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

(New York, 18-22 May 2009)

Contents

* This document was submitted for translation less than 10 weeks before the opening of the Commission session in view of the time necessary to compile the final report after the close of the Working Group's session on 22 May 2009.

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I. Introduction

1. At its thirty-ninth session in 2006, the Commission agreed that the topic of the treatment of enterprise groups in insolvency was sufficiently developed for referral to Working Group V (Insolvency Law) for consideration and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems the Working Group would identify under that topic.

2. The Working Group agreed at its thirty-first session, held in Vienna from 11 to 15 December 2006, that the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross Border Insolvency provided a sound basis for the unification of insolvency law, and that the current work was intended to complement those texts, not to replace them (see A/CN.9/618, para. 69). A possible method of work would entail the consideration of those provisions contained in existing texts that might be relevant in the context of enterprise groups and the identification of those issues that required additional discussion and the preparation of additional recommendations. Other issues, although relevant to enterprise groups, could be treated in the same manner as in the Legislative Guide and Model Law. It was also suggested that the possible outcome of that work might be in the form of legislative recommendations supported by a discussion of the underlying policy consideration (see A/CN.9/618, para. 70).

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

4. At its thirty-third session in November 2007, its thirty-fourth session in March 2008 and its thirty-fifth session in November 2008, the Working Group continued its discussion of the treatment of enterprise groups, before referred to as corporate groups, in insolvency, on the basis of notes by the Secretariat (A/CN.9/WG.V/WP.78 and Add.1, A/CN.9/WG.V/WP.80 and Add.1 and A/CN.9/WG.V/WP.82 and Add.1-4).

II. Organization of the session

5. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-sixth session in New York from 18 to 22 May 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Belarus, Benin, Bulgaria, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, Fiji, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Latvia, Malaysia, Mexico, Morocco, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Senegal, South Africa, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Afghanistan, Angola, Bangladesh, Belgium, Croatia, Denmark, Ghana, Indonesia, Iraq, Ireland, Lithuania, Mauritania, Philippines, Qatar, Republic of Moldova, Slovenia and Turkey.

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

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

(b) *Intergovernmental organizations*: Economic Community of West African States (ECOWAS) and European Commission;

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), American Bar Foundation (ABF), INSOL International (INSOL), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Women's Insolvency & Restructuring Confederation (IWIRC), International Working Group on European Insolvency Law (IWGEIL) and Union internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms. Haini Hassan (Malaysia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.84);

(b) A Note by the Secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.85 and Add.1);

(c) A Note by the Secretariat on cooperation, communication and coordination in cross-border insolvency proceedings (A/CN.9/WG.V/WP.86 and Add.1-3);

(d) A Note by the Secretariat on the discussion of intellectual property in the Legislative Guide on Insolvency Law (A/CN.9/WG.V/WP.87);

(e) A proposal by the United States of America on post-application finance (A/CN.9/WG.V/WP.88); and

(f) An addendum to a Note by the Secretariat on the draft annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property and, in particular, the impact of the insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement (A/CN.9/WG.VI/WP.37/Add.4).

10. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of cooperation, communication and coordination in cross-border insolvency proceedings, the treatment of enterprise groups in insolvency and the impact of insolvency on a security right in intellectual property.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its discussion of cooperation, communication and coordination in insolvency proceedings on the basis of document A/CN.9/WG.V/WP.86 and Add.1-3 and continued its discussion of the treatment of enterprise groups in insolvency on the basis of documents A/CN.9/WG.V/WP.85 and Add.1 and A/CN.9/WG.V/WP.88 and other documents referred therein. The Working Group also considered the impact of insolvency on a security right in intellectual property on the basis of documents A/CN.9/WG.V/WP.87 and A/CN.9/WG.VI/WP.37/Add.4 and an extract of the Report of Working Group VI on the work of its fifteenth session (A/CN.9/WG.VI/XV/CRP.1/Add.5). The deliberations and decisions of the Working Group on these topics are reflected below.

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

12. The Working Group commenced its discussion of cooperation, communication and coordination in cross-border insolvency proceedings on the basis of document A/CN.9/WG.V/WP.86, the draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings ("the Notes").

13. The Working Group expressed its appreciation for the Notes and emphasized their usefulness for practitioners and judges, as well as creditors and other stakeholders, particularly in the context of the current financial crisis. In that regard, the Notes were viewed as very timely, having application in a number of large, complex cases and being the first document on cross-border agreements to be prepared by an international organization. The Working Group further expressed its appreciation for the incorporation of the suggestions on the previous draft of the Notes (document A/CN.9/WG.V/WP.83), which had been circulated to Governments for comment.

14. The Working Group recalled its decision at its last session (see A/CN.9/666, para. 21) to defer the question of the final title of the Notes to a later stage. Suggestions made with respect to the title included changing the reference to notes to either "guiding principles" or "recommendations" on protocols and cooperation, communication and coordination. Some support was expressed for those proposals, although it was recalled that, at its previous session, it was proposed that since the document was purely descriptive, it did not offer guidance and should not constitute a guide. After discussion, the Working Group agreed that the title of the Notes

should be "Practice Guide on cooperation, communication and coordination in cross-border insolvency proceedings", as the adjective "practice" would take care of the concerns previously expressed with respect to the word "guide". The Working Group noted that the references to the title throughout the draft document would have to be changed accordingly.

15. The Working Group adopted the Notes with the view to their possible finalization and adoption by the Commission at its forty-second session in 2009. It was noted that the practical application of the Notes would be discussed at the 8th Multinational UNCITRAL/INSOL/World Bank Judicial Colloquium to be held in June 2009, prior to the forty-second session of the Commission.

V. Treatment of enterprise groups in insolvency

A. International issues

16. The Working Group continued its discussion of the treatment of enterprise groups in insolvency on the basis of documents A/CN.9/WG.V/WP.85 and Add.1 and other documents referred to therein, commencing with international issues as set forth in Add.1.

1. The coordination centre of an enterprise group

Draft recommendations 1 and 2

17. The Working Group recalled the discussion at its previous session (A/CN.9/666, para. 31) and the purposes for which it might be desirable to identify one of the enterprise group members as a coordination centre in order to achieve the objectives set forth in paragraph 5 of document A/CN.9/WG.V/WP.85/Add.1. It was recalled, in particular, that the coordination centre was to be a first among equals and not have additional powers by virtue of being the coordination centre.

18. While the achievement of the objectives set forth in paragraph 5 was generally supported, the view was expressed that identifying a coordination centre in an enterprise group brought with it a number of the difficulties associated with identifying the centre of main interests (COMI) of an individual debtor. Those included, in particular, whether the decision identifying a particular coordination centre in one State could be enforced or at least recognized in other States and which State should make the identification decision. One option suggested was the court of the State in which proceedings were first initiated with respect to a group member. A second suggestion was the court of the State in which coordination was sought. In support of the latter, it was observed that if the location of the coordination centre in the first State was not legitimate, the second State would be unlikely to cooperate.

19. Additional concerns related to: ensuring that the function of that centre was procedural and not substantive; ensuring there was sufficient flexibility to take account of individual cases; the need for speed in identifying the coordination centre, which suggested the desirability of avoiding complex criteria; the need to avoid forum shopping; the desirability of identifying the role to be played by the coordinating entity; the desirability of identifying a coordination centre only when

determined to be useful or necessary to achieve global reorganization of a group; and the need to distinguish between the role of courts in coordination and cooperation and that of the coordinating group member. It was noted with respect to the latter point, that the Working Group had not considered, at its previous session, whether coordination should be initiated and led by the court responsible for conduct of the proceedings with respect to the coordinating member or the relevant insolvency representative (see para. 6, A/CN.9/WG.V/WP.85/Add.1).

20. It was widely agreed that a decision by one court identifying a coordination centre should not be binding in other States. Courts in other States could agree with such a decision, but if they did not that should not preclude coordination and cooperation between the different courts.

21. It was observed that many cross-border group insolvency cases were led from the top of the group, including with respect to coordination and cooperation. Further, it was suggested that where that occurred, little might be gained from seeking to formally identify that top group member as the coordination centre as it would gain no additional powers or broader recognition for its role than it would already have in a de facto sense as the top group member. In response, it was suggested that the key reason for seeking to identify a coordination centre was to address the problem of duelling jurisdictions. It was pointed out, however, that if the decision as to the coordination centre was not binding, a recommendation on identifying the coordination centre might add little to the other provisions on court-to-court cooperation and coordination. It was also pointed out that in some cases it might be appropriate to have multiple coordination centres for different sub-groups or business units of a group.

22. Although there was some support for retaining a recommendation on the coordination centre, the Working Group was unable to identify a clear role for such a centre that would add to the more general recommendations on coordination and cooperation between the courts and insolvency representatives. Accordingly, the Working Group agreed to consider the other draft recommendations before deciding on the need for a recommendation on the coordination centre.

23. After further discussion, the Working Group agreed to delete draft recommendations 1 and 2, on the basis that the determination of a coordination centre did not imply any legal consequences because it was non-binding. The Working Group nevertheless recognized the value of one entity having the leading role in the cooperation and agreed to address the importance of having one entity acting as the coordinating member in the commentary.

2. Facilitating cooperation and communication

Draft recommendation 3

24. The Working Group noted that draft recommendation 3 was based on article 25 of the Model Law, appropriately extending the article to cover the situation of enterprise groups. One suggestion with respect to the draft recommendation was that the references to cooperation could be supplemented by adding a reference to coordination, which might be pursued through the coordination centre. In response, it was suggested that a general obligation for the courts and insolvency representatives to cooperate, through the use of a variety of tools, including the

Notes, made it unnecessary to identify a coordination centre. After discussion, the Working Group adopted draft recommendation 3 in substance.

Draft recommendation 4

25. It was noted that the value of draft recommendation 4 was to authorize and encourage insolvency representatives to take whatever steps were required to ensure coordination of all proceedings with respect to group members, thereby avoiding a narrow interpretation of their functions. It was also noted that the reference to facilitation of coordination was sufficient and no further reference to a coordination centre was required. After discussion, the Working Group adopted draft recommendation 4 in substance.

Draft recommendation 5

26. As a matter of drafting, a question was raised as to whether the reference to "the court" in the first line of draft recommendation 5 should be to "a court". In response, it was clarified that since the draft recommendations were intended to be enacted in domestic law, the reference would be to the domestic court and the use of "a court" would not therefore be appropriate. For similar reasons, it was noted that the references "in this State" in the draft recommendations were not required. The Working Group adopted draft recommendation 5 in substance and agreed that the drafting matters should be addressed by the Secretariat.

Draft recommendation 6

27. It was emphasized that draft recommendation 6 usefully extended article 26 of the Model Law to enterprise groups and appropriately authorized insolvency representatives, the party most commonly initiating communication, to communicate with foreign courts or representatives. The Working Group adopted draft recommendation 6 in substance.

Draft recommendation 7

28. Broad support was expressed in favour of deleting the square brackets and retaining the text to ensure a broad and flexible application, in particular in situations where the court may not play an active role in cross-border communication. The Working Group adopted draft recommendation 7 in substance with the deletion of the term "two-way" before "communication", in order to better reflect the nature of the communication between multiple parties.

Draft recommendation 8

Square brackets

29. Support was expressed in favour of retaining the text of the draft recommendation with the deletion of the square brackets, in order to align it with draft recommendation 7.

Chapeau

30. The question was raised whether the chapeau of draft recommendation 8 should also include the words "to the extent permitted by applicable law", as

contained in draft recommendation 7 or whether the references in paragraphs (b) and (e) were sufficient. The Secretariat was requested to review the use of the reference to applicable law.

Paragraph (a)

31. The Working Group agreed to replace the word "agreed" with the word "determined".

Paragraph (b)

32. It was suggested that the word "should" be replaced with the word "may", so that the provision of notice would be optional, not prescriptive. A further suggestion was that the provision of notice should be determined by the court. Those proposals were not supported.

Paragraphs (d)-(e) – Confidentiality

33. Concerns were expressed that by establishing confidentiality as the default position, paragraphs (d)-(e) did not adhere to the principle of transparency, which should be the guiding principle in insolvency proceedings. Moreover, it was observed that paragraphs (c), (d) and (e) as currently drafted were not consistent. Various suggestions were made to address those concerns, including: (i) that paragraph (e) be limited to administrative matters to ensure substantive rights would not be affected; (ii) that the chapeau be rephrased to allow the courts and the various participants to decide on the issues set forth in paragraphs (a)-(e); (iii) that parties in interest should be able to object to a decision to treat certain information as confidential; (iv) that the word "should" in paragraph (e) be replaced with "may", to clarify the exceptional character of the paragraph; (v) that since those issues were not addressed in the Model Law they should not be addressed in the draft recommendations. In response, it was stated that draft recommendation 8 was specific to supranational enterprise groups and that the Working Group should not be constrained only because it had not dealt with those issues previously; (vi) that paragraph (e) be deleted, on the basis that a provision on confidentiality of communication had the potential to be misused. That proposal was opposed on the basis that there might be situations that would warrant confidentiality and paragraph (e) thus achieved an appropriate balance.

34. After discussion, it was generally agreed draft recommendation 8 should be limited to providing that confidentiality would be an exception. To that end, the Working Group agreed to include after the words "should be" the words "only in exceptional cases".

Protection of the rights of affected parties

35. Another issue raised was ensuring that information that was confidential should not be communicated where to do so would affect the rights of certain parties. It was pointed out that that issue could be distinguished from the confidentiality of the communication as addressed in paragraph (e), which did not deal with the content of the information communicated. To protect confidential information, it was proposed that a new paragraph (f) be included along the following lines:

"Communication should respect the mandatory rules of the jurisdictions involved in the communication as well as the substantive rights of affected parties, in particular the confidentiality of information in accordance with applicable law."

36. One response to that proposal was that the protection of substantive rights was not an issue for insolvency law, as it belonged to other kinds of law, such as contractual or constitutional law. Another response was that the inclusion of a new paragraph on protection of the rights of the affected parties was necessary, as the authorization of direct communication in the cross-border context constituted a novelty for many legal systems. The concern was expressed that the word "substantive" might not be sufficient, as the rights of the parties might be of a procedural nature. After discussion, the Working Group agreed to add a new paragraph (f) to draft recommendation 8 along the lines proposed, with the inclusion of a reference to procedural rights.

37. It was noted that recommendation 111 of the Legislative Guide covered confidentiality of information and a reference to that recommendation might be included in the commentary to accompany the draft recommendations. It was recalled that the Guide to Enactment to the Model Law explained, in paragraph 182, that the implementation of cooperation was subject to any mandatory rules applicable in the enacting State and a reference to that paragraph might also be included in any commentary.

Draft recommendation 9

38. The principle set forth in draft recommendation 9 was generally supported. Several proposals were made with respect to improvement of the drafting to more clearly reflect what was intended. One proposal was that the chapeau should be revised to read "the insolvency law should specify that, for greater certainty, communication in accordance with these recommendations should be interpreted as constituting" or, as an alternative, "as reflecting", with appropriate changes to the beginning of the subparagraphs. Another proposal was to revise draft recommendation 9 as follows:

"The insolvency law should specify that:

(a) No compromise or waiver by the court of any powers, responsibilities or authority;

(b) No substantive determination of any matter in controversy before the court or the foreign court;

(c) No waiver by any of the parties of any of their substantive rights and claims; and

(d) No diminution of the effect of any of the orders made by the court or the foreign court,

shall be implied as the result of the communication made in accordance with these recommendations."

39. The Working Group approved the substance of that proposal, subject to any revisions required to align the draft recommendation with other draft recommendations.

Draft recommendation 10

40. The Working Group supported the desirability of including a recommendation along the lines of draft recommendation 10. Concerns were expressed, however, with respect to the use of the word "joint" to describe the type of hearing contemplated. It was suggested that it must be clear from the language used that there was no intermingling of the hearings and that each court would hold its own hearing in accordance with the requirements of applicable law, but that the courts might deliberate jointly or collaborate with each other. It was proposed that the draft recommendation might provide that the court was authorized to conduct a hearing in coordination with a foreign court. That proposal was widely supported.

41. A second suggestion was that, for greater clarity, the substance of the footnote might be included in the text of the draft recommendation, with appropriate drafting revisions. That suggestion was also widely supported.

42. After discussion, the Working Group adopted the substance of draft recommendation 10 with the proposed revisions.

Draft recommendation 11

43. One proposal made with respect to draft recommendation 11 was that some of the detail, in particular, the second sentence of paragraph (a) and the examples in paragraph (e), might be included in any commentary to the recommendations in order to avoid the interpretation that the examples given were intended to be exhaustive. That proposal was widely supported.

44. As a matter of drafting, it was noted that the opening words of paragraph (c) were not required as they were already set forth in the chapeau.

45. It was pointed out that article 26 of the Model Law provided for cooperation between insolvency representatives to be subject to the supervision of the court. It was questioned whether that approach should be followed in draft recommendation 11 or whether supervision of the court was only required with respect to substantive matters, such as those set forth in paragraph (e). In response, it was suggested that since the requirement for court supervision in article 26 was specifically limited to matters within the scope of article 1 of the Model Law, there was no requirement for that approach to be followed in draft recommendation 11 and to establish supervision as a precondition to cooperation. Moreover, it was pointed out that the words "to the extent permitted by law" would be sufficient to take account of any local requirements with respect to court supervision. The prevailing view was that greater supervision by the court was not required and the limitation provided by domestic law was sufficient. It was suggested that any commentary to the draft recommendations might discuss what was intended by the reference to applicable law and the different approaches that insolvency laws adopted.

46. After discussion, the Working Group adopted the substance of draft recommendation 11 with the revisions noted above.

Draft recommendation 12

47. It was proposed that draft recommendation 12 might be expanded to include more detail, such as a reference to the place of the agreement and the means of

communication, including modern means such as videoconferencing. In response, it was proposed that the first sentence was sufficient as drafted to state the general principle and that the second sentence should be deleted. That deletion was generally supported. It was further suggested that draft recommendation 12 should appear before draft recommendation 11. The Working Group agreed on the substance of draft recommendation 12 with the deletion of the second sentence and on its placement before draft recommendation 11.

3. Use of cross-border agreements

Draft recommendation 13

48. With respect to the reference to approval by the court, it was suggested that a wider formulation might be required to include non-judicial or non-supervisory authorities, such as a government ministry, that might be required to approve certain aspects of a cross-border agreement, such as a distribution with foreign exchange implications. To include that possibility, it was suggested that the draft recommendation should refer to approval by the courts "or any other competent authority". A different view was that the reference to the court was sufficiently broad and approval by other such authorities should not be introduced. To address those concerns, it was proposed that the draft recommendation should provide that insolvency representatives and other parties in interest should be authorized to enter into such agreements "to the extent permitted or in the manner required by law", without including a specific reference to approval by the courts.

49. The Working Group adopted the substance of the draft recommendation with that revision.

Draft recommendation 14

50. The Working Group adopted the substance of the draft recommendation with the deletion of the word "authorize" and use of a word such as "empower".

4. Facilitating coordination – the insolvency representative

Draft recommendation 15

51. The Working Group generally supported the idea that the same insolvency representative could be appointed in different insolvency proceedings as it would facilitate the coordination of those proceedings. Some concerns were expressed, however, with respect to the potential for conflicts of interest to arise, as previously discussed in the context of domestic issues (previously draft recommendation 27 as discussed in document A/CN.9/666, para. 102, now numbered draft recommendation 231), and the need to include an appropriate provision to address that eventuality. A suggestion that draft recommendation 15 be aligned with draft recommendation 231 received support.

52. It was noted that draft recommendation 230 (A/CN.9/WG.V/WP.85), which addressed the appointment of a single or the same insolvency representative in the domestic context, was limited by the words "where the court determines it to be in the best interests of the administration of the insolvency proceedings" and suggested that those words or words such as "in appropriate cases" might be included in draft recommendation 15. The adoption of such a formulation was generally supported.

53. A further concern related to the second sentence of the draft recommendation and the need to clarify that the insolvency representative would be subject to the supervision of the court in each of the States in which it was appointed. To that end, it was proposed that the final words of the second sentence be revised to provide for "supervision of each of the appointing courts". That proposal was widely supported.

54. A drafting suggestion that the word "authorize" be replaced with a word such as "empower" or "permit" to align the draft recommendation with draft recommendation 14 was widely supported.

5. Format of the work on enterprise groups in insolvency in the international context

55. The Working Group noted that, although dealing with the international treatment of enterprise groups, the draft recommendations addressed the content of domestic legislation, and they might therefore be added to part three of the Legislative Guide, together with the draft recommendations on domestic issues. It was acknowledged that, although the form of a Model Law might be desirable, it might not be realistic to pursue that type of text at this stage in view of the time that might be required for its negotiation, the current need for the provisions on enterprise groups in light of the global financial crisis and the question of whether there was the support necessary for its negotiation. The Working Group agreed that the draft recommendations on the international treatment of enterprise groups in insolvency should be included in part three of the Legislative Guide and adopt the same format as the preceding parts of the Legislative Guide.

B. Domestic issues

56. The Working Group continued its consideration of the domestic treatment of enterprise groups on the basis of document A/CN.9/WG.V/WP.85.

Glossary

(a) Enterprise group

57. A proposal to delete the reference to "significant ownership" received some support on the basis that it would be difficult to define and that the concept of "control" was sufficient. After discussion, the prevailing view was that the reference to significant ownership should be retained.

(b) Enterprise

58. The Working Group recalled previous discussions that the term "enterprise" should not include financial and other specialized institutions on the same basis as article 1.2 of the Model Law and part two, chapter 1, paragraph 11 of the Legislative Guide. It was agreed that footnote 1 should be revised to clarify that exclusion.

(c) Control

59. A proposal was made to replace the word "and" with "or" to provide greater flexibility, on the basis that the current wording constituted an unnecessary limitation. In response, it was noted that that issue had previously been extensively

discussed and that both concepts were viewed as necessary. After discussion, the prevailing view was that the word "and" should be retained.

(d) Procedural coordination

60. The Working Group approved the substance of the explanation of "procedural coordination" as set forth in paragraph (d).

(e) Substantive consolidation

61. Some preference was expressed for the formulation contained in the square brackets, as the word "pooling" better described what occurred in substantive consolidation. The prevailing view, however, was that the words "as if they were part of a single insolvency estate" were preferable to the words "to form a single insolvency estate".

1. Joint application

Purpose clause

Chapeau – "two or more enterprise group members"

62. One question raised was whether the words "two or more" with respect to enterprise group members were redundant and could be deleted, as the explanation of the term "enterprise group" already contained the notion of two or more enterprise group members. That proposal did not find support.

Paragraph (d)

63. The concern was expressed that the current wording of paragraph (d) of the purpose clause implied that a joint application was the only mechanism for the court to assess whether procedural coordination was appropriate. To address that concern, it was proposed that paragraph (d) be deleted, that the word "additional" be inserted before the word "mechanism" or that a footnote be added to clarify that a joint application was not a pre-requisite for procedural coordination, but merely facilitated the consideration of the court. After discussion, the Working Group approved the purpose clause in substance with the inclusion of a footnote as proposed.

Draft recommendation 199

64. The concern was expressed that the words at the end of draft recommendation 199 "that satisfy the applicable commencement standard" could be wrongly interpreted as requiring the enterprise group members to collectively satisfy the commencement standard. To address that concern, the Working Group adopted draft recommendation 199 in substance with the insertion of the words "each of which satisfies the applicable commencement standard".

Draft recommendation 200

65. It was agreed that the words "the insolvency law should specify that" be added to the chapeau.

Paragraph (a)

66. The Working Group agreed that the words proposed for addition to draft recommendation 199 should also be added to paragraph (a) of draft recommendation 200 for consistency.

Paragraph (b)

67. It was observed that there might be situations in which it might be desirable for a creditor, who was not necessarily a creditor of each enterprise group member to be included in a joint application, to join together with other creditors to make a joint application. It was suggested that the words "or creditors provided that the applicant creditors included creditors of" be included to capture that possibility. Limited support was expressed in favour of that proposal. The prevailing view was that persons permitted to make a joint application should be creditors of each enterprise group member to be included in the joint application as to adopt a different standard might be contrary to the commencement provisions of many domestic laws and open the door to abuse.

68. The Working Group adopted the substance of draft recommendation 200 with the revisions noted above with respect to the chapeau and paragraph (a).

Draft recommendation 201

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

2. Procedural coordination

Purpose clause

70. A proposal to extend paragraph (b) to include notions of fairness and administrative efficiency was not supported. The Working Group adopted the substance of the purpose clause.

Draft recommendation 202

71. The Working Group adopted draft recommendation 202 in substance.

Draft recommendation 203

72. The question was raised whether the reference to court included in draft recommendation 203 should also include the plural ("the court and courts") to clarify that there could be more than one court involved. The Working Group's attention was drawn to draft recommendations 201 and 207, which included references in footnotes 6 and 8 to the issue of the competent court. After discussion, the Working Group adopted draft recommendation 203 in substance and agreed to reflect the discussion on courts in the commentary.

Draft recommendation 204

73. The Working Group agreed to delete the words "in accordance with the insolvency law".

74. It was proposed that the appointment of a single or the same insolvency representative be added to the list of examples contained in draft

recommendation 204, on the basis that it was one of the most efficient means of facilitating procedural coordination. Different views were expressed in response. One view was that the list was illustrative, that there was no need to cover every possible example and that the appointment of a single or the same insolvency representative was already addressed in the purpose provision on the appointment of a single or the same insolvency representative in part F. Other views expressed proposed categorizing the examples by reference to courts and to the insolvency representative and deleting the latter examples, as they were already captured in draft recommendation 234 or moving all of the examples to the commentary. After discussion, the Working Group agreed to retain the examples in the draft recommendation and include a reference to the appointment of a single or the same insolvency representative.

Draft recommendation 205

75. The concern was expressed that since the words "or at any subsequent time" were too vague and might lead to abuse, it was preferable to indicate a specific time period within which an application for procedural coordination could be made. In response, it was said that the current formulation best captured the flexibility that was needed. In order to address the concern expressed, several proposals were made, including inserting after the words "at any subsequent time" the words "provided that this was possible" or "as permitted by applicable law"; to replace "at any subsequent time" with words along the lines of "or provided that the status of proceedings would permit"; or to include a second sentence that would state "The insolvency law should specify the period of time for filing the application for procedural coordination". Another proposal was to adopt a footnote along the lines of the footnote to draft recommendation 220. After discussion, the Working Group adopted the substance of draft recommendation 205 with the addition of a footnote as proposed.

Draft recommendation 206

76. It was suggested that the court should have the ability, on its own motion, to initiate procedural coordination. The Working Group recalled that that issue had been discussed at its previous session (A/CN.9/666, para. 55) and it had been decided that since the Guide generally did not provide for courts to act on their own initiative in insolvency matters, that approach should be maintained. It was noted that the issue of the court acting on its own initiative with respect to procedural coordination was addressed in the commentary included in paragraphs 23-24 of document A/CN.9/WG.V/WP.82/Add.3.

77. In support of the proposal to include the possibility for the court to act on its own initiative in draft recommendation 206, it was noted that there might be situations in which procedural coordination would be appropriate but no application was made by the parties permitted to do so in the draft recommendation. It was also suggested that unless specifically provided with respect to insolvency proceedings in these recommendations, it might not be possible under general procedural law. After discussion, the Working Group agreed that such a provision be included and drafted along the lines of: "The insolvency law may permit the court to order procedural coordination on its own initiative."

Draft recommendation 207

78. As a matter of drafting, it was suggested that draft recommendation 207 should be aligned with draft recommendation 203 and refer to "the court", deleting the words "or the courts". To reflect the notion of coordination with other courts, it was proposed that words such as "with any other competent court" be added after the words "to coordinate" in the first sentence. That proposal was widely supported.

79. With respect to the second sentence, a proposal was made to clarify that the list was not exhaustive and to redraft it as follows: "Those steps might involve, for example, coordinated proceedings, joint hearings, sharing and disclosure of information." Recalling that it had agreed not to use the term "joint hearings" with respect to international issues, the Working Group noted that such hearings did not raise the same difficulties in the domestic context and thus might appropriately be included. The substance of draft recommendation 207 was approved with the proposed revisions.

Draft recommendation 208

80. The Working Group approved a proposal to delete the square brackets around the second sentence and to retain the text. A suggestion to change the terms "modify" and "terminate" to "vary" and "vacate" was not supported on the basis that the terms "modify" and "terminate" were consistent with both the Model Law and the Legislative Guide.

Draft recommendations 209 and 210

81. It was noted that draft recommendation 209 should include the same footnote as draft recommendation 201. With that addition, the Working Group adopted the substance of draft recommendations 209 and 210.

3. Post-commencement finance

Purpose clause

82. A proposal to limit the scope of paragraph (d) to those group members involved in the post-commencement finance by adding the word "involved" at the end of the paragraph was widely supported.

83. The Working Group considered a number of proposals set forth in document A/CN.9/WG.V/WP.85, paragraphs 8-16 with respect to the draft recommendations on post-commencement finance.

Draft recommendation 211

84. It was widely agreed that draft recommendation 211 should state the general principle with respect to provision of post-commencement finance in the enterprise group context and include references to the granting of a security interest and a guarantee or other assurance and that the conditions attaching to the provision of such finance should be set forth in a separate recommendation.

85. To that end, it was proposed that paragraphs (a)-(c) of draft recommendation 211 might be sufficient if adopted with the deletion of the words in paragraph (c) after the first comma. A second proposal was that draft paragraph (a)

might be sufficient as it was broad enough to include the substance of draft paragraphs (b) and (c). In response, it was observed that paragraphs (b) and (c) did not necessarily fall within (a) and that they gave more detail as to the possible ways in which post-commencement finance might be provided.

86. After discussion, the Working Group agreed to the first proposal to retain paragraphs (a)-(c) of draft recommendation 211, with the deletion of text as proposed.

87. As a matter of drafting, it was noted that the heading to draft recommendation 211 should be aligned with the scope of application of the recommendation to clarify that both the provider and receiver of post-commencement finance were subject to insolvency proceedings.

88. With respect to the conditions to apply to the provision of post-commencement finance, the Working Group based its discussion on the draft versions of recommendation 211 contained in paragraphs 10 and 15 of A/CN.9/WG.V/WP.85. Various proposals were made with respect to how those conditions should be formulated.

89. It was widely agreed that the insolvency representative should be required to make the determinations set forth in paragraph (a) of the paragraph 15 version of draft recommendation 211, as well as the determination as to harm set forth in paragraph (c) of that version. Some concern was expressed as to the liability that might attach to an insolvency representative required to make such a determination. In response, it was suggested that the making of such a determination was really a question of risk allocation to be made on a case-by-case basis, but was not an issue to be addressed in the draft recommendation. It was also recalled that that language was used in recommendation 63.

90. It was also widely agreed that the court and creditors should play roles with respect to the provision of post-commencement finance, which should be stated in the alternative set forth in paragraphs (b) and (c) of the paragraph 15 version of draft recommendation 211. It was noted that the roles played by the courts and creditors under insolvency laws varied widely and, accordingly, the draft recommendation should adopt a flexible approach, allowing those States that gave a greater role to the courts to do so with respect to the approval of post-commencement finance and those that relied upon consent of creditors to adopt that approach. As currently drafted, it was noted that paragraph (c) was not specific as to the party to make the determination, but that it might be interpreted as including the court. In response to a proposal that the word “consent” with respect to creditors might be too restrictive and that the words “did not object” were preferable, the Working Group recalled that the word “consent” was used in recommendation 63. It was suggested that mechanisms for obtaining consent might be discussed in the commentary.

91. After discussion, it was proposed that the wording of the last sentence of recommendation 63 might be considered as an option to resolve some of the concerns expressed. The prevailing view was to support that proposal.

92. The Working Group agreed that it should be stated in a recommendation that the safeguards set forth in recommendations 65-67 applied to post-commencement finance provided in the enterprise group context. It was also agreed that the

application of recommendation 63 to an enterprise group member receiving post-commencement finance should be clearly stated in a recommendation.

Draft recommendation 212

93. A proposal to add requirements for creditor consent or court approval with respect to priority in the draft recommendation were not widely supported on the basis that recommendation 64, upon which this draft recommendation was based, required the priority to be specified in the insolvency law and did not include those additional elements. In response to a query concerning the scope of the words "the priority", it was suggested that they could be interpreted broadly to mean the level of priority, if any, which might apply and that discussion of that issue could be included in the commentary. After discussion, the Working Group adopted draft recommendation 212 in substance.

Draft recommendations 213 and 214

94. The Working Group agreed that draft recommendations 213 and 214 could be deleted.

95. The following revision of the draft recommendations on post-commencement finance was proposed and the Working Group agreed to continue its discussion at a future session on the basis of that text.

1. Purpose of legislative provisions

The purpose of provisions on post-commencement finance for enterprise groups is:

(a) To facilitate finance to be obtained for the continued operation or survival of the business of the enterprise group members subject to insolvency proceedings or the preservation or enhancement of the value of the assets of those group members;

(b) To facilitate the provision of finance by enterprise group members, including group members subject to insolvency proceedings;

(c) To ensure appropriate protection for the providers of post-commencement finance and for those parties whose rights may be affected by the provision of that finance; and

(d) To advance the objective of fair apportionment of the benefit and detriment associated with the provision of post-commencement finance among all group members involved.

2. Contents of legislative provisions

Provision of post-commencement finance by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings

211A. The insolvency law should permit an enterprise group member subject to insolvency proceedings to:

(a) Advance post-commencement finance to other enterprise group members subject to insolvency proceedings;

(b) Grant a security interest over its assets for post-commencement finance provided to another enterprise group member subject to insolvency proceedings; and

(c) Provide a guarantee or other assurance of repayment for post-commencement finance provided to another enterprise group member subject to insolvency proceedings.

211B. Post-commencement finance may be [provided] [advanced or facilitated] in accordance with recommendation 211A, where the insolvency representative of the group member advancing finance, granting a security interest or providing a guarantee or other assurance:

(a) Determines it to be necessary for the continued operation or survival of the business of that enterprise group member;

(b) Determines it to be necessary for the preservation or enhancement of the value of the estate of that enterprise group member; and

(c) Determines [in accordance with the insolvency law] that any harm to creditors is offset by the benefit to be derived from advancing finance, granting a security interest or providing a guarantee or other assurance.

211C. The insolvency law may require the court to authorize or creditors to consent to the provision of post-commencement finance in accordance with recommendations 211A and 211B.

Receipt of post-commencement finance by a group member subject to insolvency proceedings from another group member subject to insolvency proceedings

211D. In accordance with recommendation 63, post-commencement finance may be obtained by an enterprise group member subject to insolvency proceedings where the insolvency representative of that group member determines it to be necessary for the continued operation or survival of the business of that group member or the preservation or enhancement of the value of the estate. The insolvency law may require the court to authorize or creditors to consent to the obtaining of that post-commencement finance.

Priority for post-commencement finance

212. The insolvency law should specify the priority that applies to post-commencement finance provided by one enterprise group member subject to insolvency proceedings to another group member that is subject to insolvency proceedings.

Security for post-commencement finance

213. Recommendations 65, 66 and 67 apply to the granting of a security interest in accordance with recommendation 211A (b).

Post-application finance

96. The Working Group considered that topic on the basis of document A/CN.9/WG.V/WP.88. It was noted that post-application finance was a necessary form of interim measure providing relief to the enterprise group member in financial distress, because in the time period between application and commencement it was difficult to obtain the finance essential to its survival. The Working Group agreed to include the proposal in the commentary with appropriate drafting modifications and requested the Secretariat to identify the appropriate location. In addition, the Working Group agreed to clarify in the commentary the distinction between post-application and post-commencement finance, particularly with respect to safeguards, and left the possibility of formulating a draft recommendation on post-application finance for future consideration.

4. Avoidance provisions

Purpose clause

97. Some concerns were expressed with respect to the purpose clause and the need to clearly reflect the context of enterprise groups. The Working Group requested the Secretariat to examine whether any new text might be proposed for future consideration.

Draft recommendation 215

98. A proposal to delete the second sentence of draft recommendation 215 was not supported. A further suggestion made was to adopt a specific standard with respect to the avoidance of transactions in the enterprise group context, i.e. either a more lenient approach to such transactions than was currently taken with respect to transactions involving a single debtor or a stricter approach. In that regard, it was proposed that the draft recommendation should indicate whether the avoidance of transactions should be based upon a standard of prejudice to the enterprise group as a whole or to the individual enterprise group member. After discussion, the Working Group agreed not to specify any standard in draft recommendation 215, but to maintain the list of examples of factors to be considered by the court as currently drafted. The Working Group agreed to delete both sets of square brackets and retain the text, with the deletion of the words in the second text “without prejudicing the creditors of the group member or members involved”. The substance of draft recommendation 215 was approved with that modification.

Draft recommendation 216

99. The Working Group adopted draft recommendation 216 in substance with the replacement of the word “may” with the word “should”, in order to enhance the predictability for creditors.

5. Substantive Consolidation

Purpose clause

100. The Working Group was reminded that paragraph (c) had been added to the purpose clause to clarify the effect of the order of substantive consolidation. The inclusion of paragraph (c) was supported.

Draft recommendation 217

101. The Working Group adopted draft recommendation 217 in substance.

Draft recommendation 218

102. A suggestion to add the words "subject to insolvency proceedings" to the chapeau was not supported on the basis that insolvency should not be a precondition to substantive consolidation as the situations outlined in paragraphs (a) and (b) might lead to the inclusion of an apparently solvent entity in the order for substantive consolidation. As an example, it was pointed out that since it was not unusual, in the context of a fraudulent scheme, to establish an entity with no creditors to hold assets and it would be difficult under usual commencement standards to apply for commencement of proceedings with respect to that entity, it was important to be able to include that entity in the order for substantive consolidation.

103. A suggestion to add words to the effect of "in very limited circumstances" to the chapeau received support.

104. It was proposed that the words "disproportionate expense or delay" were too vague and that words such as "will produce a better outcome for all concerned" should be added to paragraph (a). That proposal was not supported on the basis that it would involve making an assessment of the position before consolidation and the likely outcome after consolidation, which would be very difficult to achieve in the situation set forth in paragraph (a).

105. The Working Group adopted the substance of the draft recommendation with the addition to the chapeau as noted above.

Draft recommendation 219

106. It was widely agreed that the words in square brackets should be deleted and the substance of the draft recommendation was adopted with that deletion. It was also agreed that examples of situations in which draft recommendation 219 might be useful should be discussed in the commentary.

Draft recommendation 220

107. The substance of draft recommendation 220 was adopted, noting the need for alignment with draft recommendation 205 with respect to the meaning of the words "at any subsequent time".

Draft recommendation 221

108. A proposal to include shareholders in the parties that could apply for substantive consolidation did not receive sufficient support. The substance of the draft recommendation was adopted.

Draft recommendation 222

109. Support was expressed in favour of retaining the term "consolidated", with perhaps some of the language from the definition of substantive consolidation being included. The substance of the draft recommendation was adopted with that

revision. It was agreed the effect of an order for substantive consolidation should be comprehensively discussed in the commentary to facilitate understanding of this remedy.

110. A proposal to consider adding an additional paragraph to the draft recommendation to the effect that creditors should not be able to enhance their position as the result of an order for substantive consolidation was not supported. It was acknowledged, however, that that was a very important issue, but any recommendation would need to be very carefully drafted as some creditors might indeed be better off, while others would be in a worse position. It was suggested that such a recommendation might be limited to labour and secured creditors. The Working Group decided to discuss that possibility at a future session.

Draft recommendation 223

111. It was agreed that the words "as far as possible" should be added to the chapeau as proposed in paragraph 23 of A/CN.9/WG.V/WP.85. It was also agreed that the reference to the court in paragraph (b) should be substituted with the words "If it is determined that". The Working adopted the substance of draft recommendation 223 with those changes.

Draft recommendation 224

112. The Working Group adopted the substance of the draft recommendation, noting that the words to be added to the chapeau of draft recommendation 223 should also be added to draft recommendation 224.

Draft recommendations 225 and 226

113. The substance of the draft recommendations was adopted.

Draft recommendation 227

114. A proposal to add the word "already" before the word "taken" was agreed and a suggestion to make the same addition to draft recommendation 228 approved. The substance of the draft recommendation was adopted with that addition.

Draft recommendations 228 and 229

115. The substance of the draft recommendations was adopted.

6. Insolvency representative

Purpose clause

116. The Working Group agreed that the text in square brackets in paragraph (a) should be retained.

Draft recommendations 230 and 231

117. The draft recommendations were adopted in substance.

Draft recommendation 232

118. The Working Group agreed that the text in square brackets should be retained and that some redrafting might be required to more clearly state the intention of the draft recommendation. The Secretariat was requested to take those suggestions into account in revising the text. The substance of the draft recommendation was approved on that basis.

Draft recommendation 233

119. It was agreed that the changes agreed with respect to draft recommendation 232 should also be reflected in draft recommendation 233. With those changes, the Working Group adopted the substance of the draft recommendation.

Draft recommendation 234

120. It was agreed that the draft recommendation should generally be aligned with draft recommendation 11 addressing international issues and that the text in square brackets should be retained. The substance of the draft recommendation was approved on that basis.

7. Reorganization plan

Purpose clause

121. A number of proposals were made with respect to the words "thereby preserving employment and, in appropriate cases, protecting investment", including deleting the text, and changing the order of the various elements. It was recalled that that wording had been used in the purpose clause to the recommendations of part two, chapter IV of the Legislative Guide. After discussion, it was agreed the text should be retained as drafted.

Draft recommendation 235

122. The draft recommendation was adopted in substance.

Draft recommendation 236

123. The substance of the draft recommendation was adopted with the retention of the word "voluntarily" and substitution of the word "may" in the first line with the word "should".

8. Placement of the sections on the insolvency representative and reorganization plans

124. In response to a proposal to consider the order in which sections F and G were set forth, it was noted that they followed the same order as the Legislative Guide. After some discussion, the Working Group requested the Secretariat to give some further consideration to that issue, bearing in mind the placement in the Legislative Guide.

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

125. The Working Group commenced its discussion on the issues concerning the impact of insolvency on a security right in intellectual property that had been referred to it by Working Group VI (Security interests) on the basis of documents A/CN.9/WG.V/WP.87 and A/CN.9/WG.VI/WP.37/Add.4 and an extract of the Report of Working Group VI on the work of its fifteenth session (A/CN.9/WG.VI/XV/CRP.1/Add.5).

126. The Working Group noted that the text contained in document A/CN.9/WG.VI/WP.37/Add.4 was intended to appear in the commentary included in the draft annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security in intellectual property. The Working Group expressed its appreciation for the coordination between Working Groups V and VI, viewing that coordination as particularly important to achieving consistency between the two UNCITRAL Legislative Guides.

127. The Working Group approved the contents of those parts of the commentary dealing with the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement as set forth in document A/CN.9/WG.VI/WP.37/Add.4, paragraphs 22-40 and the conclusions and revisions of Working Group VI reached at its fifteenth session as set forth in the extract of the Report of Working Group VI on the work of its fifteenth session (A/CN.9/WG.VI/XV/CRP.1/Add.5). In particular, the Working Group agreed that the square brackets should be removed from the text in paragraph 36 of A/CN.9/WG.VI/WP.37/Add.4. It was noted that to ensure consistency with the Legislative Guide on Insolvency Law, the words "insolvency administrator" in the Appendix of A/CN.9/WG.VI/WP.37/Add.4 should be replaced with "insolvency representative".