recommendation 2

51. It was noted that draft recommendation 2 did not provide criteria to identify the competent court for a joint application. It was noted, however, that those criteria were included in paragraph 23 of the commentary with respect to procedural coordination and would apply equally to joint applications.

52. It was observed that while draft recommendation 2 addressed the competent court, it did not address the question of the debtors covered by the insolvency law, two matters that insolvency laws generally addressed together. It was recalled that since the recommendations of the Guide applied automatically to enterprise groups if not otherwise stated, recommendation 10 of the Guide would address, in that context, the issue of which debtors were covered by the insolvency law. The Working Group agreed to include a reference to recommendation 10 of the Guide in the commentary.

3. Procedural coordination

Purpose clause

53. Noting that the purpose clause had not been revised from its previous session, the Working Group approved it in substance.

Recommendations 3 and 4

54. The question was raised as to whether the list included in draft recommendation 3 (b) was intended to be exhaustive. It was agreed that it was not

so intended and that appropriate language should be found to ensure the list was indicative only.

55. It was pointed out that the order of draft recommendations 3 and 4 might be interpreted as suggesting that the court could initiate procedural coordination without having an application before it under draft recommendation 4. In that regard, the Working Group's attention was drawn to paragraph 22 of the commentary which also suggested that the court might have that power. It was recalled that the Guide generally did not provide for courts to act on their own initiative in insolvency matters, an issue that was referred to in paragraph 24 of A/CN.9/WG.V/WP.82/Add.3. After discussion, it was agreed that the approach of the Guide should be maintained. Accordingly, it was agreed that paragraph 22 should be revised and the order of draft recommendations 3 and 4 reversed, with some appropriate language being added to ensure that the court would only make its decision on the basis of an application as currently addressed under draft recommendation 4.

56. A question was raised as to whether the court, in making an order for procedural coordination, would be limited to making the orders sought in the application. After discussion, it was agreed that that matter should be left to domestic law, but that some explanation could be included in the commentary.

57. A further question was raised as to whether the creditors referred to in draft recommendation 4 (c) should be only those creditors permitted to apply for commencement of insolvency proceedings, as there might be States where not all creditors could do so. It was recalled that the Guide recommended (recommendation 14) that all creditors of a debtor should be entitled to apply for commencement of insolvency proceedings. Since the recommendations on enterprise groups built upon the recommendations of the Guide, the distinction raised would not occur.

58. It was also questioned whether, since draft recommendation 3 (c) provided that an application for procedural coordination might be made at the time of application for commencement or later, a distinction should be made between the creditors entitled or qualified to apply at those two different times. After discussion, there was support for the view that procedural coordination should be available as widely as possible with respect to members of the same enterprise group. It was concluded that the limitation imposed by draft recommendation 4 (c), that a creditor could only apply for procedural coordination of two or more members of an enterprise group if it was a creditor of those two or more members, could not be sustained.

59. Where the application for procedural coordination was made at the time of the application for commencement, the issue of commencement should be treated separately from procedural coordination in terms of the eligibility of creditors. Similarly, once proceedings had commenced against two or more members, there should be no requirement that a creditor could only apply for procedural coordination with respect to the members of which it was a creditor. The decision to order procedural coordination should not be conditioned upon the qualifications of the creditor. Accordingly, it was agreed that draft recommendation 4 (c) should be revised to provide that an application for procedural coordination might be made by a creditor of a group member subject to insolvency proceedings.

Recommendation 5

60. The Working Group approved the substance of draft recommendation 5.

Recommendation 6

61. The Working Group approved the substance of draft recommendation 6.

Recommendations 7-9

62. The Working Group approved the substance of draft recommendations 7-9.

International issues

63. It was noted that draft recommendations 3-9 were not directly applicable in the international context, as they raised certain issues such as the determination of the competent court and the applicable law that had to be treated differently. It was further noted that a reference to the Model Law would not be sufficient to settle the coordination of proceedings involving different group members as it only addressed the coordination of parallel proceedings concerning the same debtor. A more appropriate reference might be to the Notes, which described existing practices between different jurisdictions on coordinating parallel proceedings, including proceedings concerning enterprise group members. It was suggested that the interpretation of the parts of the Model Law on coordination might be expanded to apply to enterprise groups. It was observed that using the concept of COMI (centre of main interests) might cause unnecessary difficulties in the context of enterprise groups as it was generally equated with the site of the main proceeding. To address that concern, the COMI of a group could be considered as establishing the "primary proceeding", "centre of coordination" or "nerve centre" of the group.

64. The Working Group recalled its conclusion that it might be possible to include in the work on enterprise groups a recommendation concerning the Notes (see above, para. 38) and agreed that commentary on the international issues concerning procedural coordination should address the limited application of the Model Law in the context of enterprise groups.

4. Post-commencement finance (A/CN.9/WG.V/WP.82/Add.2)

Purpose clause

65. The substance of the purpose clause was approved by the Working Group.

Recommendations 10-13

66. A view was expressed that since draft recommendations 10-13 did not apply to lenders external to the enterprise group and the recommendations of the Guide were insufficient in that regard, the draft recommendations should be modified to include external lending and permit the consideration not only of the effect of such lending on each group member, but also the benefit of that lending to the group as a whole. In response, it was questioned whether the purpose of the provisions on post-commencement finance in the enterprise group context was, following the principle of the separate legal entity, the benefit to the individual group member or to the enterprise group overall. Recalling the Working Group's agreement on the key importance of the separate legal identity of each group member, consideration of

group benefit would be, it was suggested, inconsistent with that agreement. It was also observed that if the recommendations were to address the issue of the benefit of the group as a whole, problems might arise with respect to obtaining the consent to post-commencement finance of all creditors and addressing any objections.

67. Some clarification was provided as to the scope of the draft recommendations. It was suggested, for example, that insolvent group members might be requested to guarantee finance provided to solvent group members, a situation not covered by the current draft. In response, it was observed that such a situation would amount to a disposal of the assets of the insolvent group member which would be covered by the recommendations of the Guide addressing that issue.

68. An example was given regarding the constraints on an insolvency representative to agree to external post-commencement finance due to the risk to the insolvency representative personally, because that post-commencement finance might be considered to be detrimental to creditors of the individual company to which the insolvency representative had been appointed, but which the insolvency representative could see, and the court could be persuaded, would be likely to lead to better results for the group as a whole including ultimately the creditors of that particular member.

69. A question raised was whether the safeguards included in draft recommendations 10-13 were sufficient to protect the interests of creditors. One concern was that while they might be sufficient in the context of reorganization where the reorganization was successful, they might prove insufficient if that reorganization were to fail.

70. After discussion, the Working Group concluded that: the approach to post-commencement finance should be based upon the separate legal identity of each group member; recommendation 63 of the Guide was adequate to address external lending to an insolvent group member; draft recommendations 10 and 12 were sufficient to address the provision of a security interest or guarantee by an insolvent group member for post-commencement finance provided to another group member; and the commentary should address the question of disposal of assets.

71. With respect to draft recommendation 11, the Working Group agreed to replace “may” with “should” in the first line and to delete the last sentence to address the concern that it would not be acceptable in many jurisdictions to have the priority determined by the court.

72. With respect to draft recommendation 12, the Working Group agreed to delete the words “subject to insolvency proceedings” in the fourth line, so as not to unnecessarily limit the scope of application.

73. The Working Group approved draft recommendation 13 in substance.

Pre-commencement or post-application finance

74. In the course of the discussion of post-commencement finance, it was again suggested that pre-commencement or post-application finance should also be addressed (see above, para. 37). In response, it was observed that pre-commencement or post-application finance was already covered in the Guide by the recommendations on provisional measures (recommendation 39).

International issues

75. It was noted that draft recommendations 10-13 were not directly applicable in the international context, as various difficulties, such as matters of competence and priorities for certain types of claims under the applicable law, arose in that context. In that regard, it was noted that for the purposes of approving post-commencement finance, only the competent court would have the requisite authority and would have to apply the priorities applicable under its law. It was further noted that the issue of jurisdiction might be solved in a reorganization plan. The Working Group generally agreed that the Notes were very important in respect of post-commencement finance in the international context.

5. Avoidance proceedings

Purpose clause

76. The question was raised as to whether the reference to "persons" in paragraph (d) related only to group members or might also include natural persons, such as management of group members or other insiders involved in transactions with group members. One view was that it only related to group members. A different view was that it should also include natural persons. In response, it was suggested that the recommendations of the Guide should be sufficient to address transactions between group members and individuals. After discussion, it was agreed that the focus of those recommendations should be transactions between group members and that in order to clarify the scope of paragraph (d), the words "including group members" could be added after the word "persons".

Recommendation 14

77. The question was raised as to what, in addition to the recommendations of the Guide, the draft recommendation sought to achieve. One view was that the recommendations of the Guide were sufficient to address all aspects of avoidance of transactions between group members and introducing additional considerations such as those in draft recommendation 14 might suggest different rules applied to single debtors and debtors that were enterprise group members. Another view was that draft recommendation 14 sought not to extend recommendation 87 of the Guide, but to set out the special considerations that might apply with respect to transactions occurring between group members. It was noted that group members would generally be considered to be "related persons" within the meaning of that term in the Guide.

78. After discussion, the Working Group agreed that draft recommendation 14 should be retained with the words "related persons in an enterprise group context" being replaced with the words "enterprise group members".

Recommendation 15

79. To reflect the clarifications agreed with respect to draft recommendation 14, it was agreed that the words "in the context of insolvency proceedings with respect to two or more enterprise group members" should be replaced with the words "between enterprise group members". With that revision, the substance of draft recommendation 15 was approved.

6. Subordination

80. The Working Group agreed that the commentary on subordination was useful and should be retained. A proposal that recommendations should also be developed did not receive support.

7. Substantive consolidation (A/CN.9/WG.V/WP.82/Add.3)

Purpose clause

81. Noting that the words "is available" in paragraph (c) should be replaced with the words "may be made available" to reflect the decision at its thirty-fourth session, the Working Group approved the substance of the purpose clause.

Recommendation 16

82. The Working Group approved the substance of draft recommendation 16.

Recommendation 17

83. Recalling the discussion with respect to the order of draft recommendations 3 and 4, it was questioned whether draft recommendations 17 and 18 should be reordered to address the same concerns (see above, para. 53) and whether substantive consolidation could be ordered at the initiative of the court. With respect to the latter point, it was noted that that issue had also been considered with respect to procedural coordination and that the Working Group had agreed that, consistent with the approach of the Guide, it should not be addressed, but left to national law. In that regard, reference was made to paragraph 24 of the commentary in A/CN.9/WG.V/WP.82/Add.3.

84. With respect to the ordering of the draft recommendations, the view was expressed that given the particular nature of substantive consolidation, draft recommendation 17 should clearly set forth the conditions under which substantive consolidation might be ordered by the court. Greater clarity as to the nature of draft recommendation 17 might be achieved by a heading along the lines of "Conditions under which substantive consolidation may be ordered". After discussion, it was agreed that the order of draft recommendations 17 and 18 could be considered in the light of the decision with respect to draft recommendations 3 and 4 to ensure it was clear that court orders for both procedural coordination and substantive consolidation could only follow upon an application by the specified parties.

85. A proposal to add the word "only" before the words "in the following circumstances" in the chapeau was not widely supported on the basis that that limitation was already apparent from the structure of draft recommendation 17 and from the last sentence of draft recommendation 16. A proposal to delete the words "of insolvency proceedings" in the chapeau was supported.

Recommendation 18

86. A proposal that the parties permitted to apply for substantive consolidation might include shareholders did not receive support. It was observed that since the parties most likely to have the information necessary to make an application for substantive consolidation would be the insolvency representative or the court itself,

it was difficult to see why creditors were included in paragraph (a), but there was no support for deleting their inclusion.

87. With respect to paragraph (b), it was suggested that some further limitation needed to be added to the words "at any subsequent time" to take account of the practical impossibility of pursuing substantive consolidation at an advanced stage of the proceedings. It was suggested that since paragraph 25 of the commentary addressed that issue, no further qualification might be required.

Recommendation 19

88. The Working Group agreed that there might need to be some reordering of the paragraphs of draft recommendation 19 to ensure the key effect of substantive consolidation, i.e. the creation of a single consolidated estate, was clearly stated. With respect to paragraph (c), the question was raised as to how that might apply in practice, given the substantive effect of an order for substantive consolidation on the rights of different creditors. A proposal to add the words "in so far as possible" received some support. It was agreed that the words in square brackets at the end of the paragraph should be deleted. A question was raised with respect to the interpretation of paragraph (c) in view of the extinguishment of intra-group debts and claims under paragraph (a).

89. With respect to paragraph (d), a suggestion that the word "combined" or "joint" would better explain the type of creditor meeting that was intended and avoid any suggestion that only one such meeting could be held, was widely supported.

Recommendation 20

90. The question was raised whether draft recommendation 20 could be deleted on the basis that draft recommendation 19 provided sufficient clarification as to the overall effect of substantive consolidation. One view was that paragraphs (a)-(c) could be deleted as they not only repeated principles expressed elsewhere and were clear and obvious consequences of substantive consolidation, but might also be misleading. In particular, it was suggested that paragraphs (a)-(c) might be regarded as establishing the only exceptions to the principle expressed in the chapeau. A different view was that the draft recommendation provided certainty and predictability for creditors and although stating principles that might be clear to some, they were not necessarily clear to all. After discussion, the Working Group agreed to retain the current text of draft recommendation 20 and to clarify in the commentary the illustrative nature of paragraphs (a)-(c).

91. It was suggested that the issue of whether draft recommendation 20 would result in a security interest over some or all of the assets of one group member extending to become a security interest over all of the consolidated assets should be addressed in the commentary.

Recommendation 21

92. The Working Group approved the substance of draft recommendation 21 and agreed that the reasons for making an order for partial substantive consolidation should be addressed in the commentary.

Recommendation 22

93. It was observed that the draft recommendation was unnecessarily complicated and that a statement of the principle in the chapeau would be sufficient. A different view was that because the draft recommendation dealt with a complex and difficult issue and the examples enhanced the understanding of the reader, it should be retained as drafted. The degree of specificity of the recommendation would help to avoid the suspect period being unjustifiably extended or shortened where substantive consolidation occurred. The Working Group approved the substance of draft recommendation 22.

Recommendations 23

94. In response to a question as to the scope of the draft recommendation, it was clarified that the term "modification" did not include termination of the order for substantive consolidation. It was suggested that the draft recommendation should address the issue of who may apply for an order for modification. After discussion, the Working Group approved the substance of the draft recommendation.

Recommendations 24-25

95. The Working Group approved draft recommendations 24-25 in substance.

International issues

96. It was noted that the Model Law did not apply to enterprise groups and currently had limited application. Moreover, the Model Law might only apply in terms of facilitating cooperation after substantive consolidation had been achieved in a domestic context. That was a complex issue and one that would require not only wide acceptance of substantive consolidation, but also agreement by all concerned States that particular group members should be substantively consolidated cross-border. Once that position had been reached, the Model Law and cross-border agreements could be used to facilitate cooperation. It was suggested that the commentary should address the situation where some members of an enterprise group were consolidated in one jurisdiction, while other members in a different jurisdiction were not.

8. Participants

Appointment of an insolvency representative

Purpose clause

97. The Working Group approved the purpose clause in substance.

Recommendation 26

98. In response to a question of whether it might be possible to extend the reference to "court" in the draft recommendation to other bodies, such as those responsible for supervising insolvency representatives, it was clarified that, in accordance with the explanation in the glossary to the Guide, the reference to "court" might also include a judicial or other authority competent to control or supervise insolvency proceedings.

99. The suggestion was made that the test of "the best interests of the administration" should be replaced with the more familiar test of "the best interests of creditors". That suggestion did not receive support on the basis that the purpose of draft recommendation 26 was efficient administration and the former test better captured the goals of insolvency proceedings in different jurisdictions.

[*a single*] [*the same*]

100. Support was expressed in favour of both alternatives and after discussion it was agreed that the two options should be retained as alternatives, with the square brackets deleted. The manner in which a single or the same insolvency representative was appointed to different group members, e.g. by a single or several orders, would depend on the domestic law.

Recommendation 27

101. It was noted that the use of the word "one" in draft recommendation 27 should be aligned with the approach agreed with respect to draft recommendation 26.

102. It was suggested that since more than one conflict of interest might arise in the context of the appointment of a single or the same insolvency representative, the word "any" should be used in the first line of the draft recommendation. With respect to the commentary, it was suggested that the possibility of a conflict of interest arising in connection with the lodging and verification of claims and the need for an insolvency representative appointed to several group members to keep information on each enterprise group member separate (particularly in substantive consolidation), should be addressed. The Working Group agreed to those proposals.

Recommendation 28-29

103. The Working Group approved draft recommendations 28-29 in substance.

Recommendation 30

104. The Working Group approved draft recommendation 30 with replacement of "may" in the chapeau with "should", in order to emphasize the importance of cooperation.

International issues

105. It was noted that questions of competency would create difficulties with regard to the appointment of a single or the same insolvency representative in the international context. However, it was also noted that a single or the same insolvency representative could be appointed to proceedings in different jurisdictions provided they were qualified to be appointed in each of those jurisdictions and that that approach would be desirable to facilitate cooperation.

9. Reorganization of two or more enterprise group members

Purpose clause

106. To avoid any suggestion that the word "approval" in paragraph (d) would allow a single plan to be approved in some way other than by the creditors of each

relevant member in accordance with the recommendations of the Guide, the Working Group agreed that "approval" should be replaced with "proposal".

107. Concerns were expressed with respect to the use of the word "single" and how it should be interpreted. It was suggested that the essence of the recommendation was coordination of the reorganization plan and that the "single" plan might be reached in different ways. The proposal of such a plan would not, however, affect the manner in which it had to be approved, as noted above.

Recommendation 31

108. In view of the conclusion reached with respect to the purpose clause, it was agreed that the word "approved" should be replaced with the word "proposed". It was suggested that the issue of approval should be addressed in the commentary, but not in the recommendations.

Recommendation 32

109. It was noted that the participation of a solvent group member as proposed in draft recommendation 32 could only occur voluntarily and as the result of a decision by management of that member in accordance with applicable law. Although a decision to so participate might affect the rights of creditors and shareholders, the solvent member should nevertheless be bound by the reorganization plan once approved. To the extent the final sentence of the draft recommendation might dilute that consequence, it should be deleted. The Working Group agreed to that proposal, suggesting that the commentary should elaborate upon the relevant issues. It was also suggested that the ways in which a solvent member might participate under draft recommendation 32 should be discussed in the commentary. A further suggestion was that the voluntary nature of the participation was clear from the commentary, but not from the drafting of the recommendation. The Secretariat was requested to prepare a revision of the draft recommendation that would better reflect the voluntary nature of the participation.

International issues

110. It was noted that provided the proceedings commenced in different jurisdictions were reorganization proceedings, all group members could propose the same plan, subject to domestic law with respect, for example, to priorities. The Working Group agreed that that approach should be discussed in the commentary, together with the role of cross-border agreements, cooperation and coordination.

10. Format of work on enterprise groups

111. The Working Group agreed that the recommendations and commentary on enterprise groups should be published as part III of the Guide, with the recommendations following in sequence from those of the Guide. That approach to publication would emphasize not only that the work on enterprise groups was complementary and closely related to the treatment of single debtors in the Guide, but also that it was an integral part of the legislative guidance provided by UNCITRAL on insolvency law reform.

VI. The impact of insolvency on a security right in intellectual property

112. The Working Group commenced its discussion on the issues concerning the impact of insolvency on a security right in intellectual property that had been referred to it by Working Group VI (Security interests) on the basis of paragraphs 129-143 of document A/CN.9/667, the Report of Working Group VI (Security Interests) on the work of its fourteenth session.

113. As a preliminary matter, the Working Group welcomed the reference of those insolvency questions by Working Group VI and the manner in which the questions were posed, noting that it was particularly helpful that the questions posed were specific rather than generic, thus facilitating the provision of an accurate answer that would be useful to Working Group VI. Working Group V agreed that all insolvency issues arising in the course of Working Group VI's deliberations should be referred to Working Group V for consideration.

114. The first of the issues referred was the consideration of four scenarios outlined in the table included at the end of document A/CN.9/667. Those scenarios concerned the impact of the recommendations of the Guide with respect to treatment of contracts in situations where either a licensor or a licensee was subject to insolvency proceedings and the licensor or the licensee had granted a security right in its rights under the licence. The table set forth a draft response to a series of questions relating to those scenarios. The Working Group confirmed that the draft responses accurately reflected the legal impact of the Guide with respect to the questions posed. It was observed, however, that the legal position might usefully be augmented by various practical considerations. Accordingly, it was suggested that those considerations might be included in any commentary prepared on the basis of the legal answers.

115. The second issue was raised in paragraph 133 of document A/CN.9/667 and concerned the possibility that a licensee to a contract rejected by the insolvency representative of the licensor might be permitted, under some laws, to continue to perform that contract notwithstanding the rejection. The Working Group agreed that it was not in a position to properly consider that question without better understanding of the scope and extent of the issues involved and the commentary being proposed by Working Group VI. Particular reference was made to paragraph 134 of part two, chapter II of the Guide, which indicated that various approaches were taken to the question of rejection. To assist its deliberations, the Working Group requested the Secretariat to prepare a working paper, for consideration at its next session that would provide background information on the discussion of the treatment of contracts that had taken place in the course of the development of the Guide and the recommendations that had been adopted.

116. The Working Group reached the same conclusion with respect to the third issue referred to in paragraphs 137-138 of document A/CN.9/667, and requested the Secretariat to include in the working paper to be prepared background information and explanatory material from the Guide that would be relevant to a consideration of those proposals.

117. In reaching the above conclusions, the Working Group took note of the work programme of Working Group VI and the need to consider those issues as soon as possible.