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Report of Working Group V (Insolvency Law) on the work of its forty-sixth session (Vienna, 15-19 December 2014)

Contents

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I. Introduction

A. Directors' obligations in the period approaching insolvency: enterprise groups

1. At its forty-fourth session (December 2013), Working Group V (Insolvency Law) agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group, whose task would be to examine how part four of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) could be applied in the enterprise group context and identify any additional issues (such as conflicts between a director's duty to its own company and the interests of the group, as well as issues of governing law) that might need to be addressed. The informal expert group was to report back to the Working Group no later than the session in the second half of 2014 (A/CN.9/798, para. 23). The discussion in the informal group formed the basis of the working paper prepared for consideration by the Working Group at its forty-sixth session.

B. Facilitating the cross-border insolvency of multinational enterprise groups

2. At its forty-fourth session (December 2013), the Working Group had also agreed to continue its work on cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part three of the Legislative Guide and involve reference to the Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16). Discussion of those issues commenced at the forty-fifth session (April 2014) (A/CN.9/803).

C. Recognition and enforcement of insolvency-derived judgements

3. At its forty-fourth session (December 2013), Working Group V had further agreed (A/CN.9/798, para. 30) that, at an appropriate time, it should seek a mandate from the Commission to commence work on the recognition and enforcement of insolvency-derived judgements, which had been discussed at the colloquium held in conjunction with the forty-fourth session in December 2013 (A/CN.9/815). At its forty-fifth session, the Working Group agreed (A/CN.9/803, para. 39(b)) that it should seek that mandate from the Commission at its forty-seventh session (2014). At that session, the Commission agreed that, in addition to the two topics concerning treatment of enterprise groups in insolvency, Working Group V's other

priority should be to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements, which was said to be an important area for which no explicit guidance was contained in the Model Law. The Commission approved a mandate in accordance with those terms (A/69/17, para. 155).

II. Organization of the session

4. Working Group V, which was composed of all States Members of the Commission, held its forty-sixth session in Vienna from 15-19 December 2014. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Armenia, Canada, China, Colombia, Denmark, France, Germany, Greece, Hungary, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Namibia, Nigeria, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Bolivia (Plurinational State of), Chile, Czech Republic, Dominican Republic, Egypt, Haiti, Libya, Montenegro, Qatar, Romania, Slovakia, Syrian Arab Republic and Tunisia.

6. The session was also attended by observers from the Council of Europe and the European Union.

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

(a) *Organizations of the United Nations system*: World Bank;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students Association (ELSA), INSOL Europe, INSOL International (INSOL), International Bar Association (IBA), International Insolvency Institute (III), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA) and Union Internationale des Avocates (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms. Bernice Gachegu (Kenya)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.123);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.124);

(c) A note by the Secretariat on the obligations of directors of enterprise group members in the period approaching insolvency (A/CN.9/WG.V/WP.125); and

(d) A note by the Secretariat on the recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.126).

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: (a) the obligations of directors of enterprise group members in the period approaching insolvency; (b) facilitating the cross-border insolvency of multinational enterprise groups; and (c) the recognition and enforcement of insolvency-derived judgements.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its deliberations with the obligations of directors of enterprise group members in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.125; followed by the cross-border insolvency of multinational enterprise groups on the basis of document A/CN.9/WG.V/WP.124; and the recognition and enforcement of insolvency-derived judgements on the basis of document A/CN.9/WG.V/WP.126. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Directors' obligations in the period approaching insolvency: enterprise groups

12. The Working Group commenced its discussion of this topic on the basis of the draft recommendations contained in document A/CN.9/WG.V/WP.125.

Purpose clause

13. The Working Group expressed no view as to the inclusion of the first sentence in square brackets, which provided the context for the purpose clause to draft recommendations 255 and 256 (EG). The Working Group agreed that the purpose clause should be revised as follows:

(a) In subparagraph (a), remove the square brackets and retain the text as "of the enterprise group member";

(b) Retain subparagraphs (b) and (c) as drafted;

(c) Retain paragraph (d) without the square brackets;

(d) In subparagraph (e), delete the first optional text, remove the square brackets contained in the remaining text, and delete the phrase "and of the group member as part of that enterprise group"; and

(e) In paragraph (a) of the safeguard provision at the end of the purpose clause, add the word "unnecessarily" at the beginning, delete the first optional text,

and add the words “or some of its parts” after the phrase “an insolvency solution for the enterprise group as a whole”.

14. It was stated that the difficulty in reaching appropriate language to address the directors’ obligations in the period leading to insolvency resided in establishing a balance between the duty of directors towards the group member they represented and the interests of the enterprise group as a whole. The Working Group concluded that in reference to the enterprise group, directors owed a primary duty to the enterprise group member they represented. They could take into account the interests of the enterprise group only if doing so did not result in steps being taken that were contrary to that duty.

15. It was said that employees should be included among the parties in interest to be considered in the context of insolvency and that by virtue of the declaration on the Rule of Law adopted by the General Assembly,[1] UNCITRAL should consider, in its work on the modernization and harmonization of international trade law, the importance of predictable legal frameworks for generating employment.

Draft recommendation 255 (EG)

16. In reference to draft recommendation 255 (EG), the Working Group agreed to delete the phrase “and of other group members” in the chapeau and in paragraph (b), as well as to delete the remaining square brackets in the chapeau and retain the text.

17. Several proposals to revise the draft recommendation were made as follows:

Variant A:

255 (EG). The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligations to have due regard to the interests of creditors and other stakeholders of the enterprise group member of which they are a director and to take reasonable steps:

(a) To avoid insolvency; and

(b) To minimize the extent of insolvency and its impact on creditors and other stakeholders of the enterprise group member and, where not inconsistent with those duties, take into account the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole, or some of its parts, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members.

Variant B:

255 (EG). The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligations to have due regard to the interests of creditors and other stakeholders of the enterprise group member of which they are a director and to take reasonable steps:

[1] GA res 67/1. The treatment of employees in insolvency is addressed in the UNCITRAL Legislative Guide on Insolvency Law, part two, chap. II, para. 145 and chap. V, paras. 72-73.

(a) To avoid insolvency; and

(b) Where it is unavoidable, to minimize the extent of insolvency, taking into account, to the extent it is not inconsistent with the interests of creditors and other stakeholders of the group member, the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole, or some of its parts, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members.

Variant C:

255 (EG). The law relating to insolvency should specify that from the point in time referred to in recommendation 257, the persons specified in accordance with recommendation 258 will have the obligations to have due regard to the interests of creditors and other stakeholders of the enterprise group member of which they are a director and insofar as not inconsistent with that, they may take steps to promote an insolvency solution for the enterprise group as a whole or some of its parts. In order to do so, they will have the obligations to take reasonable steps:

(a) To avoid insolvency of their group member insofar as that is consistent with a group solution; and

(b) Where insolvency of that group member is unavoidable, to minimize its impact on the creditors and other stakeholders of that group member, taking into account the possible benefit of maximizing the value of the enterprise group as a whole, the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members.

18. The Working Group agreed to deliberate on the variants as drafted and return to them later in the session. However, some preliminary support was expressed for the text in Variant C, with the suggested deletion of the phrase “insofar as that is consistent with a group solution” from subparagraph (a) and its insertion after the phrase “to minimize its impact on the creditors and other stakeholders of that group member” in subparagraph (b). In addition, it was observed that paragraph (e) of the purpose clause, referring to the principle that the creditors of the relevant group member and its other stakeholders should be no worse off under a group solution than if a solution for the individual group member had been pursued, should be reiterated in the substantive recommendations.

19. After further consideration, the following suggestions were made with respect to the revised draft recommendation. With respect to the chapeau of Variant C, some support was expressed in favour of revising the second sentence to read: “in order to do so, reasonable steps may include” and in the first sentence, replacing “not inconsistent with that” with “not inconsistent with those obligations” or “those responsibilities”.

20. Some support was expressed in favour of deleting “insofar as it is consistent with a group solution” from subparagraph (a) of Variant C.

Draft recommendation 256 (EG)

21. In reference to draft recommendation 256 (EG), the Working Group agreed to insert in the chapeau phrases along the lines of "to the extent possible" and "to the extent not inconsistent with the obligations of the director to the group member of which they are a director" to make it clear that the draft recommendation was not intended to create additional obligations and that the appropriateness of the steps to be taken would vary depending on the factual context. It was agreed that only those listed paragraphs that had a specific identifiable purpose in the context of enterprise groups, and that were not inconsistent with recommendation 256 of part four of the Legislative Guide, should be included. Accordingly, it was agreed that only paragraphs (a), (b), (d), (g) and (j) would be retained for further consideration, with the substance of paragraphs (a), (b), (d) and (g) forming an initial group of possible steps (adjusted in terms of importance), and paragraph (j) forming a second category.

22. It was agreed that the text in paragraphs (a), (b), (d) and (g) should be retained without square brackets; that in paragraph (a) the phrase "or some of its parts" be inserted at the end of the paragraph and that the word "ascertain" might be replaced with a word along the lines of "consider"; and that in paragraph (b) the word "which" might be replaced with "whether". In addition, there was support for the suggestion that consideration should be given to dividing paragraph (d) into two separate paragraphs.

23. After considering the content of paragraph (j), there was agreement that the first phrase "commencing or requesting the commencement of formal reorganization or liquidation proceedings" should be deleted. In response to a question as to how the phrase "considering the court in which proceedings should be commenced" should be interpreted, it was suggested that while a choice of court would generally be governed by rules on competence, there might be an element of strategic planning when considering insolvency proceedings for group members. Accordingly, that question should be revisited after consideration of the material on cross-border insolvency of groups (A/CN.9/WG.V/WP.124).

24. In addition, a suggestion was made that, before taking the step under paragraph (j), a director would have to provide notice to group members of that intended action in order to comply with the legal requirements in some States. It was observed that the question of notice in relation to commencement was already addressed in various recommendations of the Legislative Guide and did not need to be included in draft recommendation 256 (EG). In addition, a concern was expressed that inclusion of such a notice provision in paragraph (j) would only be appropriate if the provision of such notice could be considered a reasonable step to be taken to meet the obligation under draft recommendation 255 (EG). After discussion, there was insufficient support in the Working Group to add a requirement for such notice to the draft recommendation, but there was agreement that the issue could be addressed in the commentary.

Draft recommendations 256 (EG) bis and ter

25. The Working Group agreed that the purpose clause was acceptable as drafted.

26. The Working Group agreed to the following revisions to recommendation 256 (EG) bis:

(a) To retain the first optional text without square brackets;

(b) To delete the second optional text; and

(c) To revise the third optional text so that the draft recommendation will read “owed in relation to the creditors and other stakeholders of”.

27. Concerns were expressed with respect to the inclusion of recommendations on conflict of obligations on the basis that that issue would typically be dealt with under applicable company law. It was observed, however, that since recommendations 256 (EG) bis and ter were limited to the period approaching insolvency and many laws did not specifically address that context, the recommendations should be retained.

28. Other reservations were expressed with respect to the references to resignation as a possible step that might be taken to manage conflict of interest. One view was that including it in the draft recommendation might be regarded as encouraging resignation as a particular solution. It was acknowledged, however, that situations could be envisaged in which resignation would be an appropriate course of action, but only as a last resort. With that in mind, it was agreed that the phrase “, as a last resort,” should be added after the phrase “cannot be reconciled and”. It was also agreed that the commentary should reflect the concern that resignation was not intended to be anything other than a measure of last resort; it was recalled that resignation had been considered in terms of director liability in paragraph 27 of part four of the Legislative Guide. An additional issue with respect to resignation was clarifying that the director may have a choice as to which directorship was resigned; in some cases, that decision might not necessarily involve resignation from an insolvent group member, but could also be from a solvent member.

29. The Working Group agreed to the following revisions to recommendation 256 (EG) ter:

(a) To add as a new step the following: “not participating in any decision by the board of directors of the same member on the matters giving rise to such conflicts”; and

(b) To add “other directors of relevant members” to the list of parties to whom disclosure should be made.

30. A proposal was made to revise draft recommendation 256 (EG) ter as follows:

> “The insolvency law may specify that a director faced with conflicting obligations should take reasonable steps to manage those conflicts. Those steps may include obtaining professional advice to establish the exact nature of the conflicting obligations and how to manage them, and disclosing to other directors, creditors and other stakeholders the nature of the conflict and the situations in which the conflict is likely to arise. In determining whether conflicts are adequately managed, a director should consider whether the steps taken are sufficient so that the creditors and other stakeholders of the group members of which they are a director are in no worse a position than they would have been had the conflicts not arisen. As a last resort, the director may

need to resign from any group member in relation to which the conflict is not adequately manageable."

Draft recommendation 258

31. The Working Group addressed the questions raised in paragraphs 10-11 of A/CN.9/WG.V/WP.125, concerning the appropriateness of recommendation 258 to the group context. It was noted that part four of the Legislative Guide left open the question of what constituted a shadow director, which might raise questions in the group context as to whether it would cover other group members. After discussion, it was generally agreed that recommendation 258 as drafted was appropriate for the group context.

Form of the draft recommendations

32. There was general agreement in the Working Group that the recommendations should form an additional section of part four of the Legislative Guide.

V. Facilitating the cross-border insolvency of multinational enterprise groups

33. As a preliminary matter, the Working Group considered what it was seeking to achieve through this work on enterprise groups and the form that any text should take. Although some concerns were expressed in respect of moving toward the development of a model law or model legislative provisions, there was support for adopting that approach as a working assumption. It was observed that certain issues raised in A/CN.9/WG.V/WP.124 lent themselves more readily to treatment in a model law than others, which might better be addressed by way of legislative guidance and that those issues could be identified as discussions progressed.

34. After discussion, the Working Group agreed to proceed in its deliberations on the basis of that working assumption, noting the importance of maintaining a flexible approach.

A. The goals of a cross-border insolvency regime for groups

35. The Working Group considered paragraph 3 of A/CN.9/WG.V/WP.124, and acknowledged that while it would be important to develop goals for any text to be developed, subparagraphs (a) to (g) were more in the nature of tools to be used to achieve possible goals rather than goals in themselves. A number of concerns were expressed as to the scope and content of those subparagraphs, including that there might be inconsistencies with some of the approaches adopted in part three of the Legislative Guide. Nevertheless, it was suggested that paragraph 3 could be useful in helping to identify individual elements of a regime for the cross-border insolvency of groups and that some of the issues raised had already been considered. One example cited concerned paragraph 3, subparagraph (a) and the Working Group's previous discussion of forward planning for commencement of

insolvency proceedings and the use of living wills for financial institutions.[2] Another suggestion was that those subparagraphs could be classified into three main areas: (1) limiting the commencement of multiple proceedings; (2) improving cross-border coordination and cooperation when multiple proceedings were required; and (3) improving local insolvency laws to facilitate achievement of (1) and (2). Reaching consensus on those three areas, it was proposed, could facilitate the development of model provisions.

36. It was observed that the preamble to the Model Law, whilst requiring tailoring to the group context, might serve to inform the Working Group's discussion on goals and form the basis for a text to be considered at a future session.

37. It was also suggested that an overarching goal might be the achievement of a group solution, the common purpose of which would be the reorganization or sale as a going concern (of the whole or part of the business or assets) of one or more of the participating members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole, or to a member or members of the enterprise group. Such a solution:

(a) Could include proceedings taking place in more than one jurisdiction;

(b) Would involve more than one member of the enterprise group, one or more of which should be presently or imminently insolvent;

(c) Would not exclude any group member affected by the outcome of the group solution from participating in that solution; and

(d) Would safeguard the position of the creditors and other stakeholders of each member participating in the group solution from any harm resulting from that participation.

B. Key elements of a group regime

1. Access

38. The Working Group noted the access provided by articles 9 and 13 of the Model Law and expressed the view that something wider might be required in the group context, for example, providing access for other group members and their creditors. However, the view was also expressed that it was difficult to resolve this issue before answering questions such as why access was required, for example to obtain recognition, and the court from which it might be sought.

2. Recognition of foreign proceedings

39. The Working Group expressed serious reservations in respect of paragraph 16 and the reference to commencement of insolvency proceedings in a jurisdiction to which the debtor had no connection. Reservations were also expressed with respect to the possibility of commencing proceedings in a jurisdiction other than the centre of main interests (COMI) of the debtor concerned. By way of clarification, it was observed that what was being proposed did not involve any changes to the Model Law or abrogation of rights. Instead, what was sought was the ability to address a

[2] A/CN.9/803, para. 37.

scenario where enterprise group members could identify the jurisdiction which would provide the best opportunity to successfully reorganize as a group solution, whilst avoiding a multiplicity of parallel insolvency proceedings and protecting the interests and expectations of creditors. Where those interests and expectations could not be protected to the satisfaction of creditors, it would remain open to them to commence individual proceedings against the group member of which they were a creditor based on, for example, the COMI of that debtor, and to rely on the Model Law for cross-border recognition and assistance, if required.

40. In further clarification, it was suggested that achieving a group solution in that fashion might involve the choice of an appropriate forum as a form of strategic planning; such a choice should not be seen as abusive forum shopping.

41. It was further suggested that that approach could also incorporate the notion that a group solution might be achieved without requiring proceedings to be commenced with respect to every insolvent group member, such as by treating the claims of foreign creditors in local proceedings where appropriate (so-called "synthetic measures"). Where that was not appropriate, proceedings for individual group members could be commenced. An important safeguard to be incorporated was the principle that creditors and other stakeholders of the relevant group member should be no worse off under a group solution than if a solution for the individual group member had been pursued (see paragraph 18 above). Some reservations were expressed as to the desirability of the approach described above.

42. In response to a concern that it would be difficult for creditors to evaluate whether they might be better off under a group solution than under proceedings commenced with respect to the group member of which they were a creditor, it was observed that nothing in the group solution approach sought to abrogate creditors' rights. Moreover, the burden of proving that the group solution was the best option would be on the party proposing it.

43. An additional clarification provided was that no proposal was being made that involved stripping the State, in which a group member might have its COMI, of its jurisdiction over that group member.

44. After discussion, the Working Group agreed that the appropriate foundation for this work was the Model Law and the Legislative Guide (parts one and two), but because enterprise groups were not specifically covered in either of those texts, more work was needed to address enterprise groups and to identify areas that might require special treatment. On the question of whether insolvency proceedings could be commenced without an appropriate connection to the commencing jurisdiction, there was clear agreement in the Working Group that this was not possible. Other issues identified for future consideration with reference to the scenario in paragraph 4 of A/CN.9/WG.V/WP.124[3] included:

(a) Appropriate protection of the interests of C's creditors located in country Y, where C was subject to proceedings in country Z;

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[3] Insolvency proceedings for enterprise group members A and B commence in country Z. A is the parent company of the enterprise group. Creditors are seeking to commence proceedings against group members C and D in country Y.

(b) The connection required in order for proceedings concerning group member C to commence in country Z;

(c) Treatment of the situation where, notwithstanding that group member C was participating in a group solution in country Z, there was a possibility that proceedings could be commenced in a number of other jurisdictions;

(d) The actions available to the court in country Y with respect to the proceedings in country Z, including recognition of those proceedings and commencement of local proceedings;

(e) Treatment of the situation where the proceedings commenced in country Y were main proceedings, which would typically take precedence over the proceedings concerning C in country Z; and

(f) The factors that might be relevant to the decision of the court in country Y to commence proceedings.

45. There was agreement that exceptions to recognition on the basis of COMI and establishment under the Model Law might be envisaged for the enterprise group context in limited circumstances, but that criteria for the scope and application of such exceptions would need to be established. Two examples provided were: (a) a situation where no creditors requested commencement of insolvency proceedings at the COMI of the debtor, but were notified of proceedings taking place elsewhere; and (b) where the court of the COMI jurisdiction declined to exercise jurisdiction in favour of proceedings taking place elsewhere based, for example, on criteria along the lines of paragraph 32 of A/CN.9/WG.V/WP.124. As an alternative to (b), the court of the COMI jurisdiction might commence local proceedings and suspend their continuation, pending the outcome of the foreign proceeding; appoint a creditor representative to participate in the foreign proceedings; and, in taking those actions, the court should satisfy itself that creditors would not be worse off under the foreign proceedings than if a local proceeding had been commenced and that creditors had been, and would continue to be, informed about the foreign proceedings. Another suggestion was that a factor additional to the list provided in paragraphs 144 to 147 of the Guide to Enactment and the Interpretation of the Model Law for determining COMI in the group context might be membership in an enterprise group.

3. Relief

46. The Working Group proposed a number of forms of relief additional to those provided in the Model Law that might be required in the group context. Those might include, in respect of proceedings in country Y:

(a) Limiting any stay to realization of assets rather than commencement or continuation of those proceedings in country Y;

(b) Limiting the number and type of creditors permitted to apply for commencement of those proceedings, for example, to certain classes of privileged creditors and those with rights in rem in country Y;

(c) Permitting transfer of assets to the proceedings commenced in country Z;

(d) Appointing a person to represent the creditors of the proceedings commenced in country Y in the proceedings commenced in country Z; and

(e) Requiring information to be provided to creditors in their own language.

47. Other forms of relief to be added might include the ability to recognize, in the primary proceeding in country Z, the priority of foreign creditors' claims determined in accordance with applicable law and pay them in accordance with that priority. With respect to the possible extension of any stay to include solvent group members, it was suggested that if that possibility were to be included in draft provisions, clear criteria would be required. Reference was made to the proposed revisions to the European Insolvency Regulation referred to in paragraph 22 of A/CN.9/WG.V/WP.124 and the conditions that would apply to application of the stay discussed in that paragraph, in particular, the need for proposal of a reorganization plan.

48. The concern was expressed that at any point in time before presentation of such a reorganization plan, it would be difficult for the court in a secondary jurisdiction, such as country Y, to have sufficient information to be able to assess the likelihood of success of that plan and thus whether it was appropriate to commence secondary proceedings. In response, it was suggested that in such circumstances, the proceedings in country Y could be commenced and a provisional stay ordered. The continuation or lifting of that stay could be determined as and when further information concerning the proceeding in country Z was available. It was further suggested that since the burden of proof belonged to the party seeking to commence the primary proceedings in country Z, the court in country Y could commence secondary proceedings until the success of the primary proceedings in country Z could be proven. Another concern related to the treatment of concurrent proceedings, noting that the Model Law included provisions on that point with respect to individual debtors. There was agreement that those issues would need to be further considered.

49. Reference was made to the possibility of recognition or approval of post-commencement finance granted in another jurisdiction and the priority accorded to it, as discussed in paragraphs 36 to 38 of A/CN.9/WG.V/WP.124. A question was raised as to whether that would be permissible under the Model Law. A further observation concerned the importance of such recognition and approval, without which the availability of post-commencement finance was likely to be limited.

4. Cooperation and coordination

50. The Working Group reiterated the importance of cooperation and coordination in the group context. It was noted that although the Model Law had been used in a number of cases to facilitate coordination and cooperation between multiple proceedings concerning group members, a flexible and liberal interpretation had been required; more explicit provisions would be needed in a group context. It was observed that part three of the Legislative Guide and Chapters IV and V of the Model Law provided a starting point for developing legislative provisions. Further consideration could be given, for example, to developing procedural coordination and the concept of a coordinating court in the cross-border context, as well as expanding the forms of cooperation listed in article 27 of the Model Law.

51. It was observed that it might be useful to elaborate the types of cross-border scenario that might occur and to consider the types of cooperation and coordination required in each case. The scenarios would include, for example: (a) a single proceeding concerning multiple group members; (b) multiple proceedings in different jurisdictions concerning different group members; and (c) a single proceeding concerning multiple group members in which the claims of other group members were treated in accordance with applicable foreign law (so-called "synthetic proceedings").

5. Other issues

52. Issues raised for consideration included: (a) identification of parties, including creditors and other stakeholders, that should be permitted to participate in group proceedings and whether or not that participation should be facilitated by appointment of a representative; (b) questions of standing, particularly in concurrent proceedings; (c) voluntary participation of solvent group members, as well as creditors and other stakeholders of those solvent group members, in reorganization proceedings (noting paragraph 152 and recommendation 238 of part three of the Legislative Guide); (d) difficulties associated with appointment of a single or the same insolvency representative to different group members; and (e) balancing inclusive participation with the need for urgent action.

VI. Recognition and enforcement of insolvency-derived judgements

53. The Working Group commenced its discussion of this topic on the basis of document A/CN.9/WG.V/WP.126. As a preliminary point, it was noted that rules on both recognition and enforcement might not be required, as enforcement was often subject to local rules and not all judgements would necessarily require enforcement.

A. Judgements to be covered by a recognition and enforcement regime

54. The Working Group considered how different types of judgement might be analysed in order to identify those that could be considered to be insolvency-derived judgements. Various approaches were suggested, including developing a list of the types of judgement to be considered, such as indicated in paragraph 17, which outlined a general approach, and paragraphs 21 and 22 of A/CN.9/WG.V/WP.126, which indicated the approach adopted under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the Insolvency Regulation). It was noted in respect of the European Union, that judgements could be enforceable under regimes additional to the Insolvency Regulation (e.g. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters).[4] It was observed that any approach adopted by the Working Group should be

[4] Available from http://curia.europa.eu/common/recdoc/convention/en/c-textes/2001R0044-idx.htm.

reconcilable with existing international rules and conventions and the recognition and enforcement of judgements more generally, as well as with ongoing work in other international organizations. It was further observed that development of a draft instrument on this topic should take into account progress of the work on enterprise groups.

55. Responding to the idea of providing a list, various proposals were made with respect to the manner in which judgements might be categorized in order to determine what might be an insolvency-derived judgement. One proposal suggested the following judgements that in substance provided an enforceable remedy that was consistent with fundamental principles of creditors' rights: (a) judgements that emanated from a court of competent jurisdiction; (b) judgements that respected statutory priority schemes; (c) judgements that recognized legitimate claims of creditors; and (d) judgements that respected the rights of insolvency representatives (or their assignee) to pursue reviewable transactions.

56. It was suggested that another way of approaching the different types of judgements might be to focus, firstly, on those that formed part of the insolvency proceedings (that is, arising after commencement of those proceedings), acknowledging that different States might take different approaches to that question, and secondly, on those arising from separate actions that might be taken by the insolvency representative, by creditors or by third parties. In the first category, the focus would be on the collective nature of the proceedings as supervised by the court. Those types of judgements might be subdivided into procedural orders, such as obtaining a stay, participatory judgements concerning, for example, recognition and admission of claims and restorative orders such as those related to avoidance of pre-commencement transactions. In the second category, the role of the court, questions of due process, public policy and, possibly, reciprocity would need to be evaluated.

57. Additional issues to be considered in identifying the judgements that formed part of the insolvency proceedings could, subject to thorough examination, include: (a) decisions that could not have been taken without the commencement of insolvency proceedings; (b) whether the claim in question had a basis in law related to insolvency (as distinct from contract or tort law); (c) judgements that related to the collective resolution of financial distress including reorganization and liquidation; (d) judgements rendered as a result of a direct or natural outcome of, or as part of, the insolvency proceeding, even if handed down by a court other than the insolvency court, such as on the conduct and closure of the proceeding; (e) judgements rendered as a result of separate or individual adversary action between a plaintiff and a defendant, including causes of action that may have been assigned or sold to third parties; (f) judgements that involved a third party and had an effect on the insolvency estate, where the third party was neither a debtor nor a creditor; (g) judgements arising from a cause of action pursued by a creditor (with the approval of the court) where the insolvency representative had decided against pursuing that action; (h) orders or decrees that might not always be characterized as a final judgement but which might have a significant effect on the insolvent estate; and (i) the ancillary relief that might require recognition in order to successfully enforce a judgement (for example, equitable relief such as establishment of a constructive trust).

58. It was observed that some of the judgements discussed above would be enforceable in some jurisdictions under the existing provisions of the Model Law, while in others they would not. In some cases, that would involve questions of interpretation of the implementing legislation, as well as what was explicitly covered by the Model Law.

59. States were invited to provide information to the Secretariat in respect of types of judgement that in their jurisdictions might be considered insolvency-derived judgements.

60. As to the form of the draft instrument, it was suggested that, while it should build upon the provisions of the Model Law, it should nevertheless form a separate instrument that could be used by States that had not enacted legislation based on the Model Law. It might also serve to encourage further adoption of the Model Law.

61. A concern was expressed that difficulties associated with enforcement of certain judgements, for example, those relating to the discharge of the debtor or approval of a reorganization plan, currently existed and should be addressed in the draft instrument. Another issue was that it might be advisable to provide for severability so as to enable enforcement of only a part of a judgement in cases where grounds for refusal of other parts might exist; certain elements such as a punitive damages award might thus be excluded (as noted in paragraph 38 of A/CN.9/WG.V/WP.126).

62. After discussion, there was some agreement that, for the purposes of recognition and enforcement, judgements could be divided into three general categories: (a) those that were part of insolvency proceedings; (b) those that might be part of insolvency proceedings, but involved third parties, for example, judgements relating to avoidance of transactions and determination of property of the estate; and (c) other judgements. Development of a text for future consideration by the Working Group could be based on those categories.

B. Jurisdiction of the originating court

63. Several suggestions were made as to how this issue could be approached. One suggestion was that it could be considered in the context of grounds for refusal for recognition. Another suggestion was that for judgements that were a part of insolvency proceedings, the current Model Law structure, based on main and non-main proceeding, could be followed. For judgements that might be part of insolvency proceedings but involved third parties, a different concept of jurisdiction, such as domicile, might be required in order to ensure judgements emanating from proceedings that were neither main nor non-main could be recognized.

64. Various concerns were expressed with respect to the ability to recognize judgements from jurisdictions other than the location of main and non-main proceedings. One solution, it was suggested, would be to require a connection with the main insolvency proceedings so that the judgement would be enforceable in that jurisdiction.

C. Procedures for obtaining recognition and enforcement

65. It was stressed that speed and minimal formality were of key importance and should be borne in mind in designing the procedural requirements for seeking recognition and enforcement of judgements. With respect to the person who may apply for recognition and enforcement of a judgement, the Working Group agreed that the category should be broader than article 15 of the Model Law and could include creditors, the plaintiff, the creditors' assignees or possibly shareholders, i.e. anyone with an interest in the judgement or who was a party to it.

66. In respect of documents to be produced, the Working Group agreed that they should include a certified copy of the judgement, translated if required, and possibly confirmation of the finality of the judgement and whether or not the relevant period for appeal had expired. It was suggested that information regarding notice and service of process might also be useful.

67. In terms of the decision of a court to recognize an insolvency-derived judgement, it was suggested that it should be possible without a hearing unless the judgement was challenged on the basis of the agreed grounds for refusal and there should be no review of the decision on the merits.

D. Grounds to refuse recognition

68. With respect to the grounds raised in paragraph 40, subparagraph (a) of A/CN.9/WG.V/WP.126, it was agreed that only judgements that were final and enforceable should be covered by the draft instrument. With respect to paragraph 40, subparagraph (b) of the working paper, it was agreed that public policy, fraud, lack of due process and failure to provide adequate notice should be included as separate grounds for refusal. With respect to public policy, concern was expressed that it should be interpreted narrowly. Given the difficulty of reaching consensus on uniform interpretation of the notion of public policy, it was suggested that material on interpretation should be included in any guide to enactment of the draft provisions, such as provided in paragraphs 101 to 104 of the Guide to Enactment and Interpretation of the Model Law.

69. With respect to paragraph 40, subparagraphs (c) and (d) of A/CN.9/WG.V/WP.126, it was observed that care needed to be taken in respect of the manner in which such exceptions might be drafted to avoid unintended effects. The question of tax claims and other issues referred to paragraph 42 of the working paper was raised; it was generally observed that such claims might not be recognized or enforced.

70. Additional grounds for refusal might include circumstances: (a) where the court had doubts about the integrity of the originating court; (b) where the originating court lacked or had insufficient jurisdiction over the defendant; and (c) in which there was abuse of process and the administration of justice was brought into disrepute. It was also suggested that instead of restricting recognition to judgements originating from a main or non-main proceeding, recognition could be refused if it would hinder the administration of the cross-border insolvency of a debtor.

71. Recalling the decision taken in respect of the Model Law with respect to reciprocity, the Working Group agreed that it might be desirable to take a similar approach and not include such a requirement in the proposed text.

E. Other matters

72. In terms of other matters for inclusion in the new instrument, the Working Group agreed that articles 4 and 19 of the Model Law might be relevant, with article 4 serving as a signpost for those States that might wish to limit the courts in which applications for recognition and enforcement of foreign insolvency-derived judgements might be considered. As an alternative, determination of the competent court could be left to the person seeking recognition and enforcement of the judgement.

73. A suggestion was made that in developing this new instrument, regard should be had to some of the guiding principles outlined in the context of the work on enterprise groups. However, it was cautioned that such consideration should not be a first priority, with the initial focus being upon resolving more fundamental questions.

74. The Working Group agreed that the instrument should be developed on a stand-alone basis, as opposed to forming part of the Model Law. Nevertheless, it was agreed that the Model Law would provide the appropriate context for the new instrument.

75. A question was raised with respect to treatment of competing judgements. It was suggested that application of the res judicata principle should provide an appropriate solution. A related issue concerned the manner in which judgements arising from what might be considered “competing” insolvency proceedings might be treated.