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Report of Working Group V (Insolvency Law) on the work of its forty-eighth session (Vienna, 14-18 December 2015)

Contents

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I. Introduction

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

1. At its forty-fourth session (December 2013), Working Group V (Insolvency Law) 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 UNCITRAL Legislative Guide on insolvency law (the Legislative Guide) and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16). Discussion of those issues commenced at the forty-fifth session of Working Group V (April 2014) (A/CN.9/803), and continued at the forty-sixth (December 2014) (A/CN.9/829) and forty-seventh sessions (May 2015) (A/CN.9/835).

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

2. At its forty-fourth session, the Working Group had also 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 Legislative Guide could be applied in the enterprise group context and to 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 reported back in the second half of 2014 with a draft text for consideration by the Working Group at its forty-sixth session (A/CN9/WG.V/WP.125). That draft text was considered at the forty-sixth (A/CN.9/829, paras. 12 to 32) and forty-seventh (A/CN.9/835, paras. 13 to 22) sessions.

3. The report of the forty-seventh session of the Working Group indicated that a new draft of the text addressing the obligations of directors of enterprise group companies in the period approaching insolvency would be prepared for consideration at its forty-eighth session (A/CN.9/835, para. 13). That draft has not yet been prepared on the basis that more progress needed to be made on the work on facilitating the cross-border insolvency of multinational enterprise groups before it was possible to identify how the draft text on directors' obligations might need to be adjusted to ensure consistency. Depending on the progress made during the

forty-eighth session of the Working Group, it was noted that it might be possible to provide that new draft text for its forty-ninth session.

C. Recognition and enforcement of insolvency-derived judgements

4. At its forty-fourth session (December 2013), Working Group V had further agreed (A/CN.9/798, para. 30) that it should seek at an appropriate time 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 UNCITRAL Model Law on Cross-Border Insolvency. The Commission approved a mandate in accordance with those terms (A/69/17, para. 155). The Working Group commenced its deliberations on the topic at its forty-sixth session (December 2014) (A/CN.9/829) and continued them at its forty-seventh session (May 2015) (A/CN.9/835).

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its forty-eighth session in Vienna from 14-18 December 2015. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Armenia, Austria, Brazil, Canada, China, Colombia, Croatia, Czech Republic, Denmark, El Salvador, France, Germany, Greece, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Namibia, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, 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: Bolivia (Plurinational State of), Chile, Cyprus, Dominican Republic, Lebanon, Luxembourg, Netherlands, Peru, Republic of Moldova, Slovakia, Sudan, Tunisia and United Arab Emirates.

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*: World Bank;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students Association (ELSA), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, International Bar Association (IBA), International Insolvency Institute (III), International Women's

Insolvency and Restructuring Confederation (IWIRC), Islamic Development Bank (ISDB), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), New York City Bar Association (NYCBAR), and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Carlos SÁNCHEZ MEJORADA Y VELASCO (Mexico)

Rapporteur: Ms. Michal ELBAZ (Israel)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.132);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: key principles (A/CN.9/WG.V/WP.133);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: revised draft legislative provisions (A/CN.9/WG.V/WP.134); and

(d) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.135).

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) facilitating the cross-border insolvency of multinational enterprise groups; and (b) the recognition and enforcement of insolvency-derived judgements.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group commenced its deliberations on the cross-border insolvency of multinational enterprise groups on the basis of documents A/CN.9/WG.V/WP.128 (recalling that articles 8 to 18 had not been considered at the forty-seventh session), A/CN.9/WG.V/WP.133 and A/CN.9/WG.V/WP.134, followed by the recognition and enforcement of insolvency-derived judgements on the basis of document A/CN.9/WG.V/WP.135. The deliberations and decisions of the Working Group on these topics are reflected below.

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

A. Key principles of a regime to address insolvency in the context of enterprise groups

13. The Working Group commenced its discussion of this topic on the basis of the principles contained in document A/CN.9/WG.V/WP.133.

14. A new principle was proposed for insertion before principle 1 along the following lines:

> "The principles that follow are each subject to two fundamental underpinning principles:
>
> "(a) The jurisdiction of the courts in the State in which the centre of main interests (COMI) of an enterprise group member is located is [and remains] unaffected; and
>
> "(b) The principles do not replace or interfere with any process or procedure (including any permission, consent or approval) required by the jurisdiction in which the COMI of an enterprise group member is located, in respect of that enterprise group member's participation [to any extent] in a group solution."

15. The Working Group approved the additional principle as proposed. It was observed that the new principle would cover some issues raised in connection with other principles, for example, the requirements for participation in the coordination process as contemplated in principle 5.

16. The Working Group approved principles 1 to 8 with the following observations. It was noted that the reference to refusing the commencement of proceedings in paragraph 5 might not be possible in all jurisdictions, as it would be dependent upon domestic law. Use of the words "rather than substantive" in principle 3 should be deleted and the word "exclusively" should be added before the word "procedural".

17. Noting that substantive consolidation had been discussed in part three of the Legislative Guide, it was suggested that it should also be discussed in the cross-border context and any reasons for not including it in this draft text as a possible tool in resolving cross-border insolvency should be explained.

18. Having approved the principles, the Working Group considered how to approach the draft text on enterprise groups contained in documents A/CN.9/WG.V/WP.128 (articles 8 to 18) and WP.134. A proposal was made that the various topics contained in those documents could be divided into five main areas, the first three of which would form a set of basic provisions with the fourth and fifth being supplemental for those States wishing to go beyond the first three. The first topic, for example, could address coordination and cooperation as set out in draft articles 9 to 18 of A/CN.9/WG.V/WP.128. The second topic could include the elements needed for the development of a group solution involving multiple entities and approval of that solution, as well as voluntary participation in the solution, and obtaining relief to support that solution. The third topic could cover the use of

synthetic proceedings in lieu of commencing non-main proceedings. The fourth and fifth supplemental topics could address the use of synthetic proceedings in lieu of commencing main proceedings and approval of the group solution on a more streamlined basis that assessed whether the interests of creditors of the affected group member were adequately protected by that solution.

19. Endorsing that general approach, the Working Group agreed to first consider articles 9 to 18 of A/CN.9/WG.V/WP.128.

B. Draft legislative provisions on the cross-border insolvency of enterprise groups (A/CN.9/WG.V/WP.128)

1. Cooperation with foreign courts and foreign representatives

Article 9. Cooperation and direct communication between a court of this State and foreign courts or foreign group member representatives

20. There was general support in the Working Group for article 9 as drafted.

Article 10. Cooperation to the maximum extent possible under article 9

21. There was general support in the Working Group for article 10 as drafted, with the following comments:

(a) Some preference was expressed in favour of deleting the square brackets in paragraph (c) and retaining the text "participating in a group insolvency solution", although it was noted that consistency with the definition of that phrase needed to be maintained;

(b) An additional paragraph might be added to the draft article to address cooperation among courts on how to allocate and provide for the costs associated with cross-border cooperation; and

(c) A cross-reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation might be added to the draft article.

Article 11. Conditions applicable to cross-border communication involving courts

22. There was support in the Working Group for the deletion of draft article 11 on the basis that it was already contained in part three of the Legislative Guide and was more appropriate to that text than a model law.

Article 12. Effect of communication under article 9

23. There was some support for deleting draft article 12 as covering issues not addressed in the Model Law; however, there was also support for retaining it on the basis that it facilitated common understanding about the effect of communication. In that regard, it was noted that in jurisdictions less familiar with cross-border cooperation, there was uncertainty as to the effect of this type of communication, and that retaining draft article 12 could facilitate effective implementation of this text. It was agreed that the draft article would be retained for further consideration.

Article 13. Coordination of hearings and Article 14. Cooperation and direct communication between the […] and foreign courts and foreign group member representatives

24. There was general support in the Working Group for articles 13 and 14 as drafted.

Article 15. Cooperation to the maximum extent possible under article 14

25. There was general support in the Working Group for article 15 as drafted, with the following comments:

(a) Some preference was expressed in favour of deleting the square brackets in paragraph (d) and retaining the text "participating in a group insolvency solution"; and

(b) The language of article 27(d) of the Model Law, i.e. "agreements concerning the coordination of proceedings" should be used in paragraph (b) in place of "cross-border insolvency agreement".

26. It was noted that the draft text did not contain a draft article 16.

Article 17. Authority to enter into cross-border insolvency agreements

27. There was general support in the Working Group for article 17 as drafted, but it was suggested that the title and the substance of draft article 17 should incorporate the language of article 27(d) of the Model Law, i.e. "agreements concerning the coordination of proceedings" in place of "cross-border insolvency agreement".

Article 18. Appointment of a single or the same insolvency representative

28. Subject to giving some consideration in the next draft of the text to the use of the phrase "a single or the same insolvency representative" to provide greater clarity, there was general support in the Working Group for article 18 as drafted.

Article 8. Protection of creditors and other interested persons

29. The Working Group recalled that it had not considered draft article 8 at its previous session (as noted above in para. 12). There was general support for article 8 as drafted.

2. Coordination of concurrent proceedings (A/CN.9/WG.V/WP.128, section D)

30. There was some agreement that the draft model law may need to incorporate provisions addressing issues covered by articles 28 to 32 of the Model Law. At this stage, however, the Working Group was not clear what might be required and noted that this matter should be reverted to in future discussions.

C. Draft legislative provisions on the cross-border insolvency of enterprise groups (A/CN.9/WG.V/WP.134)

31. The Working Group next considered the revisions made to articles 1 to 7 of the draft text based on the conclusions reached at its forty-seventh session (A/CN.9/835, paras. 23-46).

Article 2. Definitions

32. Some support was expressed in favour of retaining Variant 2 of paragraphs (h) "foreign group proceeding" and (i) "enterprise group insolvency solution". It was felt that those variants better reflected the desire to focus on recognition of the coordinating proceeding.

Article 3. Recognition of a foreign group proceeding

33. The following proposals were made in respect of draft article 3:

(a) There was support for the proposal that the words in subparagraph 3(a) "that court has not prohibited participation of that group member in the" should be deleted and that the second sentence should end as follows: "any approval which may be required under the domestic law of the State of the opening of proceedings for the participation in the [foreign group proceeding] [enterprise group insolvency solution] has been obtained";

(b) That in the same subparagraph, the word "proposed" be added before the phrase "enterprise group insolvency solution";

(c) That in the same subparagraph, it might be clarified whether the words "subject to insolvency proceedings" referred to insolvency proceedings that had already commenced and it was proposed that some consideration might need to be given as to whether this subparagraph was consistent with principle 4 of A/CN.9/WG.V/WP.133; and

(d) That subparagraph 3(b) should also require a statement identifying all members of the enterprise group.

Article 5. Decision to recognize a foreign group proceeding

34. The following proposals and observations were made in respect of draft article 5:

(a) It was questioned whether the phrase "subject to any applicable public policy exception" in paragraph 1 was necessary; it was noted that the answer to that question might be resolved by the form that the draft text ultimately took;

(b) That subparagraph 1(i) could be deleted on the basis that it repeated elements of the definition of "foreign group proceeding";

(c) That since subparagraphs 1(g) and (h) were generally supported, the square brackets around them could be deleted and the text retained, with attention to consistency with the discussion at subparagraph 40(d) below; and

(d) That paragraph 1 bis should be deleted on the basis that it overlapped with the definition of "foreign group proceeding".

35. In respect of subparagraph 1(f), some concern was expressed that it revealed an overall problem with the drafting, given the definition that had been agreed for "foreign group proceeding" in draft article 2. Because of that change, the meaning of draft article 5 had been altered and, in particular, subparagraph 1(f) was somewhat circular in that it repeated elements of that definition. In addition, subparagraph 1(f) referred to other types of proceeding, for example, those commenced on the basis of the presence of assets in the jurisdiction, which would not be recognizable under the Model Law, but which may nevertheless be a necessary part of a group solution. An issue to be considered was therefore whether there should be a departure in the group context from the Model Law approach of recognizing proceedings on the basis of COMI or establishment. In considering those other types of proceedings, and the manner in which they might be involved in the group solution, it was suggested that it would be important to resolve the function of a group proceeding in achieving that group solution. For example, if the group proceeding was to simply coordinate negotiation of that solution, it would not supplant the COMI as a basis for commencement of proceedings in respect of a group member.

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding

36. There was general support in the Working Group for article 6 as drafted, with the following comments:

(a) It was agreed that the word "appropriate" should be added to the chapeau before the words "relief of a provisional nature";

(b) In respect of subparagraphs 1(a) and (b), some support was expressed in favour of retaining the words in square brackets, and also in favour of deleting those words. Those who preferred to retain the text in square brackets agreed that the word "procedural" was not necessary and could be deleted. After discussion, it was agreed that the square bracketed text should be deleted as being inappropriate for inclusion in a text to be enacted as domestic law. It was observed that the relief that might be granted under draft article 6 was discretionary and that, in any event, the court could only order relief that it was permitted to order under domestic law. It was also observed that that idea should be expressed clearly in any commentary or guide to enactment prepared for the draft text;

(c) In respect of subparagraph 1(d), support was also expressed in favour of its deletion on the basis of its potential to conflict with subparagraph 1(b), and on the basis of the potential for loss of value through the continuation of funding, which was contrary to the focus on preservation measures in draft article 6(1) and might create problems if recognition was subsequently denied. It was observed, however, that continuation of funding could be critical to achieving a successful reorganization and the provision should thus be retained. After discussion, it was agreed that subparagraph 1(d) should be retained, with the addition of the words "subject to any appropriate safeguards the receiving court may apply";

(d) It was agreed that subparagraph 1(e) should be deleted as being too broad and not consistent with the urgency required for provisional relief; and

(e) Some support was expressed in favour of retaining the text in both sets of square brackets in paragraph 4. Another suggestion was to replace that text with the

words “a proceeding in the court located at the COMI of a group member participating in the group solution”.

Article 7. Recognition of a foreign group proceeding

37. There was general support in the Working Group for article 7 as drafted, with the following comments:

(a) As noted in respect of draft article 6 above (see subpara. 36(b)), the square bracketed text in subparagraphs 1(a) and (b) should be deleted; and

(b) It was agreed that the phrase “Where the funding group member is participating in the group coordination plan, and where permitted by relevant laws [of the receiving court]” should be inserted in subparagraph 1(h).

D. Proposal in respect of the cross-border insolvency of enterprise groups

38. In keeping with the general approach endorsed in paragraphs 18 and 19 above, the Working Group considered the detail of a proposal by Switzerland, the United Kingdom, the United States and INSOL Europe. Having considered the topic of coordination and cooperation as contained in articles 9 to 18 of A/CN.9/WG.V/WP.128, there was general agreement that the proposal provided a viable way forward, separating the more contentious issues from those which were more amenable to broad agreement. It was noted that the proposal should not be considered as complete, since it included policy statements and legislative texts, and might generally require further elaboration and refinement. The Working Group discussed the specific elements of the proposal as set out below.

39. The first article considered was as follows:

“**Article A — Definitions**

“(1) ‘Group Member’ means an enterprise that has a separate legal identity and that is interconnected, by control or significant ownership, with one or more other enterprises.

“(2) ‘Group Representative’ means a person or body who is appointed pursuant to Article B(3) and who is responsible for seeking to develop a Group Solution.

“(3) ‘Group Solution’ means a set of proposals adopted in a Planning Proceeding:

“(a) For the reorganization, sale, or liquidation of all or some of the operations or assets of more than one Group Member;

“(b) That would be likely to add to the overall combined value of the Group Members involved; and

“(c) That must be approved, insofar as the proposals relate to a particular Group Member, in the jurisdiction in which that Group Member has its centre of main interests.

"(4) 'Planning Proceeding' means a proceeding:

"(a) That is a main proceeding for a Group Member that would be a necessary and integral part of a Group Solution;

"(b) In which a Group Representative has been appointed;

"(c) In which there is a reasonable prospect of developing a Group Solution; and

"(d) In which one or more additional Group Members are participating for the purpose of attempting to develop a Group Solution."

40. The following suggestions were made with respect to the drafting of the definitions:

(a) To the extent that the definitions reflected those included in other UNCITRAL insolvency texts, including part three of the Legislative Guide, care should be taken to ensure consistency;

(b) With respect to paragraph 1, since the word "enterprise" could refer to a single entity or something broader, the definition should be along the lines of "a separate legal entity that is a member of an enterprise group";

(c) The chapeau of paragraph 3 should include the text "a proposal or set of proposals…"; and

(d) With respect to subparagraphs 3(b) and 4(c), a more objective test should be used along the lines of "the purpose of which would be to enhance the overall combined value of the group members involved" and "the purpose of which would be to develop a group solution" respectively.

41. The next article considered was:

"**Article B — Participation by Group Members in an Insolvency Proceeding in this State; Appointment of a Group Representative**

"(1) Subject to paragraph (2), if an insolvency proceeding has been commenced in this State for a Group Member whose centre of main interests is located in this State, any other Group Member (whether solvent or insolvent) may participate in that proceeding for the purpose of attempting to develop a Group Solution.

"(2) An insolvent Group Member whose centre of main interests is in another State may not participate in a proceeding under paragraph (1) if a court in that other State precludes it from so doing.

"(3) If one or more Group Members participate in a proceeding under paragraph (1), the court may appoint a Group Representative, who may then seek recognition from foreign courts and may seek to participate in any foreign proceeding related to a participating Group Member."

42. The following suggestions were made with respect to the drafting of the article:

(a) Paragraph 1 should distinguish between solvent and insolvent group members because they were governed by different legislative frameworks; the interests of creditors of solvent entities were different to those of an insolvent

entity; different considerations would apply as between liquidation and reorganization as to the participation in a group solution of solvent and insolvent entities; and

(b) Paragraph 3 should clarify on whose behalf the group representative was acting in seeking recognition.

43. The next article considered was:

"**Article C — Recognition of a Proceeding Occurring in Another State as a Planning Proceeding**

"A Group Representative appointed in a foreign proceeding may seek to have that proceeding recognized in this State as a Planning Proceeding. Recognition shall be granted by the court if the criteria in Article A(4) are met."

44. It was suggested that it should be clarified that the State referred to in article C was the receiving State and not the originating State in which the group representative had been appointed.

45. The next article considered was:

"**Article D — Participation by Group Representative and Available Relief**

"(1) Upon recognition of a foreign proceeding as a Planning Proceeding under Article C, the Group Representative may participate in any proceedings in this State related to Group Members that are participating in the Planning Proceeding.

"(2) To the extent needed to preserve the possibility of developing a Group Solution, the court may, at the request of the Group Representative, grant the following relief with respect to the assets or operations of any insolvent Group Member that is participating in the Planning Proceeding in this State:

"(a) Staying execution against the Group Member's assets;

"(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the Group Member;

"(c) Suspending the proceedings temporarily to allow for the development of a Group Solution;

"(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the Group Member's assets, rights, obligations, or liabilities;

"(e) Entrusting the administration or realization of all or part of the Group Member's assets located in this State to the Group Representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

"(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the Group Member's assets, affairs, rights, obligations, or liabilities; and

"(g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State."

46. The following suggestions were made with respect to the drafting of the article:

(a) There needed to be consistency between the proceedings being recognized and the debtors in respect of whose assets relief might be granted, and further consideration of whether the relief should be automatic or discretionary upon recognition, bearing in mind the distinction between articles 20 and 21 of the Model Law;

(b) Appropriate safeguards for creditors should be considered;

(c) In respect of article D(1), thought might need to be given to the situation where a group member from the receiving State was participating in the planning proceeding, but no local proceeding had been commenced in the receiving State;

(d) Consideration should be given to adding, where relevant, the words "in this State" if the relief in article D(2) was intended to have merely territorial rather than universal effect;

(e) Identification or specification of the receiving and originating jurisdictions in respect to the COMI of relevant debtors needed to be clearer; and

(f) In respect of article D(2)(e), the restriction of relief to perishable and other assets in jeopardy was thought to be too narrow.

47. The next article considered was:

"**Article E — Approval of Local Elements of a Group Solution**

"(1) If a proposed Group Solution is developed in the Planning Proceeding, and the Group Representative submits to the court in this State the portion of the Group Solution affecting an insolvent Group Member whose centre of main interests is in this State, the court shall submit the relevant portion of the Group Solution to the approval process in [*cross-reference to relevant provisions in domestic insolvency law*].

"(2) If the approval process pursuant to paragraph (1) results in approval of the portion of the Group Solution affecting the Group Member, the court shall confirm and implement those elements relating to assets or operations in this State."

48. The following suggestions were made with respect to the drafting of the article:

(a) In respect of article E(1), the group representative should submit the entire group solution to the court in the receiving State and the approval process could then be limited to the relevant local elements of that solution; and

(b) A reference to establishment should also be included in article E(1) to cover the situation where a group solution affected creditors in a jurisdiction in which the group member participating in that solution only had an establishment.

49. The next articles considered were:

"**Article F — Use of Synthetic Non-Main Proceedings**

"(1) To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or Group Representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a non-main proceeding in that other State.

"(2) A court in this stage may stay or decline to open a non-main proceeding if a foreign representative or Group Representative from another State in which a main proceeding is pending has made a commitment under paragraph (1)."

"**Article G — Use of Synthetic Main Proceedings**[1]

"(1) To facilitate the treatment of claims that would otherwise be brought by creditors in a proceeding in another State, a foreign representative or Group Representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a proceeding in that other State.

"(2) A court in this stage may stay or decline to open a main proceeding if a foreign representative or Group Representative from another State in which a proceeding is pending has made a commitment under paragraph (1)."

50. The following suggestions were made with respect to the drafting of the articles, noting that article F formed part of the basic provisions and article G was a supplemental provision:

(a) The word "synthetic" should be deleted from the heading of article F and a more appropriate term identified;

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[1] Articles G and H were proposed as supplemental components described by the following text:

"The supplemental components, which would be additional options, would go a step further. They would permit a court to use synthetic proceedings for a group member whose COMI was in a different jurisdiction. They would also allow a court to provide additional relief — staying or declining to open proceedings, as well as approving the relevant portion of a group solution without submitting it to the applicable approval procedures under local law — if the court determined that creditors would be adequately protected.

"Use of the optional provisions might result in a group member's insolvency being handled in a manner that was not consistent with the prior expectations of creditors and other third parties that the legal entity would be subject to normal proceedings in its COMI jurisdiction. As a consequence, departing from that basic principle (COMI) should be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency largely outweighed the negative effect on creditors' expectations in particular and legal certainty in general. This would only appear to be justified:

- In jurisdictions where courts traditionally held a large degree of discretion and flexibility in the handling of insolvency proceedings,
- Where the group in question was closely integrated and therefore the benefit of synthetic proceedings in lieu of main proceedings (at the COMI) was obvious, and
- Where the use of the proceedings under Articles A to G (if available) could not achieve a similar result."

(b) Article F should be supplemented by appropriate provisions on the protection of creditors such as draft article 8 above (see para. 29) (and article 22 of the Model Law);

(c) The meaning of the term "treatment" in both articles should be clarified, i.e. whether it referred to the ranking of claims or to some other matter; and

(d) That article F should be regarded as a supplemental rather than a basic provision. To address that concern, it was proposed that articles F(1) and G(1) should be considered to be basic provisions, as they simply addressed the type of treatment that creditors might be offered, and that the reference in article F(1) to "non-main proceeding" be adjusted to "proceeding"; article G(1) as currently drafted could then be deleted. Articles F(2) and G(2) would then address the more controversial issue of the power of the court to decline to commence main or non-main proceedings; whether that should be considered to be a basic or supplemental provision would require further consideration.

51. The next article considered was:

"Article H — Additional Relief

"(1) If, upon recognition of a Planning Proceeding pursuant to Article C, the court is satisfied that the interests of creditors of affected Group Members would be adequately protected in the Group Coordination Proceeding, the court, in addition to granting any relief described in Article D, may stay or decline to open insolvency proceedings in this State relating to Group Members participating in the Planning Proceeding.

"(2) Notwithstanding Article E(1), if, upon submission of a proposed Group Solution by the Group Representative, the court is satisfied that the interests of creditors of the affected Group Member are adequately protected in the Planning Proceeding, the court may approve the relevant portion of the Group Solution and grant any relief described in Article D that is necessary for its implementation."

52. The following suggestions were made with respect to the drafting of the article:

(a) There should be consideration of the extent to which the ability to recognize and enforce a group solution might go beyond what was possible pursuant to the relief provisions of the Model Law and the manner in which article H(2) might raise issues related to the model law being developed on recognition and enforcement of insolvency-related judgements; and

(b) It was clarified that articles F and G were intended to operate independently of a group solution and thus in a situation where there was no agreement on a planning proceeding.

53. At the end of the discussion, given the support expressed by the Working Group for the group solution discussed during the deliberations, the Secretariat was requested to prepare a draft text for consideration at a future session based upon the principles contained in A/CN.9/WG.V/WP.133, and the text in A/CN.9/WG.V/WP.128 and WP.134, as well as the articles and structure of the proposal outlined above in paragraphs 18 and 38 to 52. That draft should take into

account the conclusions and agreements reached at the current session of the Working Group.

V. Cross-border recognition and enforcement of insolvency-related judgements

54. The Working Group commenced its discussion of this topic on the basis of the draft model law on the recognition and enforcement of insolvency-related judgements contained in document A/CN.9/WG.V/WP.135 (draft model law).

Article 1. Scope of application

55. The Working Group recalled its agreement concerning the need to take into consideration existing international and regional instruments, as well as those under development, in order to avoid overlap and to ensure that there were no gaps in terms of the scope of application of the draft model law. It was noted that that view was also reflected by the Commission at its forty-eighth session (A/70/17, para. 236). The Working Group agreed that those considerations should continue to be borne in mind in its ongoing deliberations.

56. In pursuit of that objective, it was proposed that the following text should be inserted in draft article 1:

> "x. This [law] shall not apply to a judgement where there is a Treaty [in force] concerning the recognition or enforcement of civil and commercial judgements (whether concluded before or after [this law] comes into force), and that Treaty applies to the judgement.
>
> "y. A judgement is to be treated for the purposes of paragraph x as falling within the class of judgements to which a Treaty applies:
>
> "(i) even where the particular judgement is not enforceable under the Treaty because of the particular circumstances of the case; and
>
> "(ii) whether or not the State has adopted the Treaty."

57. While the proposal received some support, a number of reservations were also expressed, particularly in respect of the content of paragraph (y). Some were of the view that it was unusual for an UNCITRAL instrument to state that its provisions would apply in a State other than the enacting State. Others did not agree with that interpretation of the proposed text.

58. After discussion, there was support in the Working Group for Variant 1 of draft article 1, for retaining paragraph 2 of the draft article, and with respect to the proposal outlined above, to provide a revised text based on the issues discussed in the Working Group and exploring other possible drafting options to reflect the intent of that proposal. Support was also expressed in favour of retaining Variant 3.

Additional text to address concerns about article 1, Variant 1

59. After further discussion and recalling that the Working Group had expressed a preference for the retention of Variant 1, a concern was expressed that subparagraph 1(1)(b) might lead to a conflict of laws, as it seemed to suggest that

recognition and enforcement of insolvency-related judgements in a foreign State could be governed by the law of the originating State. The following text for a new article was proposed: “In the event of a conflict between the application of this law and the law of the State where the judgement was rendered, the provisions of this law prevail.”

60. There was some acknowledgement of the difficulty that was identified. It was explained, however, that the purpose of subparagraph 1(1)(b) was simply to authorize the recognition and enforcement of an insolvency-related judgement in a foreign State in much the same way as article 1(1)(b) of the Model Law authorized assistance to be sought in a foreign State in connection with a proceeding under the law of the enacting State. On that basis, Variant 1 of draft subparagraph 1(1)(b) would not give rise to a conflict of law situation. Reference was also made to article 5 of the Model Law (which is repeated in this draft text — see para. 71 below) and it was suggested that, for greater clarity, the text of the heading of that article might be used to replace subparagraph 1(1)(b). A further proposal to remedy the perceived difficulty was to add the words “in this State” to the chapeau of Variant 1 of article 1. After discussion, it was agreed that if the intent was analogous to article 1 of the Model Law, the suggestion to use the heading of draft article 5 of the current text as a substitute for draft subparagraph 1(1)(b) might provide a solution. In that case, however, it was suggested that draft subparagraph 1(1)(b) would not be needed because article 5 of the draft text would be sufficient. The Working Group agreed that the issue would require further consideration.

Article 2. Definitions

(a) “Foreign proceeding”

61. The Working Group was generally in agreement with paragraph (a) as drafted. Support was specifically expressed in favour of retaining the text “including an interim proceeding,” and deleting the brackets around it.

(c) “Judgement”

62. The three issues raised with respect to the definition were the inclusion of the word “final”, the reference to administrative decisions, and the inclusion of provisional measures. A number of concerns were expressed with respect to the use of the word “final”, and the manner in which it might be interpreted under domestic law in different States. There was support both in favour of and against the use of the term. A proposal to resolve that issue that focussed on the enforceability of the judgement in the originating jurisdiction received some support. It was noted that the concept of enforceability was used in other international instruments.

63. Concerns expressed with respect to administrative decisions included the nature of the bodies that might issue decisions and whether the parties to the dispute had been given an opportunity to be heard before the decision was made. A proposal was made to limit administrative decisions that were enforceable under this text to those that would have the same effect as court judgements under the law of the originating State. That proposal received some support. A different proposal was to delete any reference to administrative decisions.

64. As to the inclusion of provisional measures, a number of delegations expressed concern on their inclusion on the basis that they were merely interim orders and

might be changed by the originating court. Another concern related to differences between the types of relief that might be ordered by an originating court and those that might be available as relief in the receiving State; where the former were much broader than the latter, the receiving court might be unable to recognize and enforce the order. In that regard, it was noted that relief granted under the Model Law was subject to the provisions of local law, e.g. articles 20 (2) and 22 (2). A different view was that provisional measures might be of particular importance in insolvency, particularly where they were of a protective or conservatory nature. It was suggested that some of the concerns expressed might better be addressed under draft article 10, or by qualifying provisional measures by reference to those enforceable under the laws of the originating State.

65. After discussion, it was agreed that in respect of each of the issues outlined above, since the Working Group could not reach agreement on how to reconcile the different views, the existing text should remain in square brackets. The Secretariat was requested to explore possible solutions including approaches adopted by the Hague Conference, such as that of equivalent effect, as included in article 13 of the text emanating from the fifth session of the Hague Conference working group on the judgements project (October 2015).

(d) "Insolvency-related judgement"

66. The prevailing view was that Variant 1 of the chapeau was preferred over Variant 2, noting that the reference to "insolvency estate" could be defined by reference to paragraph 12 (t) of the glossary of the Legislative Guide. No comments were expressed with respect to subparagraphs (i), (iii), and (iv).

67. With respect to subparagraph (ii), it was suggested that the words "and assets" should be added after the word "sums". That proposal received some support. A second proposal was to limit the subparagraph to those cases where the obligations arose after the commencement of insolvency proceedings. It was agreed that that proposal would need further consideration.

68. Support was expressed in favour of Variant 1 of subparagraph (v). In respect of subparagraph (vi), one view expressed was that it raised the same concerns as noted above with respect to provisional measures. It was suggested in respect of subparagraph (vii) that UNCITRAL's work on secured transactions should be cross-referenced. Further suggestions concerned subparagraphs (viii) and (xiii), which were said to be currently drafted too broadly and should be limited to judgements that would otherwise be enforceable under this instrument. In terms of subparagraph (ix), support was expressed for retention of the subparagraph with the addition of the words "that could be pursued by or on behalf of the insolvency estate". In relation to subparagraphs (x) to (xii), although it was proposed that those provisions should be deleted on the basis that they were covered by the Model Law, it was noted that there might be situations where that was not the case (such as where the foreign proceeding was no longer pending), and they should be retained in the text. There was support for the latter view on the additional basis that it was not entirely clear whether such provisions were covered by the Model Law.

69. After discussion, a preference was expressed in favour of Variant 1 of the chapeau and of Variant 1 of subparagraph (v). It was agreed that subparagraphs (ii), (vi) to (ix) and (xiii) required some revision as discussed above, and that

subparagraphs (x) to (xii) should be retained. There was broad support for deleting subparagraph (xiv).

Possible additions to draft article 2

70. After discussion, the Working Group agreed to retain Variant 3 of paragraph (f), to retain paragraph (e) and to delete paragraphs (g) and (h).

Articles 3 to 7

71. Although some reservations were expressed with respect to the need for article 5, support was nonetheless expressed in favour of retaining draft articles 3 to 7.

Article 8. Recognition and enforcement of an insolvency-related judgement

72. Support was expressed in favour of retaining Variant 2, with the following adjustment to paragraph 1: a comma should be inserted at the end of the first sentence, followed by insertion of "including by way of defence." The second sentence could then be deleted. In subparagraph 1 (b), the reference to finality should be aligned with the revised definition of "judgement". Some support was expressed in favour of deleting paragraph 3.

73. The view was expressed that subparagraph 2 (c) was not needed because only notice of the application for recognition and enforcement was required to support that application. Notice relating to the originating proceeding could be requested by the judge if proper notification of that proceeding was contested.

74. It was suggested that the words "as required by the law of the State of recognition" be added after the word "evidence" in subparagraph 2 (d).

75. Reference was made to paragraph 3 of the notes section following draft article 8, which quoted from paragraph 4 of the preliminary draft text emanating from the Hague Conference working group on the judgements project dealing with the question of postponement. Support was expressed in favour of including that concept in the draft text.

Article 9. Decision to recognize and enforce an insolvency-related judgement

76. Concerns were raised as to the intent of paragraph (f). A view was expressed that the purpose was not to provide for review of the foreign judgement itself, but rather of the proceedings in which the judgement was issued, and in particular, whether those proceedings would be manifestly contrary to the public policy of the receiving State. Concerns were also expressed, however, that that could be read as contradictory to the purpose of the draft instrument. A related concern was that refusal of recognition under the Model Law on technical grounds should not be a ground for refusing recognition of a judgement emanating from those proceedings. It was proposed that the chapeau of article 9 be simplified to read "An insolvency-related judgement shall be recognized and enforced provided:".

77. It was proposed that public policy concerns might best be addressed by incorporating an article along the lines of article 6 of the Model Law. That article would replace paragraph (f) and article 10 paragraph (d) and resolve any question of the party with the burden of proving that recognition of the judgement would be

manifestly contrary to public policy. That proposal received some support, and a proposal for text was made later in the session (see para. 81 below).

Article 10. Grounds to refuse recognition of an insolvency-related judgement

78. The Working Group supported revision of the chapeau of article 10 to read: "Recognition and enforcement of an insolvency-related judgement may be refused if:".

Paragraph (a)

79. Some support was expressed in favour of retaining the first part of the provision dealing with the possible review of the judgement and deleting the second part relating to lack of enforceability in the originating State because of such a review. An alternative view was also expressed that the later phrase of the provision in respect of lack of enforceability was the more important aspect of the provision and should be retained. That view received some support. In addition, some support was also expressed in favour of adding some provision for the protection of creditors and other stakeholders along the lines of article 22 of the Model Law, although it was noted that such a proposal had relevance to the text as a whole rather than simply with respect to paragraph (a). It was also noted that the draft text emanating from the Hague Conference working group on the judgements project provided for postponement or refusal of recognition in the event that the judgement was subject to review. It was suggested that that approach might be followed in the current text (see para. 75). After discussion, it was agreed to retain paragraph (a) for further consideration.

Paragraph (b)

80. One proposal was that paragraph (b) should be deleted because it required the receiving court to pass judgement on certain aspects of the proceedings in the originating State. A concern expressed related to the meaning of the word "notice" but in response, it was observed that not only was this provision commonly found in similar international instruments, but that the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (articles 15 and 16) might assist in interpreting this provision. After discussion, paragraph (b) was retained for further consideration.

Paragraphs (c), (d) and (e)

81. It was noted that if an article dealing with a general public policy exception were included in the text, paragraphs (d) and (e) could be deleted. After further consideration, it was proposed that the following provision based upon article 6 of the Model Law and paragraph (e) could be added: "Nothing in this law prevents this court from refusing to take an action governed by this law if the action would be manifestly contrary to public policy [or] [including] the fundamental principles of procedural fairness of the State." That proposal was supported as a basis for further consideration. A suggestion that the word "and" should be used instead of the words in square brackets was not supported on the basis that public policy included both procedural and substantive fairness. Paragraph (c) was retained for further consideration.

Paragraphs (f) and (g)

82. It was observed that since all judgements were "binding", that word could be deleted from the text. It was noted that an article along the lines of article 22 of the Model Law may also have some application to paragraphs (f) and (g). There was some support for also deleting the word "final" on the basis that the decision on enforcement should not be delayed in order to wait for the prior or earlier judgement to become final. After discussion, paragraphs (f) and (g) were retained for further consideration.

Paragraph (h)

83. There was support in the Working Group for the retention of Variant 1 of paragraph (h).

Paragraph (i)

84. Various concerns were expressed with respect to different elements of Variants 1, 2 and 3, although some preference was expressed for Variant 3. Concerns expressed included the use of the terms "unreasonable or unfair" in Variants 1 and 2, and introduction of the use of the term "centre of main interests" in Variant 3. It was pointed out that the use of that term might be problematic for States that had not enacted the Model Law. Several revisions were proposed, but after discussion, there was agreement that those three variants should be deleted. It was noted that the list of factors recently proposed in the context of the Hague Conference working group on the judgements project was not required in this text.[2]

85. Two proposals for a new paragraph (i) were made; the Working Group agreed to retain them in square brackets for future consideration. The first proposal was: "(i) The judgement was not rendered by a court in the State of the debtor's centre of main interests or by a court which would have had jurisdiction in accordance with the law of the requested State concerning recognition and enforcement of the foreign judgement." The second proposal was: "(i) The judgement was not rendered by a court that: (a) [for Model Law enacting States: was supervising a main proceeding regarding the insolvency of the party against whom the judgement was issued;] (b) exercised jurisdiction based on the consent of the party against whom the judgement was issued; (c) exercised jurisdiction on a basis on which the receiving court could have exercised jurisdiction under its own law; or (d) exercised jurisdiction on a basis that was not inconsistent with the law of the receiving court." Although there was stronger support for the second proposal, the Working Group agreed to retain both for further consideration. The view was expressed that future discussion on the matter should be linked to the discussion on scope as set out in draft articles 1 and 2.

86. A further proposal was made to include an additional paragraph in draft article 10 as follows: "The judgement adversely affects the interests of creditors and other interested parties in this State who did not, directly or through an appropriate representative, participate in the foreign proceedings, and who could not reasonably be expected to have participated in such proceedings." Support was expressed for that proposal, although it was noted that if it was limited to local creditors only, the

[2] See the text emanating from the 5th meeting, October 2015.

provision would be too narrow; the Working Group's attention was drawn to article 22 of the Model Law and paragraph 198 of the Guide to Enactment and Interpretation.

Paragraph (j)

87. It was observed that paragraph (j) could be deleted as having already been addressed by article 8.

VI. Other business

88. The Working Group was advised that a meeting of the open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues and to study adoption of the Model Law (A/CN.9/798, para. 19) had taken place. Several papers were presented for consideration and comment, and the work to be undertaken was further discussed. A further meeting of the informal group will be convened during the forty-ninth session of the Working Group in New York (2 to 6 May 2016).