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Report of Working Group V (Insolvency Law) on the work of its forty-second session

(Vienna, 26-30 November 2012)

Contents

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I. Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (Insolvency Law) (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. At its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The Working Group continued its discussion of topics (a) and (b) at its fortieth session in 2011 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.99, 100 and 101) and at its forty-first session in 2012 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.103 and Add.1, 104 and 105).

4. At its forty-third session in June 2010, the Commission discussed a proposal to study the feasibility of developing an international instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, para. 5). It was agreed that the Secretariat should prepare a comprehensive report on all or any number of the issues set forth in the proposal.

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its forty-second session in Vienna from 26-30 November 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Bolivia (Plurinational State of), Brazil, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Germany, Greece, Israel, Italy, Japan, Mexico, Nigeria, Norway, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Belarus, Belgium, Cyprus, Denmark, Dominican Republic, Guatemala, Indonesia, Lithuania, Madagascar, Poland, Qatar, Slovenia and Switzerland.

7. The session was also attended by observers from the European Union.

8. 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 intergovernmental organizations*: Islamic Development Bank (ISDB);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Institute (ELI), European Law Students Association (ELSA), Groupe de Réflexion sur l'Insolvabilité et sa Prévention (GRIP 21), INSOL International (INSOL), Inter-American Bar Association (IABA), 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 and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mr. Carlos Lorenzo Codas Zavala (Paraguay)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.106);

(b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.107);

(c) A note by the Secretariat on directors' obligations in the period approaching insolvency (A/CN.9/WG.V/WP.108);

(d) A note by the Secretariat on the insolvency of large and complex financial institutions (A/CN.9/WG.V/WP.109); and

(e) A note on technical assistance and cooperation (A/CN.9/WG.V/WP.110).

11. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of (a) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the

period approaching insolvency; and (c) insolvency of large and complex financial institutions.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; (c) insolvency of large and complex financial institutions, on the basis of documents A/CN.9/WG.V/WP.107, A/CN.9/WG.V/WP.108 and A/CN.9/WG.V/WP.109. The Working group also discussed issues relating to technical assistance and cooperation on insolvency law on the basis of document A/CN.9/WG.V/WP.110. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests

13. The Working Group commenced its session with a discussion of two issues raised by the Commission at its forty-fifth session relating to whether the Working Group's mandate on centre of main interests covered issues relating to enterprise groups and if so when the Working Group should handle this topic. In relation to the scope of the mandate on centre of main interests, the Working Group noted that it was necessary to look at issues of centre of main interests as it related to enterprise groups because most commercial activity was currently conducted through enterprise groups. The Working Group also noted the description of the mandate contained in paragraph 10 of document A/CN.9/WG.V/WP.107 and that, as originally worded, it was intended to cover centre of main interests in the context of enterprise groups. The Working Group recommended that the Commission should confirm the Working Group's view that the scope of the Working Group's mandate on centre of main interests as originally approved included centre of main interests in the context of enterprise groups.

14. Regarding the timing of such consideration, it was agreed by the Working Group that that topic should be handled upon completion of the current revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests of individual debtors.

15. The Working Group then started its discussion of the draft revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency as contained in document A/CN.9/WG.V/WP.107.

A. Purpose and origin of the Model Law

16. The Working Group adopted the substance of paragraphs 3 and 3A and the revisions to the footnotes to paragraphs 4 to 8 as drafted.

B. Purpose of the Guide to Enactment and Interpretation

17. The substance of paragraph 9 was adopted as drafted.

C. Main features of the Model Law

1. Access

18. The Working Group agreed that the first three sentences of paragraph 49B should be amended by inserting the word "both" between "address" and "inbound" in the first sentence and the words "with respect to outbound requests" and "with respect to inbound requests" at the beginning of the second and third sentences respectively, as follows: "The provisions on access address both inbound and outbound aspects of cross-border insolvency. With respect to outbound requests, the person or body administering a reorganization or liquidation under the law of the enacting State (referred to as the insolvency representative) is authorized to act in a foreign State (article 5) on behalf of local proceedings. In respect of inbound requests, a foreign representative has the following rights of direct access to courts in the enacting State (article 9); ..."

2. Recognition

19. The Working Group agreed to delete the word, "inter alia" in the third sentence of paragraph 37A and to replace the words, "as a matter of course" with "without further requirement" in the penultimate sentence of the same paragraph. The substance of paragraph 37A was otherwise adopted as drafted. Paragraph 37B was amended by inserting an additional sentence at the end of the paragraph to the effect that the public policy exception should be used in limited cases and that differences in insolvency schemes do not themselves justify a finding that enforcing one State's laws violates another State's public policy.

20. The Working Group adopted paragraphs 37C, E and F as drafted.

3. Cooperation and coordination

21. The Working Group adopted paragraphs 33B and 33E as drafted.

D. Article-by-article remarks

Chapter I. General provisions

Articles 1-8

Article 1. Scope of application

22. Paragraph 65 was adopted as drafted.

Article 2. Definitions

23. The Working Group adopted the substance of paragraphs 68, 23A and 23A bis as drafted.

Subparagraphs (a) and (b)

24. The Working Group approved paragraphs 23B, 23C, 24G and 31 as drafted.

Subparagraphs (c) to (f)

25. The Working Group approved paragraph 73 as drafted; agreed to insert the words "to the court" in the second last sentence of paragraph 73A and to revise the relevant phrase to read "evidence acceptable to the court"; and approved paragraphs 74 and 75B as drafted.

Articles 3, 5 and 8

26. The Working Group approved paragraphs 78, 84 and 91 as drafted.

Chapter II. Access of foreign representatives and creditors to court in this State

Articles 10 to 12

27. The Working Group approved paragraphs 96, 98, 100, 101 and 102 as drafted.

Chapter III. Recognition of a foreign proceeding and relief

Article 15-24

Article 15: Application for recognition of a foreign proceeding

28. The Working Group approved paragraphs 119 and 120 as drafted.

Article 16. Presumptions concerning recognition

Paragraph 1

29. It was suggested that the final two sentences of paragraph 122B did not appear to be entirely consistent with the first sentence of the paragraph, which encouraged originating courts to include information in their orders to facilitate the task of recognition. A proposal was made to delete the final two sentences of the paragraph in order to make it clearer. However, the Working Group agreed that it intended to avoid the potential problem that an originating court could make findings beyond what was necessary, which might then inappropriately influence decisions that should be made independently by the receiving court. The Secretariat was requested to prepare a revised text of paragraph 122B in order to resolve any perceived inconsistency but to maintain the intention of the Working Group.

30. The Secretariat prepared the following revised text of paragraph 122B:

> "122B. Inclusion of that information in the orders made by the court commencing the foreign proceeding should be encouraged in order to facilitate the task of recognition in relevant cases, although making findings with respect to the issues that it is the function of the receiving court to decide — such as the location of the centre of main interests or whether the foreign

proceeding is main or non-main — is to be avoided.* As noted below, those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the requirements of article 2 are met (discussed further at paras. 124B-C below).

* Except where jurisdiction is dependent upon establishing centre of main interests or the presence of an establishment."

31. Concern was raised that, while reflecting the earlier discussion in the Working Group, the revised text could be perceived as inappropriately requiring the originating court to tailor its orders with the receiving court in mind and seeking to restrict the originating court in the issues it might consider. However, it was recognized that a cautionary note could be usefully raised in the Guide to Enactment and Interpretation, since judges often consult both it and the Legislative Guide. In addition, it was agreed that the information in issue would refer primarily to the foreign proceedings and to the foreign representative as referred to in article 16(1) of the Model Law.

32. Following discussion, paragraph 122B was agreed as follows:

"122B. Inclusion of information regarding the nature of the foreign proceedings and the foreign representative as defined in article 2 in the orders made by the court commencing the foreign proceeding can facilitate the task of recognition in relevant cases. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the requirements of article 2 are met (discussed further at paras. 124B-C below)."

Paragraph 3

33. The Working Group adopted the substance of paragraph 123A as drafted.

34. The Working Group approved the substance of paragraph 123B with the following change: delete the word "frequently" at the beginning of the second sentence and insert the phrase "and in that situation" before the phrase "no issue concerning".

35. The Working Group agreed with the recommendation in footnote 6 of A/CN.9/WG.V/WP.107 that the word "prove" in the first sentence of paragraph 123C should be deleted and replaced with "satisfy the court as to". Paragraph 123C was adopted with the suggested revision.

Centre of main interests

36. The Working Group expressed a preference in favour of version 2 of paragraph 123D, with the following revisions: (a) place the third sentence referring to the EC Regulation[1] in a footnote; and (b) incorporate the third and fourth sentences from version 1 of paragraph 123E. The Working Group requested the Secretariat to prepare a revised version of the paragraph for further consideration.

[1] European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings.

37. The Secretariat prepared the following revised text of paragraph 123D:

> "123D. The concept of a debtor's centre of main interests is fundamental to the operation of the Model Law.* The Model Law accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The essential attributes of the debtor's centre of main interests correspond to those attributes that will enable those who deal with the debtor (especially creditors) to ascertain the place where the debtor is likely to commence insolvency proceedings. As has been noted, the Model Law establishes a presumption that place of registration is the place that corresponds to those attributes. However, in reality, the debtor's centre of main interests may not always coincide with the place of its registration and the Model Law provides for the rebuttal of the presumption where the centre of main interests is in a different location to the place of registration. Where the place of registration is not the debtor's centre of main interests, the centre of main interests will be identified by other factors which indicate to those who deal with the debtor (especially creditors) where the centre of main interests is. It is thus important to consider the factors that may independently indicate that a given State is the debtor's centre of main interests."
>
> "* As noted in paragraph 31A, the concept of centre of main interests also underlies the scheme set out in the EC Regulation."

38. After discussion on the revised text, the Working Group agreed on the substance of paragraph 123D, with the following revisions: (a) replace the phrase "the debtor is likely to commence insolvency proceedings" with the phrase "insolvency proceedings concerning the debtor are likely to commence" in the third sentence; and (b) replace the phrase "Where the place of registration is not the debtor's centre of main interests," at the beginning of the sixth sentence with the phrase "Where it is uncertain that the debtor's place of registration is its centre of main interests,".

Factors relevant to the determination of centre of main interests

39. Following discussion, the Working Group agreed that factors (a) and (b) should be retained in paragraph 123F as more important, and principal factors relevant to determining the centre of main interests. It was also agreed that the focus of factor (a) should be ascertainability to creditors, as they represented the most significant group of stakeholders, and that the phrase "third parties" should be deleted. In considering factor (b), it was decided that determination of the location should be based on where the central administration of the debtor occurred, and that the phrase "or operations" and the word "management" should be deleted. In respect of factor (c), the Working Group agreed that while it was a factor of less importance than factors (a) and (b), it should be retained as a potentially useful factor for determining centre of main interests, but be included in paragraph 123I rather than deleted.

40. The Working Group also agreed that paragraph 123I was not intended to be an exhaustive list, that the order in which the factors were listed in that paragraph was not indicative of any particular importance or weight that should be given to those factors, and that the first line of paragraph 123I should refer to the "principal" factors.

41. There was discussion regarding the appropriate sequencing of paragraphs 123F, G and I. In view of the decisions made with respect to the factors in paragraphs 123F and I, the Secretariat was requested to consider any consequential deletions that should be made to paragraph 123G and to its placement.

42. The Secretariat prepared the following revised text of paragraph 123F, which was approved in substance by the Working Group:

> "123F. In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been commenced is the debtor's centre of main interests. The factors are: (a) the location is readily ascertainable by creditors, and (b) the location is where the central administration of the debtor takes place."

43. The Secretariat prepared the following revised text of paragraphs 123G and 123I:

> "123G. Frequently, these factors will point to a single jurisdiction as the centre of main interests. In some cases, however, there may be a conflict between the factors, requiring a more careful review of the facts. The inquiry is thus one of fact and the court will analyse the factors to discern, objectively, where a particular debtor has its centre of main interests. In all cases, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests.
>
> "123I. When the principal factors noted above do not yield a ready answer regarding the debtor's centre of main interests, a number of other factors concerning the debtor's business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. These additional factors may include the following: […]. The order in which these factors are set out is not intended to indicate the priority or weight to be accorded to them, nor is it intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a particular case."

44. It was observed that following the approval of the revised text of paragraph 123F, consequential changes were required to paragraphs 123G and 123I on the basis that there were now only 2 factors in paragraph 123F. It was agreed that in making those revisions, an appropriate emphasis on the holistic nature of the analysis of the factors should be maintained. The Working Group agreed to revise paragraphs 123G and 123I as follows:

> "123G. When the principal factors noted above do not yield a ready answer regarding the debtor's centre of main interests, a number of other factors concerning the debtor's business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of a particular case. In all cases, however, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests.
>
> "123I. The order in which the additional factors are set out below is not intended to indicate the priority or weight to be accorded to them, nor is it

intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case. The additional factors may include the following: […].”

Movement of centre of main interests

45. The Working Group agreed that paragraphs 123K and L could be simplified to reflect the ideas that a debtor’s centre of main interests (as opposed to its place of registration) might move; that where it moved in close proximity to the commencement of insolvency proceedings, the factors discussed in paragraph 123F may be more difficult to satisfy; and that the court should look more closely at those factors as they related to a debtor in that position to ensure a proper decision with respect to recognition was made. It was also agreed that the movement of a debtor’s centre of main interests should not give rise to an assumption of fraud. The Working Group requested the Secretariat to prepare a revised version of the paragraphs for further consideration.

46. The Secretariat prepared the following revised text of paragraph 123K:

“123K. Cases have occurred in which the debtor has moved its centre of main interests in close proximity to the commencement of insolvency proceedings, in some instances even between the time of the application for commencement and the actual commencement of those proceedings. In some examples, the move was intended to give the debtor access to an insolvency process, such as reorganization, that more closely met its needs than what was available under the law of its former centre of main interests. In other examples, the move of the place of registration (or habitual residence) may have been designed to thwart the legitimate expectations of creditors and third parties or undertaken as the result of insider exploitation or biased motivation. As a general rule, whenever there is evidence of such a move in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the factors identified in para. [...] above more carefully and take account of the debtor’s circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable to third parties may be harder to meet if the move of the centre of main interests occurs in close proximity to the opening of proceedings.”

47. After discussion, the Working Group agreed that the phrase “Cases have occurred in which the debtor has moved its centre of main interests” in the first sentence should be replaced with the phrase “A debtor’s centre of main interests may move prior to commencement of insolvency proceedings; in some instances”, and that the phrase “As a general rule,” at the beginning of the penultimate sentence should be deleted. The Working Group did not reach agreement on whether or not to include the second and third sentences of paragraph 123K: some suggested that the examples in the sentences were useful as demonstrating two possible extremes, while others were of the view that providing the examples could invite unnecessary, and possibly subjective, scrutiny of the matter. As a compromise, it was agreed that the second and third sentences should be included as a footnote enclosed in square brackets and that the phrase “centre of main interests” in the third sentence should replace the phrase “place of registration

(or habitual residence)". It was also agreed that the cross-reference should be to the factors in paragraphs 123F and 123I.

48. The substance of paragraph 123M was adopted as drafted.

Article 17. Decision to recognize a foreign proceeding

Paragraph 1

49. In paragraphs 124B and C, the Working Group agreed to retain the reference to "information" and delete the reference to "evidence". With that amendment, the Working Group adopted the substance of the paragraphs as drafted.

Paragraph 2

Timing of the determination with respect to centre of main interests

50. The substance of paragraphs 128A-B was adopted as drafted.

51. The Working Group approved the substance of paragraph 128C with the following revisions: (a) replace the words "debtor ceased trading" with a reference to the cessation of the business activity of the debtor; (b) delete the second sentence referring to the EC Regulation; and (c) replace the words "The same issue" at the beginning of the fifth sentence with the words "The same reasoning".

52. The Working Group agreed that the timing of the determination with respect to centre of main interests should also apply to establishment. The Secretariat was requested to include appropriate text to reflect that decision.

53. It was also agreed that the text need not include further explanation of habitual residence.

Abuse of process

54. It was noted that the material in paragraph 123L relating to false claims as to the location of centre of main interests should be included in paragraph 123J. A suggestion to relocate paragraph 123J to the remarks under article 6 was not supported.

Paragraphs 3 to 4

55. The Working Group adopted the substance of paragraphs 125, 130 and 131 as drafted.

Article 18. Subsequent information

Subparagraphs (a) to (b)

56. The Working Group adopted the substance of paragraphs 133 and 134 as drafted.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

Paragraphs 1 to 4

57. The substance of paragraphs 135 to 140 was adopted as drafted.

Article 20. Effects of recognition of a foreign main proceeding

Paragraphs 1 to 4

58. The Working Group adopted the substance of paragraphs 144 to 146, 149, and 151 to 153 as drafted.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

59. The substance of paragraphs 154, 156, 158 and 160 was adopted as drafted.

Article 22. Protection of creditors and other interested persons

60. The Working Group adopted the substance of paragraphs 162 to 164 as drafted.

Article 23. Actions to avoid acts detrimental to creditors

61. The substance of paragraphs 165 to 167 was adopted as drafted.

Article 24. Intervention by a foreign representative in the proceedings in this State

62. The Working Group adopted the substance of paragraph 170 as drafted.

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 27. Forms of cooperation

63. The substance of paragraphs 183 and 183A was adopted as drafted.

Chapter V. Concurrent proceedings

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] *after recognition of a foreign main proceeding*

64. The Working Group adopted the substance of paragraphs 185 and 187A as drafted.

Chapter VI. Assistance from the UNCITRAL Secretariat

B. Information on the interpretation of legislation based on the Model Law

65. The substance of paragraphs 201 and 202 was adopted as drafted.

V. Directors' obligations in the period approaching insolvency

66. The Working Group resumed its consideration of the topic of directors' obligations in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.108.

A. Purpose of legislative provisions

67. The Secretariat drew the Working Group's attention to two issues for consideration under the purpose of the legislative provisions. The first related to the

choice of a term or description to be given to persons who would be responsible for taking the necessary action to avoid insolvency or minimize the effects of insolvency. The second issue was with regard to use of the words “likely”, “imminent” or “unavoidable” to describe the period before insolvency within which the obligations or duties should be carried out.

68. Concerning the term or description to be given to persons in a company who would be responsible for taking the necessary action, it was agreed that a more generic description like “those charged with making decisions concerning management of the company” should be used on the basis that the term “directors” had different meanings in various jurisdictions, and that the generic description would cover persons who were not de facto directors but made decisions on behalf of the company. The Working Group agreed to use the more generic description with a modification to delete the words “charged with”. This change should be reflected throughout the draft recommendations.

69. Regarding the use of the words “likely”, “imminent” or “unavoidable”, the Working Group agreed to delete the words “likely” and use “imminent or unavoidable”. This change should be reflected throughout the draft recommendations.

B. Contents of legislative provisions

Recommendation 1 — The obligation

70. The Working Group agreed that the words “law relating to insolvency” should be retained throughout the draft recommendations. Since that formulation differed from the references to “the insolvency law” in parts one, two and three of the Legislative Guide, some text should be included to explain that the broader formulation had been adopted to take account of the relevance of other law, particularly company law, to the obligations of directors.

71. Various views were expressed with respect to paragraph 2 of draft recommendation 1 and the steps that should be taken, bearing in mind the goal of encouraging directors to use reorganization and appropriate informal procedures in a timely manner, the need to broaden the focus of directors to include the interests of creditors and the desirability of specifying steps that were particular to the period approaching insolvency, rather than steps that were typically included in the general obligations of a director. Reasonable steps, it was suggested, might be grouped under several phases, such as those relating to evaluation of the current situation of the business, identification of the options that might be open to the company to avoid or, where it was unavoidable, to minimize the impact of insolvency and finally, the taking of appropriate action. It was proposed that paragraph 32 of the commentary discussed reasonable steps in some detail and should inform revision of recommendation 1, paragraph 2. It was suggested that although avoidance of insolvency and minimization of its impact where it was unavoidable were different situations that might be regarded as requiring different measures, many of the steps that should be taken in either event overlapped and different sets of steps were not required.

72. Concern was expressed that including an obligation to avoid transactions that might be subject to avoidance if insolvency proceedings commenced, might establish a ground for liability that did not typically exist under avoidance provisions. In response, it was suggested that since the Legislative Guide on Insolvency Law provided the mechanism for avoidance of certain transactions, it was appropriate to include in this work an obligation to avoid such transactions where those transactions had no reasonable business justification. It was agreed that draft recommendation 1 should refer to "obligations" as there was reference to more than one obligation and that that revision should be reflected throughout the draft recommendations.

73. After discussion, the Secretariat was requested to prepare a revised text, taking into account the issues discussed, for further consideration.

74. The Secretariat prepared the following revised text of recommendation 1:

"1. The law relating to insolvency should specify that from the point in time referred to in recommendation 2, the person specified in recommendation 3 will have the obligations to have due regard to the interests of creditors and other stakeholders and to take reasonable steps to:

(a) Avoid insolvency; and

(b) Where it is unavoidable, minimize the extent of insolvency.

"2. Reasonable steps might include:

(a) Evaluating the current financial situation of the company and ensuring proper accounts are being maintained and that they are up-to-date; being independently informed as to the current and ongoing financial situation of the company; holding regular board meetings to monitor the situation; seeking professional advice, including insolvency or legal advice; holding discussions with auditors; calling a shareholder meeting;

(b) Evaluating the options that might be available to the company to avoid insolvency or, where it is unavoidable, to minimize its impact and modifying management practices to take account of the interests of a range of stakeholders; protecting the assets of the company so as to maximize value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; not committing the company to enter into the types of transaction that might be subject to avoidance unless there is an appropriate business justification;

(c) Taking appropriate action, including continuing to trade in circumstances where it is appropriate to do so to maximize going concern value; holding negotiations with creditors or commencing other informal procedures; commencing formal reorganization or liquidation proceedings."

75. The Working Group approved paragraph 1 as drafted.

76. With respect to paragraph 2, the Working Group approved the substance of the steps included with a few changes as follows: conform the language in paragraph (b) relating to "the interests of a range of stakeholders" to the wording used in the chapeau to paragraph 1 to ensure the priority of the interests of creditors; and add some wording at the end of paragraph (c) relating to commencement of

formal proceedings to address a concern that commencement of such proceedings should only occur where it was appropriate to do so, but also taking into account those jurisdictions where there may be an obligation to commence in certain situations. With respect to the latter, it was suggested that the manner in which that issue was treated in recommendation 1 should conform to the manner in which it was treated in part two of the Legislative Guide.

77. As to the structure of subparagraphs (a)-(c) of paragraph 2, there was concern that since the steps listed in those subparagraphs might apply to both of the situations in paragraph 1, no distinction should be made between those two situations in terms of the steps that it might be reasonable to take. Nevertheless, it was also noted that commencement of formal proceedings might be more appropriate when insolvency was unavoidable, and that other steps might be more appropriate where insolvency could be avoided. The Working Group agreed that it might be possible to merge the steps listed in paragraphs 2, subparagraphs (a) and (b), together with the first two steps listed in subparagraph (c). The commencement of formal proceedings should be addressed separately and should take account of the appropriateness of that step to the financial situation being faced by the business, as well as any obligation to commence that might exist under national law, as noted above. The Secretariat was requested to prepare a further revision of the recommendation for consideration at a future session.

Recommendation 2 — The time at which the obligation arises

78. The Working Group approved the draft recommendation with the deletion of the word “likely”.

Recommendation 3 — Persons that owe the obligation

79. The Working Group agreed to amend draft recommendation 3 by deleting the square brackets around the words “the person”, deleting the words “defined under national law as fulfilling the role of a director” and “undertaking the responsibilities of a director” and retaining the words “formally appointed as a director and any other person exercising factual control and performing the functions of a director.” The remaining draft recommendations should also use the phrase “the person who owes the obligation.” The amended recommendation would state:

> “3. The law relating to insolvency should specify the person who owes the obligation, which may include any person formally appointed as a director and any other person exercising factual control and performing the functions of a director.”

Recommendation 4 — Liability

80. With respect to subparagraph 1, the Working Group agreed after discussion that: the phrase “creditors have suffered loss or damage” should be retained and that the phrase “creditors’ interests have been harmed” should be deleted; and that the phrase “committed in the period referred to in recommendation 2” should be deleted.

81. With those revisions, the substance of draft recommendation 4 was adopted.

Recommendation 5 — Elements of liability and defences

82. The Working Group agreed that, although the aspects of the recommendation referring to draft recommendation 1 would have to be discussed once that recommendation had been revised and agreed, the phrase "creditors have suffered loss or damage" should be retained and the phrase "creditors' interests have been harmed" should be deleted. The Working Group also agreed that the final sentence of the draft recommendation should be deleted.

Recommendation 6 — Remedies

83. After discussion, the Working Group agreed, with respect to the first sentence of the draft recommendation, that (a) it should be made clear that payment would not be due until after the question of a director's liability had been litigated and that the damages referred to would be assessed by the court; (b) that any compensation payable was linked to the liability in recommendation 4, paragraph 2; and (c) that the remedies for liability "should" include payment in full to the insolvency estate. With respect to the second sentence, concern was expressed that the current formulation was too broad, referring generally to rights and claims in a manner that might preclude directors from exercising their rights as creditors and participating in the ordinary processes of insolvency in the period before any cause of action with respect to draft recommendation 1 had been litigated. It was proposed that the draft recommendation should be limited to restricting a director's right to set-off. In that regard, a proposal was made to use the original formulation in draft recommendation 7, paragraph (c) of A/CN.9/WG.V/WP.104 — "a limitation on the exercise of set-off with respect to any debts owed by the company to the director". That proposal was supported.

84. Further concerns were raised with respect to the issue of set-off in recommendation 6, particularly with respect to distinguishing between pre- and post-application aspects of set-off as they related to directors' obligations and liability, and the relevance, for example, of director insurance. It was observed that set-off was difficult to define and could exist in several different forms, both legal and equitable and that it raised important issues of timing and questions of conduct. The uncertainty caused by set-off might be remedied through the use of subordination. It was suggested that those issues might be further considered in the commentary or in a footnote to recommendation 6. The Secretariat was requested to prepare a revised text, taking into account the issues discussed, for further consideration.

Recommendation 7 — Conduct of proceedings for breach of the obligation

85. The substance of the draft recommendation was approved with the addition of a cross-reference to recommendation 4.

Recommendations 8 and 9 — Funding of proceedings for breach of the obligation

86. The substance of draft recommendations 8 and 9 was approved by the Working Group.

Recommendation 10 — Additional measures

87. Differing views were expressed with respect to the second sentence in square brackets. One view was that the financial sanctions provided for in draft recommendation 6 should be complemented by additional measures so as to prevent egregious behaviour by directors and to protect the public from directors who had acted negligently or improperly. Another view was that other examples additional to disqualification should be included. A different view was that such a limitation was not warranted on the basis that it would be punitive, infringe on certain constitutional rights, discourage competent directors from taking up such positions and be outside the ambit of insolvency law. After discussion, the Working Group agreed that the second sentence should be deleted.

88. Regarding the first sentence, there was concern that deletion of the second sentence emptied the first sentence of much of its meaning. Some support was expressed in favour of deleting recommendation 10 completely and having recommendation 6 as the only remedy. A different view was that the first sentence could be retained to flag that States might include in national legislation measures additional to the payment of compensation. A suggestion was made that any revised recommendation should address the nature, duration, and proportionality of such measures. The Working Group agreed to delete the first sentence as drafted, but would consider further proposals.

89. The Secretariat prepared the following revised text of recommendation 10:

> "10. In order to deter behaviour of the kind leading to liability under recommendation 4, the law relating to insolvency may include remedies additional to the payment of [compensation][damages] provided in recommendation 6.
>
> "* The additional remedies that may be available will depend upon the types of remedies available in a particular jurisdiction and what, in addition to the payment of compensation, might be proportionate to the behaviour in question and appropriate in the circumstances of the particular case. Examples of such remedies are discussed in paras.--- [of the commentary]."

90. In its consideration of the revised text, the Working Group was reminded that the Legislative Guide already contained similarly structured recommendations that simply flagged an issue of importance. A number of different views were expressed on whether to insert the text as a recommendation or to include it in the commentary. These included that such measures were frequently a part of insolvency law; that they were outside the scope of insolvency law and belonged, for example, in the realm of company law; and that this was instead a grey area that required further consideration purely on its merits without reference to national approaches. In support of the latter view, it was observed that such a recommendation could be both enlightening and pedagogical. After discussion, the prevailing view was to support the consideration of the recommendation together with its footnote at a future session.

C. Commentary

91. The Working Group next considered the draft commentary with respect to directors' obligations in the period approaching insolvency as contained in document A/CN.9/WG.V/WP.108, paragraphs 6 to 51. The Working Group agreed that the commentary should be restructured to reflect the order of the recommendations and to include the recommendations following the relevant sections of the commentary. Further, a number of issues were identified in the commentary where the terminology used differed from that agreed in the recommendations or found elsewhere in the Legislative Guide on Insolvency Law, or where the drafting should be adjusted to accord with agreement reached on the recommendations. The Secretariat was requested to take into account the comments of the Working Group in preparing revised text of the commentary.

D. Issues relating to directors of enterprise group members

92. The Working Group considered the issues relating to directors of enterprise group members. It was agreed that although the topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, the possibility of further work should be given serious consideration. The Working Group agreed that once it had completed its consideration of recommendations 1-10 and the related commentary, it could consider whether to address the issues that might be relevant in the context of enterprise groups. To facilitate those deliberations, the Secretariat was requested to provide further information, particularly as to different national approaches and solutions that might inform the discussion in the Working Group.

E. Cross-border issues

93. The Working Group agreed to defer its consideration of those issues to a future session.

VI. Circulation of texts to States for comment

94. The Working Group requested that consolidated revised versions of both the texts on centre of main interests and directors' obligations incorporating all revisions agreed by the Working Group be made available for consideration at its next session. The Working Group observed that once these texts had been further considered by the Working Group, they could then be circulated to States for comment prior to possible adoption by the Commission at its forty-sixth session in 2013.

VII. Insolvency of large and complex financial institutions

95. The Working Group considered that topic on the basis of document A/CN.9/WG.V/WP.109 and in particular the questions raised for the consideration of the Working Group in paragraph 64 of that document. The Working Group welcomed the very useful summary of work undertaken to date by

international organizations provided by the paper and, in particular, the extent to which the paper indicated the use by those organizations of the work undertaken by the UNCITRAL in the areas of cross-border insolvency and enterprise groups.

96. The Working Group agreed that it would be very useful for the Secretariat to continue monitoring the work of those other organizations, perhaps focusing specifically on the cross-border aspects of that work, and to provide further papers describing that work for the information of the Working Group and the Commission, subject to the availability of resources. The need to avoid duplication of work was emphasized, as was the desirability of limiting the areas of inquiry to those in which the Working Group had particular competence and expertise. It was observed that in much the same way that the work of UNCITRAL with respect to cross-border insolvency and enterprise groups had informed the work of the institutions addressed in the working paper, the work of those organizations on financial institution insolvency might inform the further work to be undertaken by the Working Group with respect to centre of main interest and enterprise groups. The desirability of possibly fostering greater cooperation and coordination between UNCITRAL and the international organizations working on financial institutions insolvency was also noted. A further benefit to be derived from monitoring the developments with respect to financial institution insolvency was that the global financial crisis had spurred considerable legislative reform and activity that could provide a background against which to assess the continuing relevance of the approach and solutions provided by the Legislative Guide on Insolvency Law.

VIII. Technical assistance and cooperation

97. The Working Group next considered issues relating to technical assistance and cooperation as outlined in document A/CN.9/WG.V/WP.110. It was reported that UNCITRAL texts on insolvency are used widely by the World Bank in its technical assistance activities, and that the European Union referred regularly to UNCITRAL insolvency texts in the current revision of its insolvency regulation. It was noted that the 10th Multinational Judicial Colloquium organized jointly by UNCITRAL, INSOL and the World Bank would be held in The Hague in 2013, and that participants had proven to be strong promoters of UNCITRAL insolvency texts.

98. It was observed that the accessibility of UNCITRAL insolvency texts could be improved through their translation into additional languages, and noted that several States had already performed such translations. UNCITRAL was encouraged to continue to pursue opportunities for cooperation with relevant entities such as the World Bank and the IMF, and to consider opportunities for awareness-raising and technical assistance presented by increased economic integration in regional groups such as the Association of Southeast Asian Nations (ASEAN). The members of the Working Group were also invited to raise awareness of UNCITRAL insolvency texts in their States and to encourage their adoption. In addition, the Working Group agreed that its members would keep the Secretariat abreast of additional instances in which the insolvency texts had been adopted or used, particularly in the case of the Legislative Guide, the use of which was more difficult to track than the Model Law on Cross-Border Insolvency.