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

(Vienna, 9-13 November 2009)

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 considerations (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, its thirty-fourth session in March 2008, its thirty-fifth session in November 2008 and its thirty-sixth session in May 2009, 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 (A/CN.9/WG.V/WP.78 and Add.1, A/CN.9/WG.V/WP.80 and Add.1, A/CN.9/WG.V/WP.82 and Add.1-4 and A/CN.9/WG.V/WP.85 and Add.1). At its thirty-sixth session, the Working Group decided that the draft recommendations on the international treatment of enterprise groups in insolvency should be included in part three of the Legislative Guide and adopt the same format as the preceding parts of the Legislative Guide (see A/CN.9/671, para. 55).

II. Organization of the session

5. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-seventh session in Vienna from 9 to 13 November 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Belarus, Bolivia (Plurinational State of), Bulgaria, Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Iran (Islamic Republic of), Italy, Japan,

Lebanon, Malaysia, Mexico, Mongolia, Paraguay, Republic of Korea, Russian Federation, Senegal, Serbia, Spain, Switzerland, Thailand, Uganda, 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: Argentina, Belgium, Croatia, Denmark, Dominican Republic, Indonesia, Lithuania, Philippines, Portugal, Romania, Slovakia, Slovenia and United Republic of Tanzania.

7. 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) *Invited international non-governmental organizations*: American Bar Association (ABA), American Bar Foundation (ABF), Center For International Legal Studies (CILS), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Swaps And Derivatives Association (ISDA), International Women's Insolvency & Restructuring Confederation (IWIRC) and Union internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mme. Kaïré Sow FALL (Senegal)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.89);

(b) A note by the Secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.90 and Add.1-2).

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 the treatment of enterprise groups in insolvency.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. 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.90 and Add.1-2 and other documents referred therein. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Treatment of enterprise groups in insolvency

12. The Working Group commenced its work with a discussion on the inclusion of a general purpose clause for the recommendations applicable to enterprise groups in part three of the Legislative Guide.

A. General purpose clause

13. It was generally agreed that there was a need to include a statement of general purpose for the recommendations applicable to enterprise groups in part three of the Legislative Guide. To that end, a text along the following lines was proposed: "The purpose of this part of the Legislative Guide is to permit the courts to consider the insolvency of one or more enterprise group members, within the context of the group where the group is found to exist, in order to promote the key objectives in recommendation 1 in both the domestic and cross-border contexts." Another suggestion made was to include only the wording contained in document A/CN.9/WG.V/WP.90/Add.2, paragraph 3 that "The purpose of this part of the Legislative Guide is to achieve a better, more effective result for the enterprise group as a whole." A further proposal to combine those two suggestions was widely supported.

14. Noting that the insolvency laws of different jurisdictions accorded different roles to the courts in insolvency, a more general formulation deleting the reference to the court was proposed. It was also observed that the purpose was not only better solutions for the enterprise group members, but also for the creditors. The Secretariat was requested to prepare a draft text for further consideration taking account of those various proposals.

15. The Working Group considered and adopted the draft general purpose clause for part three prepared by the Secretariat along the following lines:

> "The purpose of this part is to permit, in both domestic and cross-border contexts, treatment of the insolvency proceedings of one or more enterprise group members within the context of the enterprise group to address the issues particular to insolvency proceedings involving enterprise groups and to achieve a better, more effective result for the enterprise group as a whole and its creditors and, in particular:
>
> "(a) To promote the key objectives of recommendation 1; and
>
> "(b) To more effectively address, in the context of recommendation 5, instances of cross-border insolvency proceedings involving enterprise group members."

16. The Secretariat was requested to place the new purpose clause in the appropriate position in the revised text of part three of the Legislative Guide.

B. International issues

17. The Working Group continued its discussion on the international treatment of enterprise groups in insolvency on the basis of document A/CN.9/WG.V/WP.90/Add.1.

18. It was observed that an element missing from the current draft text was that of recognition of foreign proceedings and enforcement of foreign orders, which were regarded as prerequisites for cross-border cooperation and coordination in many jurisdictions. The concern was expressed that recognition and enforcement were difficult issues, which could require lengthy discussion and might delay the completion of this work. One view was that document A/CN.9/WG.V/WP.90/Add.1, paragraphs 8-10 sufficiently addressed those issues. Another view was that the draft recommendations might be indicated as applying in the international context only where a State had enacted the Model Law. In response, it was said that such wording would unnecessarily limit the application of part three, which was intended to extend the operation of the Model Law and to apply to cross-border insolvency proceedings between jurisdictions that had not enacted the UNCITRAL Model Law, as discussed in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the "Practice Guide"). In that regard, it was suggested that the Practice Guide should be treated more comprehensively in the commentary.

19. In order to reconcile the different views, it was proposed that a recommendation to the effect that foreign proceedings should be recognized under domestic law should be included. A further proposal was to extend the recommendation to provide for access of foreign insolvency representatives to the courts and for recognition of relief. It was observed that providing for recognition and relief might be too ambitious and unnecessarily complex. After discussion, the Working Group agreed to include a new recommendation along the lines that the insolvency law should provide direct access to courts for the foreign insolvency representative.

20. The Working Group considered a draft recommendation prepared by the Secretariat. The substance of a draft recommendation along the following lines was adopted:

Access to courts and recognition of foreign proceedings

"The insolvency law should provide, in the context of insolvency proceedings with respect to enterprise group members,

"(a) Access to the courts for foreign representatives and creditors; and

"(b) Recognition of the foreign proceedings, if necessary under applicable law."

21. The Secretariat was requested to place the draft recommendation in the appropriate position in the revised text of part three of the Legislative Guide.

Draft recommendations 240-247

Purpose Clause

22. The Working Group agreed to include the words "involving courts" after the word "cooperation" in the chapeau, in order to clarify its relationship with the following draft recommendations on cooperation between the courts.

Draft recommendation 240: cooperation between the court and foreign courts or foreign representatives

23. It was observed that the word "other" should be inserted before the words "members of that enterprise group" in the second last line of draft recommendation 240.

24. With respect to the text in square brackets, support was expressed for its deletion as it was viewed as redundant. In support of deletion, it was further stated that the reference to the term "court" could lead to confusion, as in some jurisdictions the competent authority was an administrative authority rather than the courts. In response, it was recalled that the glossary of the Legislative Guide made it clear that the term "court" included a reference to an administrative authority. It was also recalled that the draft recommendation reflected article 27(a) of the Model Law, which referred to that person "acting at the direction of the court" rather than to that person being appointed by the court. Moreover, it was clarified that the reference to the person appointed for that purpose was not a reference to a person who was either an additional insolvency representative or a substitute for an insolvency representative, but rather to a person appointed solely for the purpose of facilitating cooperation, whether between the courts or between the courts and insolvency representatives.

25. After discussion, the Working Group agreed to remove the square brackets, retain the text and align the wording of the draft recommendation with the wording used in the Model Law. The Working Group further agreed to include a footnote to the term "foreign representative" referring to the definition in article 2(d) of the Model Law, in order to clarify its meaning.

Draft recommendation 241: cooperation between the insolvency representative and foreign courts

26. The Working Group adopted draft recommendation 241 in substance.

Draft recommendation 242: cooperation to the maximum extent possible involving courts

27. As a matter of drafting, it was proposed that the reference to recommendations 240 and 241 in the chapeau of draft recommendation 242 was not required and could be deleted. That proposal was supported. A further suggestion was that the words "to the maximum extent possible" should also be deleted from the chapeau on the basis that they might unnecessarily restrict the notion of cooperation. That suggestion was not supported.

28. Other proposals were that the examples of means of communication included in paragraph (b) and the types of documents referred to in paragraphs (c) and (d) should be moved to the commentary and that, since paragraphs (b) to (d) were

simply examples of means of communication referred to in paragraph (a), they could be included in that paragraph. The Secretariat was requested to consider redrafting the recommendation along those lines.

29. Concern was expressed with respect to paragraph (e) and the possibility that it might be interpreted as supporting substantive consolidation in a cross-border context. For that reason, it was suggested that the paragraph should focus on consideration, in a coordinated manner, of insolvency solutions available for group members subject to insolvency proceedings. A further suggestion was to add the words "to facilitate coordination" at the end of paragraph (f). Those proposals were not supported.

30. The relationship in those draft recommendations between cooperation, coordination and communication was questioned. It was suggested, in particular, that coordination and cooperation were distinct concepts and that while paragraphs (a) to (d) of draft recommendation 242 addressed examples of cooperation, paragraphs (e) to (g) related to coordination, which should be addressed in a separate recommendation. While it was recalled that the Model Law treated communication and coordination as examples of how cooperation might be achieved, it was observed that since coordination was of relatively greater importance in the context of enterprise groups than in the case of an individual debtor, a slightly different approach might be justified in those recommendations. A different proposal was that the drafting of recommendation 242 should make it clear that communication and coordination were examples of how cooperation might be achieved. The Working Group supported the latter proposal and agreed that paragraphs (e) to (g) should be retained in the draft recommendation as currently drafted with the deletion of the square brackets.

Draft recommendation 243: direct communication between the court and foreign courts or foreign representatives

31. The concern was expressed that draft recommendation 243 might permit unconditioned communication between courts and foreign courts or foreign representatives. To address that concern, a closer link with draft recommendation 245 was required. Another concern was that since in some jurisdictions such direct communication was not allowed, the provision would create difficulties. In response, it was observed that draft recommendations 243 and 244 were only permissive in nature, not directive. It was further explained that draft recommendations 243-244 were consistent with the corresponding articles of the Model Law.

32. A different concern raised was whether communication between courts and foreign representatives could take place without recognition of the relevant foreign proceedings as provided in the Model Law. The Working Group recalled that it had already discussed that issue and agreed to include a recommendation on access to courts and granting of recognition (see paragraph 20 above). It was also noted that the issue of communication was independent from recognition, which was generally regulated by domestic procedural law and adoption of the Model Law. It was further noted that the Model Law did not condition communication upon recognition.

33. After discussion, the Working Group adopted draft recommendation 243 in substance.

Draft recommendation 244: direct communication between the court and foreign courts or foreign representatives

34. The Working Group adopted draft recommendation 244 in substance and requested the Secretariat to include appropriate references to the Model Law when preparing the final document.

Draft recommendation 245: conditions applicable to cross-border communications involving courts

35. Paragraph (a) was adopted in substance, with the deletion of the alternative text in square brackets.

36. Concern was expressed that paragraph (b) established an obligation to provide notice that was too broad and could operate to hinder, rather than to facilitate communication. It was proposed that if notice were required, it could be provided after the communication had taken place. Alternatively, since the issue of provision of notice was often determined by procedural rules rather than the insolvency law, it was suggested that the recommendation could refer to provision of notice in accordance with applicable law. That approach was widely supported.

37. Further concerns related to the use of the term "affected persons". The first was that it was not a term used in the Legislative Guide and for consistency, the term "parties in interest" should be used. The second was that in the context of the draft recommendation it could be interpreted to include creditors and might therefore be too broad and onerous to implement. After discussion, the Working Group agreed that "affected persons" should be replaced with "parties in interest".

38. The scope of paragraph (c) was also felt to be too broad and potentially difficult to implement, particularly when there were numerous parties that might participate in person in a communication. It was noted that in some States it would be difficult to restrict a party in interest's right to appear and be heard and that the scope of the court's discretion to limit participation in a communication might vary from State to State. A proposal was made to limit the paragraph to participation by insolvency representatives and parties in interest along the following lines: "The insolvency representative should be entitled to participate in person in a communication. A party in interest may participate in accordance with applicable law and when determined by the court to be appropriate." That proposal, with the deletion of the phrase "in person", received support.

39. It was pointed out with respect to paragraph (d) that if the transcript was made part of the record of the proceedings it would be publicly available and the requirement to make it available to specified parties was unnecessary. The Working Group agreed that the draft recommendation should end with the words "as part of the record of the proceedings", with the remaining text deleted.

40. Paragraphs (e) and (f) were approved in substance with the words "affected persons" replaced by the words "parties in interest".

41. The Working Group adopted the substance of draft recommendation 245 with those amendments.

Draft recommendation 246

42. A proposal to revise the chapeau of the draft recommendation as follows was supported: "The insolvency law should specify that a communication made in accordance with these recommendations shall not imply:". For greater clarity, it was proposed that the reference to "these recommendations" be replaced with a specific reference to recommendations 240-245 and that the words "between the courts" be added after the word "communication".

43. A concern was expressed with respect to the use of the words "in controversy" in paragraph (b) and the words "lacking consensus" were proposed as an alternative. Another proposal was to delete the words "in controversy" completely, so that the recommendation would simply refer to "any matter before the court". That proposal was supported. A further concern with respect to paragraph (b) was that it might prevent the courts, in the course of a communication, from reaching agreement with respect, for example, to approval of an agreement in accordance with draft recommendation 254. In response, it was pointed out that paragraph (b) was not intended to exclude explicit agreements being reached, but rather sought to prevent agreement being implied from the fact of communication. It was suggested that that concern might be addressed in the commentary, rather than by adding further text to the recommendation. That solution was supported.

44. The Working Group agreed that the words "[or the foreign court]" should be deleted from paragraphs (b) and (d) on the basis that domestic legislation generally would not address what occurred in a foreign court and, in any event, could not affect decisions taken in those courts.

45. The Working Group adopted the substance of draft recommendation 246 with those amendments.

Draft recommendation 247: coordination of hearings

46. Various views were expressed with respect to the reference to "joint" hearings. One view referred to practical experience with such hearings and suggested that the reference might be retained as reflecting that practical experience, albeit that it was not widespread. Another view was that joint hearings could not be contemplated under domestic law and that the reference should be to "coordinated" hearings. Yet another view was that since the recommendations sought to promote and develop practice with respect to coordination, the reference to "joint" hearings should be retained. It was pointed out that since paragraph 35 of the commentary indicated that the reference to "coordinated hearings" might include joint, simultaneous or parallel hearings, all that was required in the recommendation was a reference to "coordinated hearings". The Working Group agreed to delete the references to "joint" hearings.

47. The Working Group agreed that the last sentence should be retained without the brackets. Since that sentence emphasized the independence of each court, the words "and independence" in the second sentence of the draft recommendation were not required. That solution was agreed.

48. The Working Group adopted the substance of draft recommendation 247 with those amendments.

Draft recommendations 248-250

Purpose Clause

49. The Working Group adopted the draft purpose clause in substance.

Draft recommendation 248: cooperation between insolvency representatives

50. General support was expressed for draft recommendation 248. One suggestion made was to clarify that the "foreign representatives" referred to in draft recommendations 248 and 249 were appointed in insolvency proceedings commenced in other States with respect to other members of that enterprise group. After discussion, the Working Group agreed to include the suggested modification and to retain the text of draft recommendation 248 without the brackets.

Draft recommendation 249: communication between insolvency representatives

51. The Working Group agreed to retain the text of the draft recommendation without the brackets, and to align it with the modification agreed for draft recommendation 248. A proposal to delete the second sentence of draft recommendation 249 was supported.

Draft recommendation 250: cooperation to the maximum extent possible between insolvency representatives

52. A proposal to replace the words "should be implemented" in the chapeau with the words "may be implemented" was broadly supported.

53. The Working Group adopted paragraph (a) of draft recommendation 250 in substance.

54. A proposal to replace the word "use" with the word "conclusion" in paragraph (b) was not supported. After discussion, the Working Group adopted paragraph (b) of draft recommendation 250 in substance without any modification.

55. The concern was expressed that the words "division of the exercise of powers" at the beginning of paragraph (c) suggested that the legal obligations of insolvency representatives could be reduced. To address that concern, it was suggested that the words "division of the exercise of powers and" be deleted. That proposal found broad support. Another proposal made was to delete the words "or leading" in front of the word "role". That proposal was also widely supported. The Working Group adopted paragraph (c) of draft recommendation 250 in substance with both proposed modifications.

56. The Working Group adopted paragraphs (d)-(e) of draft recommendation 250 in substance.

57. A proposal to align the wording of paragraph (e) of draft recommendation 242 with the wording used in paragraph (d) of draft recommendation 250 to avoid the reference to "assets" was supported.

Draft recommendations 251-252

Purpose clause

58. The Working Group agreed that the draft purpose clause should more closely reflect the content of draft recommendations 251 and 252 and include the idea that the appointment of the same or a single insolvency representative was only appropriate in some cases and would be the result of careful consideration by the court, as well as noting the need to address conflicts of interest.

59. It was also suggested that those ideas should be discussed in the commentary, with emphasis being given to the need for the insolvency representative appointed in such circumstances to have the necessary qualifications and international experience.

Draft recommendation 251: appointment of the same insolvency representative and draft recommendation 252: conflict of interest

60. The Working Group agreed to retain the text "in appropriate cases" in draft recommendation 251, deleting the brackets, and to move the second text in brackets to the purpose clause. The Working Group also agreed to retain draft recommendation 252 as drafted and delete the brackets. It was noted that the use of the phrase "the same or a single" was not consistent in that section and should be aligned.

61. The Working Group adopted the substance of draft recommendations 251 and 252 with those amendments.

Draft recommendations 253-254

Purpose clause

62. A proposal was made to add a reference to approval by the creditor committee to the draft purpose clause. Although acknowledging that creditor committees may have a role to play with respect to approving cross-border insolvency agreements, the Working Group adopted the substance of the draft purpose clause with the deletion of the brackets.

Draft recommendations 253: authority to enter into cross-border insolvency agreements and draft recommendation 254: approval or implementation of cross-border insolvency agreements

63. Despite initial support for retaining the text "to the extent permitted or in the manner required by applicable law" in draft recommendation 253, it was agreed, after discussion, that those words should be deleted as they might unnecessarily limit the use of insolvency agreements where applicable law contained such limitations. It was emphasized that the purpose of the recommendation was to promote the use of such agreements, particularly in situations where the law currently contained potential barriers to their use.

64. The retention of the text "involving two or more members of an enterprise group" without the brackets in both draft recommendations was generally supported.

65. The Working Group adopted the substance of draft recommendations 253 and 254 with those amendments.

Commentary

66. It was agreed that the Secretariat would revise the commentary to reflect the issues raised in the course of the Working Group's deliberations on draft recommendations 240 to 254, including the issues of recognition and access, and include more comprehensive references to, and material from, the UNCITRAL Practice Guide.

C. Domestic issues

67. The Working Group continued its deliberations on enterprise groups in insolvency in the domestic context as set forth in A/CN.9/WG.V/WP.90, commencing with the glossary and recommendations 211-216 on post-commencement finance.

1. Glossary

68. The Working Group adopted the glossary in substance.

2. Post-commencement finance — draft recommendations 211-216

Purpose clause

69. It was proposed that at the end of paragraph (d) the words "affected by or benefitting from the post-commencement finance" should replace the word "involved", to ensure greater clarity of meaning. In response, it was observed that addition of the word "involved" had been agreed at the last session of the Working Group (A/CN.9/671, paragraph 82) and that it was clear from the context that the reference was to the creditors involved in the post-commencement finance.

70. The Working Group adopted the substance of the draft purpose clause without modification.

Draft recommendation 211: provision of post-commencement finance by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings

71. Concern was expressed as to whether paragraph (b) of draft recommendation 211 adequately addressed the situation of an insolvent group member receiving post-commencement finance based on the granting of a security interest by another insolvent group member, in accordance with recommendations 65-67. In response, it was confirmed that those recommendations should apply to the receiving group member in the same way as they applied to any other debtor receiving post-commencement finance, but that that issue could be expressly addressed in the commentary to ensure the connection between the earlier recommendations and the recommendations on enterprise groups. The situation of a solvent group member receiving finance on the basis of a security interest provided by an insolvent group member had previously been discussed in the context of disposal of assets (see A/CN.9/666, paragraph 67).

72. The Working Group agreed to remove the brackets and adopt the substance of recommendation 211.

Draft recommendation 212: provision of post-commencement finance by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings

73. As a general consideration, it was suggested that the commentary should discuss the manner in which post-commencement finance in the group context might be negotiated between insolvency representatives and occur only as the result of an agreement between them.

74. General preference was expressed in favour of using the word "provided" in the chapeau to align the draft recommendation with the general usage in the Guide concerning post-commencement finance.

75. The Working Group discussed the question of whether paragraphs (a) to (c) should be cumulative or whether paragraphs (a) and (b) should be alternatives. One view was that the three paragraphs should be cumulative. Another view was that paragraphs (a) and (b) should be alternatives: paragraph (a) was appropriate in the case of reorganization, paragraph (b) related more to liquidation and was not required in cases of reorganization and paragraph (c) should apply in both of those cases. After discussion, it was agreed that paragraphs (a) and (b) were alternatives and could be combined in a single paragraph and that paragraph (c) would then form a second requirement.

76. With respect to paragraph (c), the Working Group agreed to delete the words in brackets and to add the words "of that group member" after the word "creditors".

77. The Working Group agreed to remove the brackets and adopted the substance of the following revision of draft recommendation 212:

> "The insolvency law should specify that post-commencement finance may be provided in accordance with recommendation 211, where the insolvency representative of the group member advancing finance, granting a security interest or providing a guarantee or other assurance:
>
> "(a) Determines it to be necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of the estate of that enterprise group member; and
>
> "(b) Determines that any harm to creditors of that group member is offset by the benefit to be derived from advancing finance, granting a security interest or providing a guarantee or other assurance."

Draft recommendation 213

78. The Working Group agreed that the words "advancing finance, granting a security interest or providing a guarantee or other assurance" as used in draft recommendation 212 should be repeated in draft recommendation 213 as follows:

> "The insolvency law may require the court to authorize or creditors to consent to the advancing of finance, granting of a security interest or provision

of a guarantee or other assurance in accordance with recommendations 211 and 212."

79. The Working Group agreed to remove the brackets and adopted the substance of draft recommendation 213 with that amendment.

Draft recommendation 214: post-commencement finance obtained by a group member subject to insolvency proceedings from another group member subject to insolvency proceedings

80. It was clarified that draft recommendation 214 was based upon recommendation 63 and addressed the situation of an enterprise group member receiving post-commencement finance, as distinct from draft recommendations 211 and 212, which addressed the situation of an enterprise group member advancing post-commencement finance.

81. The Working Group agreed to remove the brackets and adopted the substance of draft recommendation 214.

Draft recommendation 215: priority for post-commencement finance

82. The Working Group recalled that the purpose of draft recommendation 215 was to draw the attention of the legislator to the need to address the priority applying to the provision of post-commencement finance by one enterprise group member subject to insolvency proceedings to another group member subject to insolvency. It was further recalled that draft recommendation 215 left that priority to be regulated by domestic law, as the Working Group had agreed not to specify the ranking of priorities in the group context. The Working Group agreed to remove the brackets and adopted the substance of draft recommendation 215.

Draft recommendation 216: security for post-commencement finance

83. The Working Group agreed to remove the brackets and adopted the substance of draft recommendation 216.

3. Joint application for commencement — draft recommendations 199-201

Purpose clause

84. The Working Group adopted paragraph (a) of the draft purpose clause in substance.

85. A proposal was made to include words along the lines of "a court of competent jurisdiction" in paragraph (b) of the draft purpose clause, to clarify that, in some States, different courts might have jurisdiction with respect to commencement of insolvency concerning different enterprise group members. A different understanding was that a joint application should be considered by a single court, as otherwise coordination would be required. After discussion, the Working Group adopted paragraph (b) of the draft purpose clause in substance and agreed to address the issue of more than one competent court in the commentary.

86. It was noted that the benefit of a joint application was the overall benefit to the administration. In that light, it was suggested that the words "associated with commencement of those insolvency proceedings" following the word "costs" in

paragraph (c) should be deleted. That proposal found broad support. The Working Group adopted paragraph (c) of the draft purpose clause in substance with the suggested modification.

Draft recommendation 199: joint application for commencement of insolvency proceedings

87. The Working Group adopted draft recommendation 199 in substance.

Draft recommendation 200: persons permitted to apply

88. The Working Group agreed that since paragraph (a) included a reference to recommendation 15, paragraph (b) should include a reference to recommendation 16. The Working Group adopted the substance of draft recommendation 200 with that amendment.

Draft recommendation 201: competent court

89. The Working Group adopted draft recommendation 201 in substance.

4. Procedural coordination — draft recommendations 202-210

Purpose clause and draft recommendations 202-203: procedural coordination of two or more insolvency proceedings

90. The Working Group adopted the draft purpose clause on procedural coordination and draft recommendations 202-203 in substance.

Draft recommendation 204: procedural coordination of two or more insolvency proceedings

91. The Working Group agreed to delete the text in brackets and adopted the substance of draft recommendation 204.

Draft recommendation 205: timing of application and draft recommendation 206: persons permitted to apply

92. The Working Group adopted draft recommendations 205-206 in substance.

Draft recommendation 207: coordinating consideration of an application

93. The Working Group recalled its discussion on "joint hearings" in the international context (see paragraph 46 above) and agreed that the same approach should be adopted in the domestic context, replacing the word "joint" with "coordinated". The Working Group adopted the substance of draft recommendation 207 with that amendment.

Draft recommendations 208: modification or termination of an order for procedural coordination, draft recommendation 209: competent courts and draft recommendation 210: notice of procedural coordination

94. The Working Group adopted draft recommendations 208-210 in substance.

5. Avoidance proceedings — draft recommendations 217-218

Purpose Clause

95. In response to a question, it was clarified that the draft purpose clause on avoidance proceedings was to draw the attention of legislators to the need to give special consideration to the avoidance of transactions occurring in the context of enterprise groups. For that reason, it was proposed that the words "to take into account" should be replaced with the words "to examine the transaction". Another proposal was to delete the word "specific" before the word "circumstances", to show the general nature of the purpose clause. After discussion, the Working Group agreed to retain the text of the draft purpose clause without the brackets and with the deletion of the word "specific".

Draft recommendation 217: avoidable transaction and draft recommendation 218: elements of avoidance and defences

96. The Working Group adopted draft recommendations 217-218 in substance.

6. Substantive consolidation — draft recommendations 219-232

Purpose clause

97. The Working Group adopted the substance of the draft purpose clause.

Draft recommendation 219: exceptions to the principle of separate legal identity

98. The Working Group adopted the substance of draft recommendation 219 and agreed to revise the heading to "The principle of separate legal identity".

Recommendation 220: circumstances in which substantive consolidation may be available

99. A proposal to delete the brackets and retain the text in the chapeau with the addition of the word "only" before "in the following limited circumstances" was widely supported.

100. The reference to "disproportionate" in paragraph (a) was questioned on the basis that the concept implied a comparison that was missing from the text of the paragraph.

101. A proposal to redraft paragraph (b) in order to align it with paragraph (a), as follows, was widely supported:

> "Where the court is satisfied that enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity."

102. The Working Group adopted the substance of draft recommendation 220 with those amendments.

Draft recommendation 221: Exclusions from substantive consolidation

103. The Working Group discussed the circumstances that would give rise to the desirability of excluding assets and related claims from an order for substantive consolidation in order to provide greater clarity to the draft recommendation and

guidance to legislators and judges. Examples of those circumstances included where part of the business activities of the group could be separated from the intermingled assets or the fraudulent scheme or where the ownership of certain assets could readily be identified. It was proposed that those examples be discussed in more detail in the commentary.

104. Since it was agreed, after discussion, that it was not possible to identify with clarity all situations in which it might be appropriate to exclude assets and claims, it was proposed that the draft recommendation should operate to permit exclusions, that the word "specified" should be deleted, and that an insolvency law should include appropriate standards or guidelines to cover those situations. Noting that draft recommendation 220 was a permissive provision, it was agreed that draft recommendation 221 should be revised along the following lines:

> "Where the insolvency law provides for substantive consolidation in accordance with recommendation 220, the insolvency law should permit the court to exclude assets and claims from an order for substantive consolidation and specify standards applicable to those exclusions."

Draft recommendation 222: application for substantive consolidation — timing of an application

105. The Working Group agreed that the proviso at the end of the draft recommendation should be deleted and that the word "impracticability" in the footnote should be replaced with the word "possibility". It was also agreed that that footnote should be aligned with the footnote to draft recommendation 205, which addressed a similar issue of timing.

106. The Working Group adopted the substance of draft recommendation 222 with those amendments.

Draft recommendation 223: application for substantive consolidation — persons permitted to apply

107. A proposal to align the order of the persons permitted to apply under the draft recommendation with the order in which they were discussed in paragraph 153 of the commentary was supported. The Working Group adopted the substance of draft recommendation 223 with that amendment.

Draft recommendation 224: effect of an order for substantive consolidation

108. Several views were expressed with respect to the words in brackets in paragraph (c). One view was that in order to align that paragraph with paragraph (a) and the definition of substantive consolidation, the word "single" should be used. Another view was that while it was acceptable to use the word "single" in the context of the phrase "treated as if they were part of a single insolvency estate", that formulation was not used in paragraph (c) and to avoid confusion, the word "consolidated' was preferred. After discussion, the Working Group agreed to retain the word "single", without the brackets and delete the word "consolidated".

109. Another view with respect to paragraph (c) was that it essentially repeated the ideas contained in paragraph (a) and was thus superfluous. A different view was that

it addressed a different situation and could be retained in order to make it clear how claims were treated.

110. A question was raised as to the impact of paragraph (c) on guarantees. Three situations in which that question might be relevant were identified. The first involved a guarantee provided by one group member to another group member, where they were both subject to the order for substantive consolidation. The second also involved an intra-group guarantee, but the guarantor was not subject to the order for substantive consolidation. The third situation involved provision of a guarantee by an external guarantor to a group member that was subject to substantive consolidation. It was pointed out that in the first situation, where both group members were consolidated, the guarantee and any associated claims would be extinguished under paragraph (b). The second situation might be addressed by provisions in the Legislative Guide on related person transactions. The third situation was not covered by draft recommendation 226 and would therefore be subject to treatment under domestic law, which very often restricted the guarantor's claim where it had made a payment under the guarantee, unless the Working Group decided to recommend the adoption of special rules. After discussion, the Working Group agreed that it would not address that issue in a recommendation, but that it should be discussed in the commentary.

111. A question was raised with respect to the effect of substantive consolidation on the avoidance of intra-group transactions. It was noted that the other recommendations of the Guide would address the question of transactions between external entities and consolidated members of the group. Moreover, draft recommendation 229 addressed calculation of the suspect period when substantive consolidation was ordered. However, the question raised was not specifically addressed, but could be included in the commentary.

112. After discussion, the Working Group approved the substance of draft recommendation 224, with the amendment to paragraph (c) noted above.

Draft recommendation 225: effect of an order for substantive consolidation

113. The Working Group was reminded that draft recommendation 225 responded to a request at the last session of the Working Group to include a recommendation to the effect that labour and secured creditors should not be able to enhance their position as the result of an order for substantive consolidation (see A/CN.9/671, para. 110). Several concerns were expressed with respect to the draft recommendation. One concern expressed was that referring only to labour claims and claims by creditors holding a security interest over an asset of an enterprise group member was discriminatory and neither reasonable nor desirable. If any priority claims were to be addressed, the draft recommendation should refer to all priority claims. In addition, the Working Group was cautioned that in draft recommendation 225 there might be a confusion between the issue of priority of a claim and its value as opposed to the amount recovered on the claim; the value of a claim would not be affected by substantive consolidation, whereas the actual recovery might be. Another concern was expressed with regard to a security interest covering all of the assets of a group member (floating charge) and, in particular whether, as a result of substantive consolidation, the assets covered by that security interest could be extended to all assets included in the consolidated estate.

114. Various proposals were made to address the concerns expressed. One proposal was to broaden the scope of draft recommendation 225 by replacing the word "labour" with the words "a creditor holding a" or by referring generally to all priority claims. Another proposal was to include in draft recommendations 226 and 227 the purpose of draft recommendation 225. Another proposal was to replace the word "should" with the word "may". A different proposal was to delete draft recommendation 225 and to reflect the issues discussed in the Working Group in the commentary. It was emphasized that draft recommendations 226 and 227 sufficiently addressed the issue of respecting priorities by use of the words "as far as possible", noting that an order for substantive consolidation would occur only in the case of intermingling of assets or fraud, when priorities could not be easily identified or quantified. After discussion, the prevailing view was to delete draft recommendation 225 and to reflect the discussion in the commentary.

Draft recommendation 226: treatment of security interests in substantive consolidation

115. A proposal to broaden the types of secured claim referred to in draft recommendation 226 did not find support, as it would require earlier parts of the Legislative Guide to be reconsidered, in particular the approach to, and possibly the definition of, security interests. The Working Group adopted draft recommendation 226 in substance.

Draft recommendation 227: recognition of priorities in substantive consolidation and draft recommendation 228: meetings of creditors

116. The Working Group adopted draft recommendations 227-228 in substance.

Draft recommendation 229: calculation of the suspect period in substantive consolidation

117. Concern was expressed that draft recommendation 229 provided unnecessary detail by specifying the different ways of calculating the suspect period in substantive consolidation. In response, it was observed that the draft recommendation should include sufficient details to provide guidance to the legislator. After discussion, the Working Group agreed to adopt draft recommendation 229 in substance.

Draft recommendation 230: modification of an order for substantive consolidation

118. A concern was expressed that the current language of draft recommendation 230 was not satisfactory as it would not be possible to modify an order for substantive consolidation without affecting actions or decisions already taken. It was observed that the purpose of the modification might be to undo what had already been done, but what should be avoided was unjustly affecting vested rights and interests arising from the original order. A proposal was made to revise draft recommendation 230 along the lines of "Without prejudice to the effects of what has already occurred, the insolvency law may specify that an order substantive for consolidation may be modified." In response, it was said that the current drafting of the recommendation adequately conveyed that purpose and that the concerns expressed could be further addressed in the commentary. After discussion, the Working Group adopted draft recommendation 230 in substance.

Draft recommendations 231: competent court and draft recommendation 232: notice

119. The Working Group adopted draft recommendations 231-232 in substance.

7. Participants — draft recommendations 233-237

Purpose clause

120. The Working Group adopted the draft purpose clause in substance. It was agreed that the commentary could address issues relating to the appointment of an interim insolvency representative and clarify that the objectives of cooperation noted in paragraph (b) of the purpose clause related to the determination that the appointment of a single or the same insolvency representative would be in the best interest of the administration of the insolvency. It was also agreed that the domestic commentary would be aligned with the international commentary.

Draft recommendation 233: appointment of a single or the same insolvency representative, draft recommendation 234: conflict of interest, draft recommendation 235: cooperation between two or more insolvency representatives in a group context and recommendation 236: cooperation between two or more insolvency representatives in procedural coordination

121. The Working Group adopted draft recommendations 233-236 in substance.

Draft recommendation 237: forms of cooperation [cooperation to the maximum extent possible]

122. The Working Group agreed with the deletion of the reference limiting the substance of draft recommendation 237 to what was permitted under applicable law as noted in paragraph 12 of document A/CN.9/WG.V/WP.90/Add.2. A concern was expressed that draft recommendation 237 included too much detail and might be misinterpreted. A proposal to include the words “including intra-group claims” after the word “claims” found broad support. A proposal to align draft recommendation 237 with draft recommendation 250 on cooperation between insolvency representatives in the international context received support. Accordingly, draft recommendation 237 would have the same heading as draft recommendation 250 and paragraph (b) of draft recommendation 237 would follow the changes agreed with respect to paragraph (c) of draft recommendation 250. After discussion, the Working Group adopted the substance of draft recommendation 237 with the amendments noted above.

8. Reorganization of two or more enterprise group members — draft recommendations 238-239

Purpose clause and draft recommendations 238-239: reorganization plans

123. The Working Group adopted the draft purpose clause and draft recommendations 238-239 in substance.

9. Commentary

124. The Working Group made the following proposals with respect to the commentary:

(a) To add further explanation of what is meant by vertical or horizontal integration of enterprise groups;

(b) To add a reference to insolvency representatives in paragraph 8;

(c) To include "income trusts" in paragraph 9 as an additional example of the types of entity that might be part of an enterprise group;

(d) To address a concern with respect to paragraph 28 by deleting the sentences beginning with "The opportunities for…";

(e) To add further explanation to the final sentence of paragraph 54;

(f) To modify the reference in paragraph 57 to "all parties in interest, including creditors" on the basis that it was too broad;

(g) To delete the reference to "very small claims" in paragraph 77;

(h) To modify paragraphs 103 and 109 to capture concerns expressed in the course of discussions in the Working Group with respect to post-commencement finance; in particular, to replace the word "applying" in the penultimate sentence of paragraph 103 with the word "including";

(i) To simplify the last sentence of paragraph 144;

(j) To provide more detail of the operation of contribution orders;

(k) To reflect, in paragraphs 176-177, the need to consider the nature of the group — including the level of integration and business structure — in deciding whether it is appropriate to appoint a single/same insolvency representative and to stress the importance of the competence, knowledge and expertise of any person to be appointed in that capacity; and

(l) Generally to align the commentary to take account of revisions made to the recommendations.

10. Completion of work

125. The Working Group agreed that its work on the treatment of enterprise groups in insolvency would be sufficiently mature to be considered by the Commission for finalization and adoption in 2010 and requested the Secretariat to circulate the draft of part three to Governments as soon as possible to ensure sufficient time was available for comment and for compilation of those comments for the next session of the Commission.

D. Future work

126. The Working Group had a preliminary exchange of views on possible topics for future work.

127. It had before it a proposal by the Union Internationale des Avocats (UIA) on a possible international convention in the field of international insolvency law, which might cover the following issues:

(a) Granting of access to courts to foreign insolvency representatives;

(b) Recognition of foreign insolvency proceedings (with the effect of granting the foreign proceeding the rights of a national proceeding or triggering a secondary proceeding); and

(c) Cooperation and communication between insolvency representatives and courts.

128. If agreement on those issues seemed possible, the proposal suggested the international convention might also contain provisions on:

(a) Direct competence ("convention double");

(b) Applicable law ("convention triple", could be part of a separate protocol).

129. Other topics proposed for consideration included: liability of directors and officers of enterprises in insolvency or in proximity to insolvency; insolvency of banks and financial institutions; the concept of centre of main interests (COMI) of an enterprise and the factors relevant to its determination, as well as issues of jurisdiction and recognition; the development of a Model Law based on the Legislative Guide or on some aspects of the Legislative Guide, including the recommendations currently being finalized on international aspects of the treatment of enterprise groups; review of the enactment of the Model Law and promotion of its wider adoption; sovereign insolvency; and the insolvency of public or State-owned enterprises.

130. Preliminary support was expressed in favour of various proposals, noting that more detailed information would be required in order to facilitate discussion, possibly at the next session of the Working Group. It was suggested that the feasibility of some proposals would depend upon the scope of the work proposed and, in the case of the proposal for an international convention, upon support from Governments and cooperation with other international organizations with competence in related areas. Support was expressed in favour of the goal of developing an international convention, but there were reservations with respect to the feasibility of reaching agreement, particularly in view of the difficulties encountered in the past in the area of international insolvency law. With respect to other proposals, in particular the insolvency of banks and financial institutions, more information was required with respect to work currently being undertaken by other international organizations in order to consider whether there was any scope for work by UNCITRAL.

131. The Working Group agreed that it should discuss those proposals further and in more detail at its next session.