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Report of Working Group V (Insolvency Law) on the work of its thirtieth session (New York, 29 March – 2 April 2004)

Contents

* Revised dates.
** This is a late submission due to time required for final consultations.

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I. Introduction: Summary of the previous deliberations of the Working Group

1. The Commission, at its thirty-second session (1999), had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law. That proposal had recommended that, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that have expertise and interest in the law of insolvency, the Commission was an appropriate forum for the discussion of insolvency law issues. The proposal urged that the Commission consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

2. Recognition was expressed in the Commission for the importance to all countries of strong insolvency regimes. The view was expressed that the type of insolvency regime that a country had adopted had become a "front-line" factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work on an international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, the fear was expressed that the work might not be brought to a successful conclusion. It was said that a universally acceptable model law was in all likelihood not feasible and that any work needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

3. To facilitate that further study, the Commission decided to convene an exploratory session of a working group to prepare a feasibility proposal for consideration by the Commission at its thirty-third session. That session of the Working Group was held in Vienna from 6 to 17 December 1999.

4. At its thirty-third session in 2000, the Commission noted the recommendation that the Working Group had made in its report (A/CN.9/469, paragraph 140) and gave the Group the mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.[1]

5. It was agreed that in carrying out its task the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), INSOL International (INSOL) (an international federation of insolvency professionals) and Committee J of the Section on Business Law of the International Bar Association (IBA). In order to obtain the views and benefit from the expertise of those organizations, the Secretariat, in cooperation

with INSOL and IBA, organized the UNCITRAL/INSOL/IBA Global Insolvency Colloquium in Vienna from 4-6 December 2000.

6. At its thirty-fourth session in 2001, the Commission had before it the report of the Colloquium (A/CN.9/495).

7. The Commission took note of the report with satisfaction and commended the work accomplished so far, in particular the holding of the Global Insolvency Colloquium and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, in particular with respect to the form that the future work might take and interpretation of the mandate given to the Working Group by the Commission at its thirty-third session. The Commission confirmed that the mandate should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide. In order to avoid the legislative guide being too general or too abstract to provide the required guidance, the Commission suggested that the Working Group should bear in mind the need to be as specific as possible in developing its work. To that end, model legislative provisions, even if only addressing some of the issues to be included in the guide, should be included as far as possible.[2]

8. The twenty-fourth session of the Working Group on Insolvency Law (New York, 23 July-3 August 2001) commenced consideration of this work with the first draft of the legislative guide on insolvency law. The report of that meeting is contained in document A/CN.9/504. Work continued at the twenty-fifth (Vienna, 3-14 December 2001), twenty-sixth (New York, 13-17 May 2002) and twenty-seventh (Vienna, 9-13 December 2002) sessions of the Working Group. The reports of those meetings are contained in documents A/CN.9/507, A/CN.9/511 and A/CN.9/529 respectively.

9. At its twenty-seventh session, in response to a request by the Commission at its thirty-fifth session in 2002 that the Working Group make a recommendation as to the completion of its work,[3] the Working Group stressed the need to finalize the guide as soon as possible and recommended that while the draft guide may not be ready for final adoption by the Commission in 2003, nevertheless a draft should be presented to the Commission in 2003 for preliminary consideration and assessment of the policies on which the legislative guide was based. Such an approach would facilitate the use of the legislative guide as a reference tool before final adoption in 2004 and would allow those countries that have not participated in the Working Group an opportunity to consider the development of the guide. It was noted that the Working Group might require a further session in the second half of 2003 and possibly even the first half of 2004 to refine the text for final adoption.

10. At its twenty-eighth session (New York, 24-28 February 2003) the Working Group adopted the recommendation to the Commission that "After five sessions (between July 2001 and February 2003) of extensive study, analysis and deliberation, the Working Group advises the Commission that it has completed its review of the core substance of the draft legislative guide on insolvency law (as set forth in document A/CN.9/WG.V/WP.63 and Addenda 1-17) and recommends that the Commission:

> "1. Approve the scope of the work undertaken by the Working Group as being responsive to the mandate given to the Working Group to prepare 'a

comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches';

"2. Give preliminary approval to the key objectives, general features and structure of insolvency regimes as set forth in the introductory chapters of Part One of the legislative guide;

"3. Direct the Secretariat to make the current draft of the legislative guide available to all United Nations member States, relevant intergovernmental and non-governmental international organizations, as well as the private sector and regional organizations for comment;

"4. Continue to work collaboratively with the World Bank and other organizations working in the field of insolvency law reform to ensure complementarity and avoid duplication and take into consideration the work of the Working Group VI on secured transactions; and

"5. Direct the Working Group to complete its work on the legislative guide and present it to the Commission in 2004 for approval and adoption."[4]

11. At its thirty-sixth session in 2003, the Commission considered the draft legislative guide and approved it in principle, subject to completion consistent with the key objectives. The Commission also requested the Secretariat to make the draft legislative guide available to Member States, relevant intergovernmental and non-governmental international organizations, as well as private sector and regional organizations and individual experts, for comment as soon as possible, and to present it to the Commission in 2004 for approval and adoption.[5]

12. Work on the draft legislative guide continued at the twenty-ninth session of the Working Group (Vienna, 1-5 September 2003). The report of that meeting is contained in document A/CN.9/542.

II. Organization of the session

13. Working Group V (Insolvency Law) which was composed of all States members of the Commission, held its thirtieth session in New York from 29 March to 2 April 2004. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Italy, Japan, Mexico, Romania, Singapore, Spain, Sudan, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

14. The session was attended by observers from the following States: Australia, Belarus, Croatia, Cuba, Czech Republic, Denmark, Holy See, Ireland, Libyan Arab Jamahiriya, Madagascar, Mongolia, Netherlands, Nigeria, Philippines, Qatar, Republic of Korea, Saudi Arabia, Serbia and Montenegro, South Africa, Switzerland, Turkey, Venezuela and Viet Nam.

15. The session was also attended by observers from the following international organizations: (a) organizations of the United Nations system: International Monetary Fund (IMF), World Bank; (b) intergovernmental organizations: Asian-African Legal Consultative Organization, Asian Development Bank, Hague Conference on Private International Law, International Association of Insolvency Regulators (IAIR); (c) non-governmental organizations: American Bar Association (ABA), American Bar Foundation (ABF), Center for International Legal Studies (CILS), Centre pour la Recherché et l'Étude du Droit Africain Unifié (CREDAU), European Law Students Association, Groupe de Réflexion sur l'Insolvabilité et sa Prévention (GRIP 21), INSOL International, International Bar Association (IBA), International Insolvency Institute (III), International Law Institute (ILI), International Working Group on European Insolvency Law and Union Internationale des Avocats.

16. The Working Group elected the following officers:

Chairman: Wisit WISITSORA-AT (Thailand)

Rapporteur: Jorge PINZÓN SÁNCHEZ (Colombia)

17. The Working Group had before it the draft Legislative Guide on Insolvency Law (A/CN.9/WG.V/WP.70, parts I and II); and a Note by the Secretariat: "Applicable law in insolvency proceedings" (A/CN.9/WG.V/WP.72).

18. The following background materials were also made available: Possible future work on insolvency law: Note by the Secretariat A/CN.9/WG.V/WP.50; Reports of the Secretary-General A/CN.9/WG.V/WP.54, A/CN.9/WG.V/WP.54/Add.1-2; A/CN.9/WG.V/WP.55; A/CN.9/WG.V/WP.57; A/CN.9/WG.V/WP.58; A/CN.9/WG.V/WP.59; A/CN.9/WG.V/WP.61 and Add.1; Report on the UNCITRAL/INSOL/IBA Global Insolvency Colloquium (2000) A/CN.9/495; Report of UNCITRAL on the work of its thirty-fourth session (2001) A/56/17; thirty-fifth session (2002) A/57/17; and thirty-sixth session (2003) A/58/17; Report of Working Group V (Insolvency Law) on the work of its twenty-second session (December 1999) A/CN.9/469; twenty-fourth session (July/August 2001) A/CN.9/504; twenty-fifth session (December 2001) A/CN.9/507; twenty-sixth session (May 2002) A/CN.9/511; twenty-seventh session (December 2002) A/CN.9/529; twenty-eighth session (February 2003) A/CN.9/530 and twenty-ninth session (September 2003) A/CN.9/542.

19. The Working Group adopted the following agenda:

1. Scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legislative guide on insolvency law.
5. Other business.
6. Adoption of the report.

III. Summary of deliberations and decisions

20. The Working Group reviewed the draft legislative guide on insolvency law commencing with applicable law in insolvency proceedings (A/CN.9/WG.V/WP.72) followed by document A/CN.9/WG.V/WP.70, part II and finally, part I. For lack of time the Working Group did not finalise its consideration of the Glossary in part one of the draft Guide, completing up to and including the term "related person". The deliberations and decisions of the Working Group with respect to the various documents are set forth below. The Working Group's deliberations were informed by the deliberations and conclusions of its joint session with Working Group VI (26 March 2004). The substance of paragraphs of the commentary and recommendations not specifically referred to in the report were found to be generally acceptable by the Working Group. Having completed its deliberations on the substantive parts of the Guide, the Working Group was of the view that approximately 5 to 6 days should be sufficient time for the Commission to finalize and adopt the draft Guide at its thirty-seventh session.

21. It was recalled that during its twenty-ninth session , the Working Group had considered a number of issues relating to coordination and harmonization of the draft UNCITRAL Legislative Guide on Insolvency Law with the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. The Working Group noted a proposal to jointly publish the World Bank Principles and the finalized UNCITRAL Legislative Guide on Insolvency Law to prepare a unified standard on insolvency and creditor rights. That joint publication would include:

i. A section on the legal framework for insolvency, combining the World Bank's Principles with UNCITRAL's Legislative Guide (legislative recommendations and commentary). The section could also contain additional commentary prepared by the Bank if the additional commentary (a) dealt with aspects not covered by the UNCITRAL commentary, (b) was not inconsistent with the latter, and (c) clearly provided "value-added" material. Any perception of a "parallel commentary" was to be avoided.

ii. A section on institutional and regulatory frameworks, risk management, and informal workouts. The section would mainly incorporate the relevant sections of the World Bank's Principles together with related legislative recommendations and commentary currently being prepared by Bank staff, with the approach under (i) above to be followed for those subsections (mainly on certain regulatory framework issues) where UNCITRAL had legislative recommendations and commentary.

iii. A section on creditors rights and enforcement that would include the relevant sections of the World Bank's Principles and related recommendations and commentary (prepared by the Bank). In the case of the subsection(s) dealing with secured transactions issues, the unified standard would make clear that for the moment the standard in this area, unlike in other areas covered by the unified standard, included only the applicable World Bank Principles, and that the full standard would be completed at a later stage by incorporating the content of UNCITRAL's Legislative Guide on Secured Transactions, once it was finalized by UNCITRAL in 2005 or 2006.

22. Before finalization of the joint publication it was noted that the Chairman of the UNCITRAL Working Group on Insolvency Law, together with a group of experts and the secretariat of the Commission, would liaise with the World Bank with a view to ensuring the elimination of any potential inconsistencies between the UNCITRAL Legislative Guide and the World Bank Principles.

23. The Working Group supported that proposal, welcoming the coordination of work between the three organizations and the formulation of a joint publication, which would be of significant value to the field of insolvency law reform.

IV. Deliberations and decisions of the Working Group

A. Applicable law in insolvency proceedings (A/CN.9/WG.V/WP.72)

24. The Working Group noted that Working Group VI (Security Interests), at its fifth session (22-25 March 2004), found the principles contained in the current text of A/CN.9/WG.V/WP.72 to be generally acceptable (see A/CN.9/550, paragraph 34). In particular, it was agreed that the commencement of insolvency proceedings should not displace the general, pre-insolvency conflict-of-laws rules applicable to the creation and effectiveness of a security right against third parties. It was further agreed that commencement of insolvency proceedings should not displace the law applicable to priority of security rights, except to the extent explicitly provided in insolvency law. However, it was also agreed that commencement could displace the rules applicable to the enforcement of security rights since enforcement should be subject to the insolvency law of the State in which the insolvency proceedings were commenced.

Purpose clause

25. With regard to the purpose section of the recommendations set forth in A/CN.9/WG.V/WP.72, it was suggested that an additional purpose of applicable law provisions in insolvency proceedings was to maximize the value of assets rather than to settle disputes between a debtor and its creditors. It was argued that that was important, as the effect of forum shopping would be to reduce the value of the estate. The general view of the Working Group, however, was that maximization of value of assets was better addressed as a principal objective of insolvency law as a whole, and that the current wording of the section should be retained.

Recommendation 179

26. While the Working Group generally approved the substance of recommendation 179 as drafted, strong support was expressed for locating the recommendation in a different chapter of the Guide, as it did not address issues of applicable law. Suggestions included: Part I.C, paragraph 28, outlining the general features of an insolvency law; and Part II, chapter V.A, in the introductory remarks concerning treatment of creditor claims. It was noted that, wherever placed, cross-references to the chapter on applicable law should be included. One drafting suggestion was to add the phrase “whether foreign or domestic” to recommendation 179 after the words, “under general law”.

Recommendation 180

27. The Working Group generally approved the substance of recommendation 180 as currently drafted. It was also agreed that the substance of the conclusions of Working Group VI (Security Interests), as noted above, should be included in the relevant part of the commentary in the chapter on applicable law.

Recommendation 181

28. Following discussion, broad support was expressed in the Working Group for retaining recommendation 181 as currently drafted, as opposed to moving subparagraphs (a)-(s) to the commentary. It was agreed, however, that some of the listed items, for the purposes of clarity, should be expanded. For example, it was suggested that the phrase, "that could be of prejudice to certain parties" be added to the end of subparagraph (g).

Recommendation 182

29. The Working Group agreed that the recommendation was essential to the chapter on applicable law and approved the substance of the text as currently drafted.

Recommendation 183

30. Several concerns were expressed as to the inclusion of recommendation 183 in the draft guide and as to its meaning. One concern was that, as a general principle, employees of the debtor working in the forum State should be treated according to the law of that State and that the words after "labour contracts" be amended to read "may be limited to employees in the State in which insolvency proceedings commence". Another concern was that the recommendation should be revised to provide that only some contracts might be subject to another law or that the recommendation should only be relevant to labour contracts that were governed by law other than the law of the forum. A further concern was that, as currently drafted, the recommendation might give the impression that the Working Group favoured the inclusion of such an exception in an insolvency law and it should therefore be removed to the commentary. A different view was that since the provision was merely permissive and that in some regions of the world it was quite common for businesses to have employees working in different jurisdictions under different labour contracts, the recommendation should be maintained. It was noted that the absence of such an exclusion from the law of the forum might have public policy implications that had the potential to cause uncertainty and impede the conduct of insolvency proceedings. It was questioned whether the term "labour contracts" included both individual employment contracts and collective bargaining agreements. Responses to that question indicated that in some States it would include both, while in others only individual employment contracts. It was proposed that the commentary should address that question of definition. After discussion, the prevailing view was that recommendation 183 should be retained as drafted.

31. A proposal to include a further exception for rights *in rem* received some support, but after discussion, the prevailing view was that it should not be included. Some support was expressed for the view that rights *in rem* would already be covered by recommendation 180, and further explanation could be given in the

commentary if required. It was also a matter of some concern that the Guide not be seen to encourage the proliferation of exceptions.

32. It was proposed that section D should be relocated to part two, chapter I, of the Guide.

B. Draft legislative guide on insolvency law, part two (A/CN.9/WG.V/WP.70, part II)

33. The Working Group commenced its consideration of document A/CN.9/WG.V/WP.70 with part two.

1. Part two. Chapter I. Application and commencement

34. It was observed that since in several States a "commercial" activity was one undertaken in the pursuit of profit, the term could not be used to describe a non-profit making enterprise, such as a charity or a public service organization. After some discussion, the Working Group agreed that the Guide should refer to debtors that engage in "economic", rather than "commercial", activities. This would enable such non-profit enterprises to be included in the scope of the Guide; it was noted that a key purpose of the Guide was to provide an insolvency law of broad application.

35. It was noted that several matters referred to in the recommendations were not discussed in the commentary, including the use of presumptions of insolvency mentioned in recommendation 11 (to which only a passing reference was made in paragraph 116) and debtors entitled to a discharge which was mentioned in recommendation 20, but not discussed in paragraphs 147-149. It was noted that since recommendation 20 referred to lack of assets as a ground for denial of the application, it should be aligned with recommendations 14 on denial and 21 on dismissal. It was also noted that, while the commentary currently addressed the provision of notice to foreign creditors with regard to the submission of claims, there was no specific discussion of the provision of notice to those creditors on the commencement of proceedings.

36. It was suggested that the Guide might provide greater guidance on issues arising in those States in which a long period might occur between the time of application and commencement of insolvency proceedings, including adjustment of the suspect period for avoidance actions, and treatment of creditor's claims in that interim period. One response was that while further material might be added regarding the approach of different laws to those issues, it was not necessary for the Working Group to make any recommendations on either point. A further suggestion was that in the context of paragraphs 332-335 concerning the suspect period and chapter V.A on creditor claims, the Working Group could further consider those issues.

37. It was noted that while recommendation 145 addressed conversion of reorganization proceedings to liquidation, conversion from liquidation to reorganization was not discussed and a new recommendation, along the lines of recommendation 7 might be added to the effect that the insolvency law should address the question of conversion from one type of insolvency proceeding to the

other. It was proposed that the following language be added to recommendation 13 (b) before the conjunction: "by contesting the application, consenting to the application or, where the application seeks liquidation, requesting the commencement of reorganization proceedings". The Working Group approved the substance of the language proposed for addition to recommendation 13.

38. It was suggested that footnote 12 to paragraph 106 be corrected to note that the International Accounting Standards Board formulated international financial reporting standards rather than the GAAP accounting principles that were produced by the United States Financial Accounting Standards Board.

39. In response to a suggestion that the Guide should include specific recommendations on application by a government authority to commence insolvency proceedings, it was recalled that the Working Group had decided not to include such recommendations. A further suggestion to include a footnote to recommendation 13 noting that the same procedure could apply to a public authority where it was not a creditor was not supported.

2. Part two. Chapter II. Treatment of assets on commencement of insolvency proceedings

(a) Assets constituting the insolvency estate

40. Following discussion, the Working Group agreed that recommendation 24 should be amended in the following manner: in the chapeau, replace "identify the assets that will constitute the estate, including" with "specify that the estate should include"; in subparagraph (a) delete the bracketed phrase "owned by the debtor" and the remainder of the subparagraph following the words "third party-owned assets". It was suggested that footnote 28 to the recommendation be expanded to better explain the use of the term "assets" as discussed in the context of the joint session with Working Group VI (see document A/CN.9/550, paragraph 22). It was noted that recommendation 24 and the glossary would have to be aligned.

41. It was also agreed a new recommendation should be added to restate the text on timing deleted from recommendation 24, to the effect that the insolvency law should specify the date from which the estate was to be constituted, being either at the time of application for commencement or the effective date of commencement of insolvency proceedings. Support was also expressed for adding a cross-reference from recommendation 25 to chapter V.D on applicable law (A/CN.9/WG.V/WP.72).

42. It was noted that since many jurisdictions excluded damages from personal injury claims from the insolvency estate, an appropriate cross-reference might be made from paragraph 170 to the discussion of that point in footnote 25 to paragraph 157, and a footnote to that effect added to paragraph 174. It was noted that some States also excluded such things as monies received for public works from the estate.

(b) Protection and preservation of the insolvency estate

43. Support was expressed in favour of adding, at the end of paragraph 197, a qualification to the effect that the court should only exercise the power to grant provisional measures if it was satisfied that the estate or assets of the debtor were at risk.

44. With respect to the recommendations, a proposal to retain, in recommendation 31, the words "upon urgent application" and "promptly" and delete alternative text in square brackets, was supported, as was a proposal to delete, in recommendation 38 (b), the text in square brackets to reflect the discussion and agreement in the joint session with Working Group VI (see A/CN.9/550, paragraph 17) on protection of value. A further proposal was to add the words "and application for commencement is dismissed" to the end of recommendation 33 to reflect a further situation in which provisional measures would terminate.

45. It was noted that the substance of recommendation 36, additional measures available on commencement of insolvency proceedings, was not discussed as such in the commentary, and the text of the commentary should be revised accordingly.

(c) Use and disposal of assets

46. A number of issues were raised with respect to the recommendations in section C. It was observed that the phrase "use or disposal" was used in addition to "sale", but that forms of disposal other than sale were not addressed in recommendations 43-47, such as disposal by way of further encumbrance or by lease. To address other forms of disposal, particularly further encumbrance, it was proposed that text along the following lines be added: "The insolvency law should specify that assets subject to security interests may be further encumbered, subject to the requirements of recommendations 50, 51 and 52". It was explained that those recommendations addressed the protections to be provided to secured creditors in the event of provision of post-commencement finance (chapter II.D) and were also relevant to the issue of further encumbrance. That proposal was supported.

47. It was also observed that although the estate included the debtor's interest in third party owned assets (recommendation 24), the recommendations on use and disposal were limited in their application to the use and disposal of "assets of the estate". It was questioned whether that issue was addressed in chapter II.E on contracts or whether more detail was required in chapter II.C to ensure the debtor could continue to exercise its rights with respect to third party owned assets. The following additional recommendation was proposed:

> "The law should specify that the insolvency representative may use assets owned by third parties and in the possession of the debtor provided specified conditions are satisfied, including:
>
> "(a) The interests of the third party will be protected against diminution in the value of the assets; and
>
> "(b) The costs under the contract of continued performance of the contract will be paid as an expense of administering the estate."

The Working Group adopted the substance of the proposed language.

48. In response to a suggestion that the phrase "assets of the estate" should be replaced with "assets of the debtor", it was noted that the section on constitution of the insolvency estate included provision for certain assets of the debtor to be excluded from the estate in the case of natural person debtors and the phrase "assets of the debtor" was therefore too broad in the context of sale and disposal.

49. With respect to recommendation 41, it was observed that the reference to the right of creditors to object to a proposed sale was unrelated to the heading of the recommendation and may need to be separated from the recommendation. It was also suggested that the recommendation might need some redrafting to avoid the implication that objection by a creditor was sufficient to prevent the sale. Some support was expressed in favour of providing the creditor with the opportunity to be heard by the court on the proposed sale.

50. It was noted with respect to recommendation 42 that use of the word "publicized" might imply something different from a requirement for giving notice and that the text, both in the commentary and recommendations, should use these terms consistently.

51. The substance of the following revision of recommendations 41 and 42 was supported:

> *Procedure for notification of disposal*
>
> (41) The insolvency law should specify that adequate notice of any disposal conducted outside the ordinary course of business is given to creditors[1] and that they have the opportunity to be heard by the court.
>
> (42) The insolvency law should specify that notification of public auctions is provided in a manner that will ensure the information is likely to come to the attention of interested parties.
>
> Footnote [1] When the assets are encumbered assets or subject to other interests, recommendation (43) applies.

52. It was noted that as currently drafted, recommendation 44 appeared to repeat the content of other recommendations, specifically recommendation 40 (b), and could be deleted. To address the overlap of those recommendations, and to clarify the application of recommendation 43, it was proposed that recommendation 40 (b) should refer to recommendations 41 and 43; that the chapeau of recommendation 43 should read "The insolvency law should permit the insolvency representative to sell assets that are encumbered or subject to other interests free and clear of those encumbrances and other interests …"; that recommendation 43 should apply only to sales outside the ordinary course of business; and that in order to confirm that subparagraphs (a) to (d) of recommendation 43 should apply cumulatively, the word "and" be added after subparagraph (c). That proposal received support.

53. It was recalled that the joint session had discussed the issue of retention of title (see A/CN.9/550, paragraphs 21-22) and in order to give effect to the conclusions reached, it was proposed that some additional material should be added to paragraphs 236 and 237 to clarify the ability of the estate to continue to use those assets.

54. With respect to cash proceeds, it was proposed that paragraph 238 should also refer to non-cash proceeds of sale and that recommendation 43 (d) should be amended to recognize ongoing priority rights where property was purchased with the proceeds of sale of an asset, such as where inventory was sold and further inventory purchased with the proceeds. Support was expressed in favour of including recommendations on cash proceeds. It was proposed that recommendation 40 (a) be revised to provide for the use and disposal of assets of the estate (including assets

subject to security interests) in the ordinary course of business except cash proceeds, with an additional recommendation along the following lines:

> "The law should specify that, where the secured creditor does not agree, the court may authorize the use of cash proceeds provided specified conditions are satisfied, including:
>
> "(a) The secured creditor was given the opportunity to be heard by the court;
>
> "(b) The interests of the secured creditor will be protected against diminution in the value of the cash proceeds."

55. The Working Group adopted the proposal with respect to recommendation 40 (a) and the substance of the language proposed as a new recommendation.

56. It was further suggested that the term "cash proceeds" be added to the glossary with a definition along the lines of "proceeds, if subject to a security interest, of the sale of encumbered assets". That proposal was supported. It was suggested that the commentary should make it clear that what was being discussed was the proceeds that arose out of the sale of encumbered assets, and not the proceeds of the sale of any assets.

57. It was noted that recommendation 137 may have been rendered redundant by the changes proposed to the section on use and disposal of assets, but that it would need to be reconsidered in the context of reorganization.

58. With respect to recommendation 48 and paragraph 234, it was proposed that the commentary should address the question of to whom assets could be relinquished, particularly in the case of land. It was also suggested that further clarification might be required with respect to valuation of the relinquished asset in order to determine the value of any associated claim by the creditor.

(d) Post-commencement finance

59. The Working Group acknowledged the importance of providing sufficient incentives for the provision of new finance and it was proposed that additional language be added to recommendation 49 to reflect that importance.

60. It was proposed that recommendation 52 should be permissive only, so that the insolvency law "may" include provisions for that type of priority. After discussion, it was agreed that the word "should" would be retained. It was observed that as the concept of "unreasonable risk" created difficulty in some legal systems, the words after "protected" should be deleted.

61. It was noted that there was some inconsistency between the recommendations and the discussion in the commentary on the provision of a security interest as opposed to the provision of priority and it was suggested that the text should be aligned. It was also suggested that the discussion should focus on the provision of priority, since that was more prevalent than providing a security interest.

(e) Treatment of contracts

62. Regarding recommendation 56, it was agreed that the words "on the commencement of insolvency proceedings" be deleted from the chapeau to remove any implication that the recommendation did not apply in the period between an application for commencement and commencement. With respect to sub-paragraphs (a) and (b), the suggestion was made that the paragraphs should focus on the event of insolvency, rather than upon application or commencement. Further suggestions included adding the words "or accelerates", following "terminates" in the chapeau and adding a subparagraph (c), "the entry of an order seeking conversion of a liquidation proceeding to a reorganization proceeding". While different views were expressed regarding the strength of the direction to be given by the recommendation, and whether "may" or "should" should be used, it was agreed, after discussion, that the provision would remain as drafted. It was observed that where a party was required or continued to perform a contract after commencement, the benefits derived from continued performance should be paid for by the estate, and it was noted that that issue was addressed in part by recommendations 65 and 67, which required some redrafting.

63. It was suggested that the square bracketed language in recommendation 62 might be deleted.

64. With respect to recommendation 65, it was suggested that clarification was required as to whether subparagraph (a) would include both pre-commencement and post-commencement breach and whether the meaning of "is able to perform" in subparagraph (b) included the ability to continue to pay for services provided. The Working Group considered a proposal for redrafting recommendations 65 to 67 as follows:

Continuation of contacts where the debtor is in breach

(65) The law should specify that where the debtor is in breach under a contract the insolvency representative can continue the performance of that contract, provided the breach is cured, the non-breaching counterparty is substantially returned to the economic position it was in before the breach, and the estate is able to perform under the continued contract.

(65)(b) deleted

Performance prior to continuation or rejection

(66) The law should specify that the insolvency representative may accept [or require] performance from the counterparty to a contract prior to continuation or rejection of the contract. Claims of the counterparty arising from performance accepted [or required] by the insolvency representative prior to continuation or rejection of the contract should be payable as an expense of administering the estate:

(a) if the counterparty has performed the contract to the benefit of the estate, the benefits conferred upon the estate, pursuant to the terms of the contract, are payable as an administrative expense.

(b) if the insolvency representative uses assets owned by a third party that are in the possession of the debtor subject to contract, that third party

should be protected against diminution of the value of those assets and the cost under the contract of continued performance of the contract should be treated in accordance with paragraph (a).

(67) The law should specify that where a decision is made to continue performance of a contract, damages for the subsequent breach of that contract should be payable as an administrative expense.

65. It was proposed that paragraph 278 precede paragraph 277 under the heading "Performance prior to continuation or rejection", with the addition of the following text to the end of paragraph 278:

"Where the insolvency representative determines that a contract should be performed prior to a determination to continue or reject, the insolvency representative should be able to accept or require performance from the counterparty. As a condition to accepting or requiring performance, the costs under the contract of costs under the contract of continued performance should be payable as expenses of administering the estate. If the insolvency representative uses assets owned by a third party that are in the possession of the debtor subject to contract, that party should be protected against erosion of the value of those assets and the costs under the contract of the benefits conferred on the estate by the use of those assets should be payable as an administrative expense."

66. The Working Group approved the substance of the revision proposed for recommendations 65 to 67, together with the proposed commentary.

67. It was suggested that a new subparagraph (d) might be added to recommendation 70 to the effect that defaults should be cured before the assignment as part of the conditions of the assignment. It was queried whether that proposal would be limited to post-commencement default, or also include pre-commencement default.

68. Support was expressed for adding at the end of recommendation 71 the words: "and the estate will have no further liability under the contract".

(f) Avoidance proceedings

69. It was questioned whether the Working Group should retain the requirement for knowledge of the debtor's intent in recommendation 73 (a), on the basis that to do so would set a very high standard that would be difficult to prove. It was agreed, following discussion, that the paragraph should focus on the effect of the transactions on creditors and, accordingly, that the opening phrase of the paragraph should be "transactions with the effect of defeating, delaying or hindering the ability of creditors …", and that the final phrase should be "or otherwise prejudice the interests of creditors" with the words, "and where the counterparty knew or should have known of the debtor's intent", being deleted.

70. It was further suggested that there appeared to be a gap in recommendation 73 (b) as it made no reference to gifts that would also be considered to be within this category of transaction.

71. Concern was expressed that although the commentary to the Guide discussed various approaches to the length of the suspect period, sufficient guidance on the

desirability of adopting short periods was not provided in recommendation 75. In particular, it was proposed that the recommendations should include reference to specific periods—in the case of transactions in recommendation 73 (a), perhaps 1 to 2 years and for those in 73 (b) and (c), perhaps 6 months to 1 year. While there was some support for including more specific references to possible time periods, it was generally agreed that more discussion of the need for shorter periods and the supporting reasons should be added to the commentary.

72. Several observations were made with respect to subparagraphs (b) and (c) of recommendation 76. Firstly, it was suggested that those provisions should not be limited in their application to related person transactions but could be applicable more generally. Another observation was that the distinction between those two paragraphs was not clear, although it was also observed that a presumption under subparagraph (b) could be challenged, while subparagraph (c) established a rule of procedure that could not. After discussion, there was some support for removing subparagraphs (b) and (c) from recommendation 76 and redrafting them to be of more general application as evidentiary provisions.

73. It was agreed that in the second sentence of recommendation 81 the text in square brackets should be retained without the brackets. The question was raised, however, as to whether that text should apply to all of recommendation 73 or simply subparagraph (a). One view was that only the transactions described in subparagraph (a) should be excepted from the general rule that the suspect period applied retrospectively from commencement. A different view was that the concern with concealed transactions might apply equally to all of the transactions described in recommendation 73. Support was expressed in favour of both views, but after discussion it was agreed that the reference to subparagraph (a) should be deleted so that the exception would apply to all of the transactions described in recommendation 73. It was also suggested that the recommendation should include more specific reference to the time period within which avoidance proceedings could be commenced, for example 2 years, in order to ensure that those proceedings were not taken many years after the transactions in question. It was agreed that more specific discussion should be included in the commentary.

74. In response to a question about the effect of avoided transactions, reference was made to paragraphs 330-31 of the commentary and to a previous agreement not to include recommendations on that point.

75. With respect to recommendation 80, it was agreed that in addition to the current text, the recommendation should establish a general principle that the costs of avoidance proceedings should be paid from the estate.

(g) Set-off, financial contracts and netting

76. Although the view was expressed that a general right of set-off should only be available in very limited circumstances, the text of recommendation 85 as drafted received support.

77. With respect to recommendation 92, it was agreed that the text in square brackets should be retained without the brackets on the basis that it clarified the scope of the provisions. In that regard, the suggestion that it might be more appropriate to include that text in the purpose provision than as a specific recommendation received some support.

78. Concern was expressed as to the uncertainty created by the absence of guidance on the scope of the term "financial contact". It was noted that a definition was included in the glossary to the Guide, although in square brackets. It was also observed that the types of contracts to be included in the provisions on financial contract were generally well recognized in the financial world and that the need for flexibility made reaching a definition of such contracts difficult.

3. Part two. Chapter III. Participants

(a) The debtor

79. In response to a concern that where information was to be provided by a legal person debtor it should include information as to possible future liabilities of the debtor, it was generally agreed that that would be covered by the term "business affairs" in recommendation 95 (b) and by the reference to the provision of information regarding the types of proceedings affecting the debtor in sub-paragraph (b) (ii). For clarification, it was proposed that subparagraph (b) (v) be redrafted along the lines of "creditors and their claims, prepared in cooperation with the insolvency representative and revised and amended by the debtor as claims are verified and admitted or denied". Although some concern was expressed as to the usefulness of retaining the word "reasonably" in paragraph (b) it was agreed that in order to avoid vexatious and unjustified requests, especially by creditors, the retention of that term might prove helpful.

80. It was agreed that the opening phrase in square brackets of recommendation 95 (c) should be deleted and the words "to cooperate" added. It was noted that some of the material included in paragraph 376 of the commentary was not applicable only to debtors in possession and should be removed. As a general matter, it was suggested that the Guide should make it clear, both in the commentary and the recommendations, that whenever an insolvency law provided for a debtor in possession, that debtor generally should have the same powers and functions as an insolvency representative. To address that concern, it was proposed that a further recommendation be added after recommendation 97 to the effect that the law should specify that a debtor in possession would have the powers and functions of an insolvency representative, except for the right to remuneration.

(b) The insolvency representative

81. A proposal that the Guide should place more emphasis on the use of independent agencies to select, appoint and supervise the insolvency representative was noted, but not supported on the basis that many countries were not necessarily in a position to establish such agencies and therefore the inclusion of such recommendations was not desirable.

82. It was agreed that paragraph 400 of the commentary should specify that the insolvency representative should not have a criminal record.

83. It was proposed that the reference to liability in recommendation 105 was too broad and that the final phrase should be "and any related standard of liability imposed."

(c) Creditors—participation in insolvency proceedings

84. The Working Group agreed to replace the italicized wording in recommendation 112 with the phrase "a specific percentage of the total value of", noting that the requirement varied significantly between States. It also agreed to delete the bracketed language in recommendation 115.

85. It was agreed that, while the substance of the recommendations was largely acceptable, some redrafting of the section might be necessary to ensure that while the commentary should clearly express the preference of the Working Group for the setting up of creditor committees, it should be noted that other forms of representation and consultation of creditors existed that worked successfully in some States. It was noted that, accordingly, some revision of recommendation 113 might be necessary. The observation was made that where a regime relied upon creditor committees, the insolvency law should ensure that such arrangements respected the rights of all creditors. In discussing the role of creditor committees and creditor meetings, it was noted that the two subjects raised different issues. It was remarked, however, that the purpose of creditor interaction in relation to any particular issue would decide the appropriate creditor forum. The voting requirements of reorganization, for example, would determine whether a meeting of all creditors would be required or whether a smaller representative group might act. There was general agreement that the representation of rights had to be balanced with the need for timely and efficient conduct of the proceedings.

86. Support was expressed for ensuring that the commentary addressed the right of foreign creditors to fully participate in proceedings, noting the discussion of the principle of equal treatment of foreign and domestic creditors in chapter V.A, on the treatment of creditor claims.

(d) Party in interest's right to be heard and to appeal

87. With regard to a suggestion to add to the rights of creditor committees the right to be heard in the proceedings in recommendation 117 in the preceding section, it was noted that a creditor committee was defined in the glossary as a party in interest, and, as such, was covered by recommendations 121 and 122.

4. Part two. Chapter IV. Reorganization

(a) The reorganization plan

88. While the Working Group expressed general satisfaction with the substantive policy of the section, it was agreed that some redrafting of the recommendations would give clearer effect to the discussion of the relevant issues in the commentary and strengthen the Guide overall.

89. It was suggested that the following propositions should guide a revision of the recommendations: (a) to the extent that reorganization included secured creditors, the insolvency law should provide a number of safeguards to protect against inter-creditor discrimination; (b) if a creditor was to be bound by a reorganization plan without its consent, it should have the right to vote in the proceedings; (c) if secured or priority creditors were bound by a plan, those creditors should vote on the plan as a separate class; (d) a creditor in a particular class should receive the same terms as all other creditors in that class and to the extent that differing treatment of creditors

could maximize the success of a reorganization plan, different classes of unsecured creditors should be created; (e) dissenting creditors in an approving class should receive at least as much as they would have received in liquidation proceedings; and (g) a dissenting class of creditors should receive at least as much as that class would have received in liquidation proceedings, relative to their particular class interests.

90. The Secretariat was requested to prepare a redraft of the recommendations based upon those observations. The Working Group also agreed that the following changes be incorporated in that revision: (a) to retain the bracketed language, but not the brackets, in recommendation 128 (b)(i); (b) to retain recommendation 135, as currently drafted, but noting that it was closely connected to recommendation 145(c), to move recommendation 135 to follow recommendation 144; (c) to amend the references in recommendation 139 (a) and (b) to refer to recommendations 138 and 140 respectively.

91. A number of further drafting amendments were also suggested: (a) to include equity holders in the list of parties in recommendation 125 (b) who might propose a plan; (b) to merge recommendations 126 and 127 under the heading "Preparation and submission of a disclosure statement"; (c) to add the phrase "and retention of title arrangements" to the end of recommendation 128 (b)(ii); (d) to delete the word "statements" from recommendation 129 (a); (e) to add a new subparagraph to recommendation 129 requiring the inclusion in the disclosure statement of any supplementary non-financial information that might impact on the future performance of the debtor (e.g. the availability of a new patent); (f) to include in recommendation 129 a reference to the obligations of confidentiality established in chapter III; (g) that recommendation 130 be expanded to detail the classes that may vote on the plan; (h) that recommendation 133 be modified to state that where there are distinct classes of creditors, creditors should vote in classes; (i) to amend recommendation 138 (b) to reflect the idea that no one creditor should be particularly prejudiced compared to all other creditors within its class; (j) that the words "with regard to each respective class" be inserted in recommendation 138 (c), following "creditors"; (k) to clarify whether footnote 94 to recommendation 138 (f) referred to agreement by a class or individual creditors; (l) to add the words "or dismissal" before "where" in the chapeau to recommendation 145; (m) that it should be made clear that conversion was appropriate where the breach of the terms of the plan was by the debtor, but not where the breach was attributable to a third party; and (n) with regard to paragraph 522, the debtor might be allowed to vote on the plan in defined circumstances.

92. Different views were expressed regarding the need for recommendation 128 (c)(vi), but no decision as to retention or deletion was taken by the Working Group.

93. There was some support for the introduction of a new recommendation based on paragraph 539 of the commentary to the effect that the court should not be asked to review the economic and commercial basis of creditors decisions, or the economic feasibility of a reorganization plan. In response, it was observed that these were normal tasks regularly undertaken by courts in some jurisdictions and it was agreed that no recommendation should be included.

(b) Expedited reorganization

94. Concern was expressed that the expedited section was not sufficiently clear as to the goal of those types of proceedings, nor as to the relationship of expedited proceedings to full reorganization proceedings discussed in section A of chapter IV and elsewhere in the Guide, or the scope of such proceedings. Although a suggestion was made to place the section in an annex to the draft Guide, the prevailing view was that it should remain as part of chapter IV of the Guide. However, to facilitate understanding of the chapter and more clearly explain the purpose and scope of expedited proceedings, it was proposed that the commentary should be redrafted to include more explanatory material and that it should more closely follow the content of the recommendations.

95. With respect to recommendation 146 (a), various views were expressed as to the appropriate commencement conditions that should apply. One view was that a debtor should not have to be eligible to commence proceedings under the insolvency law in order to commence expedited proceedings, although it was noted that the proceedings could be used by any debtor eligible under the reorganization law. Another view, which received support, was that both texts in square brackets could be deleted, so that expedited proceedings would be available to debtors that were likely to be generally unable to pay their debts as they matured. It was agreed that the language in square brackets in subparagraph (b) could be deleted.

96. It was suggested that as the treatment noted in subparagraph (e) of recommendation 147 would be included within the plan and disclosure statement in subparagraph (a) and also in subparagraph (d), subparagraph (e) could therefore be deleted.

97. With respect to recommendation 150, it was proposed that the requirement to provide individual notice, especially to equity holders and bond holders, could be especially burdensome and it was agreed that it would be sufficient if notice was to be communicated using existing available means. It was also noted that the requirement to provide notice to equity holders was not included in other notice provisions in the Guide.

98. It was queried how the requirement for court confirmation of an expedited plan in recommendation 151 could be reconciled with the optional nature of confirmation in section A of chapter IV, and suggested that more discussion might be required in the commentary.

99. After discussion, it was agreed that the first text in square brackets in recommendation 153 be retained and the second deleted. With respect to other text set forth in square brackets in the recommendations, the Working Group agreed that in recommendation 147 (b) that text should be deleted; in recommendation 149 (b) it should be retained; and in recommendation 151 (b) it should be retained.

5. Part two. Chapter V. Management of proceedings

(a) Creditor claims

100. It was agreed that recommendation 154 should be revised to require only those creditors who wanted to participate in the proceedings to file their claims. It was also proposed that claims should be allowed to be submitted by different means.

101. With respect to secured creditors, it was proposed that recommendation 156 should require them to submit claims and that they should be submitted under recommendation 154 or 158 at an early stage of the proceedings, to facilitate the conduct and administration of the proceedings. It was suggested that recommendation 159 should follow or be merged with recommendation 154.

102. It was agreed that the text in recommendation 160 in square brackets should be deleted and that the concept of providing special measures for both currency instability and currency fluctuations be explained in the commentary.

103. It was also agreed that the text in square brackets in recommendations 163, 166 and 167 should be retained and that issues arising from recommendations 166 and 167 should be subject to review under recommendation 163. No support was expressed in favour of a proposal to include disallowance in recommendation 168 (c). It was noted that recommendation 169 should be read in conjunction with recommendations 162 and 163.

(b) Priorities and distribution

104. A proposal to add the words "classes of" before the word "claims", and the words "if any" after the word "claims" in recommendation 172 was supported. It was noted that the reference to subordinated claims should only encompass the concept of equitable subordination as contractual subordination could result in claims being treated at different levels of priority, depending upon the agreement.

(c) Corporate groups

105. The Working Group generally approved the substance of revisions to section C as follows:

644. Three issues of specific concern in insolvency proceedings involving one of a group of companies are:

(a) Whether any other company in the group will be responsible for the external debts of the insolvent company (being all debts owed by the insolvent company except for those owed to related group companies, i.e. "intra-group debts"); and

(b) Treatment of intra-group debts (claims against the debtor company by related group companies).

(c) Commencement of insolvency proceedings by a group company against a related group company.

Amend the first sentence of paragraph 645 as follows:

645. Reflecting the complexity of this topic, insolvency laws provide different responses to these and other issues which may be distinguished by the extent to which a law allows the veil of incorporation to be lifted.

Add the following text as a new paragraph after paragraph 645:

Although a variety of approaches are taken to these very complex issues, it is important that an insolvency regime address matters concerning corporate groups in sufficient procedural detail to provide certainty for all parties concerned in commercial transactions with corporate groups. Alternatives to

direct regulation of corporate groups in insolvency would include providing sufficient definition in other parts of the insolvency law to allow application of those provisions to corporate groups, such as the use of avoidance or subordination provisions with respect to related parties.

106. It was also proposed that a reference to the applicable law chapter could appropriately be added to section C.

6. Conclusion of proceedings

(a) Discharge

107. It was suggested the commentary should include a statement to the effect that discharge of the debtor should not affect the liabilities of a third party that has guaranteed the obligations of the debtor.

108. With respect to the provision of discharge, it was proposed that the commentary should draw a clear distinction between providing that discharge and imposing conditions on the debtor that would nevertheless limit its rehabilitation. It was noted, for example, that under some laws a discharged debtor was not permitted to undertake commercial activity.

(b) Conclusion of proceedings

109. A proposal to revise both recommendations 186 and 187 to provide that the law should specify the procedures by which both liquidation and reorganization proceedings should be closed was supported. Specifying who could apply, whether the application for closure and the decision to close might be publicized and whether creditors could be heard were noted as being relevant to that procedure. It was also proposed that recommendation 187 should address the situation where implementation of the plan failed or it was determined to be incapable of implementation. It was noted that amendment of the plan might also be relevant in such cases.

C. Draft legislative guide on insolvency law, part one

110. Support was expressed in favour of a proposal to include a set of recommendations addressing the key objectives and to locate other recommendations of a general nature, such as recommendations 7 and 179, in part one of the draft guide. The Working Group agreed that the recommendations along the following lines be added to the text.

111. Following paragraph 22 of the commentary (where subparagraphs (a)-(h) of the recommendation reflect the statement of key objectives set forth in paragraphs 12-22 of A/CN.9/WG.V/WP.70, part I):

> "(1) In order to establish and develop an effective insolvency law, the following key objectives should be considered:
>
> "(a) Provide certainty in the market to promote economic stability and growth;
>
> "(b) Maximize value of assets;

"(c) Strike a balance between liquidation and reorganization;

"(d) Ensure equitable treatment of similarly situated creditors;

"(e) Provide for timely, efficient and impartial resolution of insolvency;

"(f) Preserve the insolvency estate to allow equitable distribution to creditors;

"(g) Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and

"(h) Recognize existing creditors rights and establish clear rules for ranking of priority claims."

112. Following paragraph 27 of the commentary:

"(2) The recommendations in the Legislative Guide have been designed to address each of the key objectives and achieve an appropriate balance between them."

113. Following paragraph 30 of the commentary (where subparagraphs (a)-(n) reflect the substance of paragraph 28 of A/CN.9/WG.V/WP.70, part I):

"(3) In order to design an effective and efficient insolvency law, the following common features should be considered:

"(a) Identifying the debtors that may be subject to insolvency proceedings, including those debtors that may require a special insolvency regime;

"(b) Determining when insolvency proceedings may be commenced and the type of proceeding that may be commenced, the party that may request commencement and whether the commencement criteria should differ depending upon the party requesting commencement;

"(c) The extent to which the debtor should be allowed to retain control of the business once insolvency proceedings commence, or be displaced and an independent party (in the Guide referred to as the insolvency representative) appointed to supervise and manage the debtor, and the distinction to be made between liquidation and reorganization in that regard;

"(d) Protection of the assets of the debtor against the actions of creditors, the debtor itself and the insolvency representative, and where the protective measures apply to secured creditors, the manner in which the economic value of the security interest will be protected during the insolvency proceedings;

"(e) The manner in which the insolvency representative may deal with contract entered into by the debtor before the commencement of proceedings and in respect of which both the debtor and its counterparty have not fully performed their respective obligations;

"(f) The extent to which setoff or netting rights can be enforced or will be protected, notwithstanding the commencement of insolvency proceedings;

"(g) The manner in which the insolvency representative may use or dispose of assets of the insolvency estate;

"(h) The extent to which the insolvency representative can avoid certain types of transactions that result in the interests of creditors being prejudiced;

"(i) In the case of reorganization, preparation of the reorganization plan and the limitations, if any, that will be imposed on the content of the plan, the preparer of the plan and the conditions required for its approval and implementation;

"(j) The ranking of creditors for the purposes of distributing the proceeds of liquidation;

"(k) Implementation of the reorganization plan;

"(l) Distribution of the proceeds of liquidation;

"(m) Discharge or dissolution of the debtor in liquidation; and

"(n) Conclusion of the proceedings."

114. The Working Group strongly supported a proposal to include the text of the UNCITRAL Model Law on Cross-Border Insolvency and the Guide to Enactment together with the draft guide, stressing the need for countries to address not only domestic insolvency law reform, but also issues of cross-border insolvency. Given the different nature of the two texts, however, it was agreed that the Model Law should perhaps be included as an annex to the draft guide to avoid any confusion as to how the two different types of texts might be used or adopted by States. It was noted that those issues could be addressed in the introduction to the draft guide, and that the draft Guide should retain the appropriate cross-references to the Model Law and Guide to Enactment. It was also proposed that the Guide should strongly recommend the adoption of the UNCITRAL Model Law.

115. A number of suggestions were made with respect to the organization of the material in part one, including integrating the introduction in part one more closely to the substance of part two by including appropriate cross-references; underlining the Guide's focus on debtors engaged in economic activity, rather than consumer debtors; reorganizing paragraphs 28-30 closer to paragraphs 65-69; adding an introductory paragraph to section II of part one, to explain in particular the reason for including the material on administrative procedures; and adding to section III information on work being done by international organizations on strengthening institutional infrastructure. It was noted that the reference to the Bank of England guidelines in paragraph 46 required some clarification and that the Secretariat would revise paragraphs 58 and 59 in light of the conclusions on chapter IV, section B, and include the revised explanation of expedited reorganization proceedings under the heading "Reorganization proceedings".

116. As a matter of drafting, the Secretariat was requested to consider whether the phrase "overall goal" was appropriate in the last sentence of paragraph 12 and whether the last sentence of paragraph 13 should be added to paragraph 14; and to add words along the lines of "preserving the value of the enterprise" to the second sentence of paragraph 14.

D. Glossary

117. The Working Group requested the Secretariat to reorganize the glossary to facilitate comparison between the official language versions.

Administrative claim or expense

118. It was agreed that the current drafting of the term should be retained with the deletion of the word "proper", qualifying the insolvency representative's exercise of its functions. A further amendment suggested was to refer to legal as well as contractual obligations.

Application for commencement of insolvency proceedings

119. The Working Group agreed to delete the term from the glossary.

Avoidance provisions

120. The Working Group considered the following revised definition:

> "Provisions of the insolvency law which permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any such assets transferred or their value to be recovered in the collective interests of creditors or the insolvency estate if the transactions meet criteria specified in the insolvency law."

121. Adoption of that revision with the deletion of the final clause "if the transactions meet criteria specified in the insolvency law" was agreed.

Assets of the debtor

122. The substance of the text as drafted was supported.

Burdensome assets

123. It was agreed that the words "for example" be replaced with "or", and the text as drafted be adopted.

Centre of main interests

124. The Working Group approved the substance of the text as drafted.

Claim

125. The Working Group considered a proposal to revise the text as follows:

> "A right to payment from the estate of the debtor, whether arising from a debt, a contract or other theory of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent.
>
> Note: Some jurisdictions recognize the ability or right, where permitted by applicable law, to recover [assets][goods] from the debtor as a claim."

126. That proposal received some support, but for lack of time the Working Group was unable to complete its consideration of the term.

Commencement of proceedings

127. The Working Group considered a proposal to revise the text as follows:

> "The event determining the effective date of insolvency proceedings whether established by statute or a judicial decision."

128. That proposal received some support, but for lack of time the Working Group was unable to complete its consideration of the term.

Creditor

129. The Working Group considered a proposal to add the following text:

> "A natural or legal person which has a claim against the debtor that arose on or before the commencement of the insolvency proceedings."

130. Although there was some support for not adding the term to the glossary, it was agreed that since it was closely related to the term "claim", it should perhaps be revisited when that term was resolved.

Creditor committee

131. The Working Group approved the substance of the definition with the addition of the words "of creditors" to describe the representative body.

Debtor

132. Deletion of the term "debtor" from the glossary was supported.

Discharge

133. The Working Group adopted the text as drafted, substituting "claims" for "liabilities".

Disposal

134. The Working Group adopted the text as drafted.

Encumbered asset

135. The Working Group adopted the text as currently drafted, but requested the Secretariat to review the Guide to ensure consistent use of the phrase "other interests", being interests held by a third party, such as co-ownership, that were broader than security interests.

Equity holder

136. The Working Group adopted the following definition of equity holder:

> "The holder of issued stock or a similar interest that represents an ownership claim to a proportion of the capital of a corporation or other enterprise."

Establishment

137. The text as drafted was adopted by the Working Group, with the bracketed language to be placed in a footnote.

Estate

138. It was agreed to delete the cross-reference to "insolvency estate".

Financial contract

139. The current drafting of the text was adopted by the Working Group, with the reference to the origin of the text to be placed in a footnote. It was noted that the wording had been deliberately framed in a general and open-ended way to provide the necessary flexibility to capture what were rapidly-evolving instruments or arrangements, which would still provide guidance to users of the Guide by clearly indicating the intention of what the term should encompass. It was stated that the purpose of giving guidance as to the usage of the term in the draft Guide was to provide some certainty as to the scope of the subject matter to be excluded from the ambit of the normal insolvency regime, in the interests of avoiding systemic risk to the financial markets. It was suggested that the Guide might note that purpose to ensure users were fully aware of the underlying intention of the draft Guide.

Government authority

140. The Working Group agreed to delete the term from the glossary.

Insolvency

141. The substance of the text was approved as currently drafted.

Insolvency estate

142. The Working Group agreed that the text should be shortened to "assets of the debtor subject to the insolvency proceedings".

Illiquidity

143. It was proposed that the Guide include of the term "illiquidity", or incapacity to pay debts, as it was a term known to many countries. After discussion, it was agreed that the underlying concept was encompassed in the Guide's discussion of the commencement standard for insolvency proceedings, and that an additional term was not necessary.

Insolvency proceedings

144. The Working Group supported the substance of the following revised text:

> "Collective proceedings, subject to court supervision, either for reorganization or liquidation".

Insolvency representative

145. The Working Group agreed to adopt the definition "foreign representative" used in UNCITRAL Model Law on Cross-Border Insolvency with appropriate

amendments, along lines of, "person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs".

Liquidation

146. The Working Group supported the substance of the following revised text:

> "Proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law".

Lex fori concursus

147. The Working Group agreed to add the following term to the glossary:

> "*Lex fori concursus*": the law of the State in which the insolvency proceedings are commenced.

Lex rei situs

148. The Working Group agreed to add the following term to the glossary:

> "*Lex rei situs*": the law of the State in which the asset is situated.

Netting

149. The Working Group adopted the following proposal for drafting of the term, but did not reach agreement on a final text:

> "The setting-off of [mutual] monetary or non-monetary obligations [between parties to] [under] financial contracts."

Netting agreement

150. The Working Group approved the current drafting with the opening words "an agreement", to be replaced with "a form of financial contract".

Ordinary course of business

151. The following revised text was proposed but for lack of time was not considered by the Working Group:

> "Transactions consistent with both (i) the operation of the debtor's business prior to insolvency proceedings; and (ii) ordinary business terms."

Pari passu

152. The Working Group considered the following proposal for amendment of the text:

> "The principle according to which similarly situated creditors are treated proportionately to their claim and are satisfied proportionately out of the assets of the estate available for distribution to creditors of their rank."

153. The Working Group adopted the text with the deletion of the words, "proportionately to their claim" and addition of the words "to their claim" before "out of the assets".

Party in interest

154. The Working Group agreed that the text should be redrafted along the following lines:

> "Any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest."

Post-commencement claim

155. The substance of the drafting was approved.

Preference

156. The following proposal for revision of the text was proposed but not fully considered by the Working Group:

> "A transaction which results in a creditor obtaining an advantage or irregular payment."

Priority

157. A formulation along the following lines was proposed but for lack of time not fully considered by the Working Group:

> "The right of a person to rank ahead of another person where that right arises by operation of law."

Priority claim

158. The Working Group agreed that the term should be retained, with the words "out of available assets" deleted.

Priority rules

159. The Working Group supported deletion of the term from the glossary.

Protection of value

160. Although some support was expressed in favour of deleting the term, the prevailing view was to retain the first and fourth sentences and to delete the remainder.

Related person

161. It was proposed that the text should note the context in which a party might be a related person for the purposes of insolvency law e.g. avoidance and treatment of claims, and that the insolvency law also should take account of definitions of related person in other laws e.g. corporate law.

162. The following amended text was proposed, but not discussed for lack of time:

"As to a debtor that is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor and (ii) a parent, subsidiary, partner or affiliate. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity."

163. The following amended terms were proposed, but for lack of time, the Working Group was unable to consider them:

Secured claim

"A claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default, the amount of which secured claim shall be equal to the value of the security interest. Any amount by which the claim exceeds the value of the encumbered asset shall be an unsecured claim.

Secured creditor

"A creditor holding a security interest."

Security interest

"A right or interest in an encumbered asset to guarantee payment of a claim. Whether established voluntarily or by agreement, a security interest generally includes, but is not necessarily limited to, mortgages, pledges, charges and liens."

Voluntary restructuring negotiations

"Negotiations that are not regulated by the insolvency law and will generally involve negotiations between the debtor and some or all of its creditors resulting in a consensual modification of the claims of participating creditors."

164. Some additional definitions were proposed but not discussed for lack of time. It was agreed that they should be retained in square brackets for consideration by the Commission.

Debtor in possession

"[A debtor in a reorganization proceeding which retains full control over the business, with the consequence that the court does not appoint an insolvency representative.]"

Fraudulent transfer

"[A transaction made by a debtor which is insolvent or which is made insolvent by the transfer, where the transfer is at an undervalue or is made to defeat, hinder or delay creditors.]"

Notes

[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 400-409.

[2] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 296-308.

[3] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 194.

[4] A/CN.9/530, para. 18.

[5] For the complete text of the Commission's consideration and decision see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 172-197.