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

(New York, 19-23 April 2010)

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## I. Introduction

1. At its thirty-ninth session in 2006, the Commission agreed that the topic of the treatment of corporate 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 (the “Guide” or “Legislative Guide”) 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 corporate groups and the identification of those issues that required additional discussion and the preparation of additional recommendations. Other issues, although relevant to corporate 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 corporate 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 corporate 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, its thirty-fifth session in November 2008, its thirty-sixth session in May 2009 and its thirty-seventh session in November 2009, the Working Group continued its discussion of the treatment of enterprise groups, previously 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, A/CN.9/WG.V/WP.82 and Add.1-4, A/CN.9/WG.V/WP.85 and Add.1 and A/CN.9/WG.V/WP.90 and Add.1-2). At its thirty-sixth session, the Working Group decided 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 (see A/CN.9/671, para. 55).

5. At its thirty-seventh session in November 2009, the Working Group commenced a preliminary discussion on possible future work (see Report of Working Group V (Insolvency Law) on the work of its thirty-seventh session, document A/CN.9/686, paras. 126-131). Topics suggested for future work included an international insolvency convention, liability of directors and officers of enterprises in insolvency or in proximity to insolvency, insolvency of large and

complex financial institutions, the concept of centre of main interests (COMI) of an enterprise and the factors relevant to its determination, as well as issues of jurisdiction and recognition.

## II. Organization of the session

6. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-eighth session in New York from 19 to 23 April 2010. The session was attended by representatives of the following States members of the Working Group: Belarus, Benin, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Madagascar, Malaysia, Mexico, Morocco, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Spain, Sri Lanka, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Angola, Bangladesh, Croatia, Cuba, Denmark, Indonesia, Iraq, Kuwait, Lithuania, Panama, Philippines, Slovenia and Turkey.

8. Non-Member States and entities: Holy See and Palestine.

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

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

(b) *Invited intergovernmental organizations*: European Commission (EC);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), American Bar Foundation (ABF), Center For International Legal Studies (CILS), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Law Institute (ILI), International Women's Insolvency and Restructuring Confederation (IWIRC), Inter-Pacific Bar Association (IPBA) and Union Internationale des Avocats (UIA).

10. The Working Group elected the following officers:

*Chairman*: Mr. Wisit Wisitsora-At (Thailand)

*Rapporteur*: Mr. Maged Sobhy Siweha (Egypt)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.91);

(b) A note by the Secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.92 and Add.1-2);

(c) A note by the Secretariat on future work (A/CN.9/WG.V/WP.93);

(d) A proposal for future work by the delegation of the United States of America (A/CN.9/WG.V/WP.93/Add.1-2);

(e) A proposal by INSOL International: Directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases (A/CN.9/WP.93/Add.3);

(f) A proposal by the delegation of the United Kingdom for the development of guidelines on directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases (A/CN.9/WP.93/Add.4);

(g) A proposal by the delegation of Switzerland for preparation of a study on the feasibility of an instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WP.93/Add.5); and

(h) Comments by the International Bar Association respecting proposals to consider an international convention and/or Model Law on Cross-border Enterprise Group Insolvency (A/CN.9/WP.93/Add.6).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the treatment of enterprise groups in insolvency and future work.
5. Other business.
6. Adoption of the report.

### **III. Deliberations and decisions**

13. 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.92 and Add.1-2 and other documents referred to therein. The deliberations and decisions of the Working Group on these topics are reflected below.

### **IV. Treatment of enterprise groups in insolvency**

14. The Working Group commenced its work with the domestic treatment of enterprise groups in insolvency as set forth in A/CN.9/WG.V/WP.92.

#### **A. Introduction to part three**

##### **1. General purpose clause**

15. The Working Group recalled its decision at its thirty-seventh session to include a statement of general purpose for the recommendations applicable to enterprise groups in part three of the Legislative Guide. It approved the substance of the draft purpose clause, subject to the addition of text clarifying what was intended by the words "a better, more effective result" for the enterprise group. It was also suggested that the wording of the first sentence might be clearer if it referred to the

“treatment of the insolvency proceedings concerning one or more members of an enterprise group”.

## **2. Glossary**

16. The Working Group approved the substance of the draft glossary.

## **B. General features of enterprise groups**

### **1. Introduction, paragraphs 1-5**

17. The Working Group approved the substance of paragraphs 1-5, subject to substituting the words “legal persona” in paragraph 1 with the words “legal personality”.

### **2. Nature of enterprise groups, paragraphs 6-16**

18. A proposal to move footnote 9 to the glossary was not supported. A further proposal to broaden the language of paragraph 9 so as to include examples of parent or holding entities that were not incorporated, such as foundations, received support. Another suggestion was to align the language of the footnote with the language used in the glossary with respect to control and ownership.

### **3. Reasons for conducting business through enterprise groups, paragraphs 17-25; Defining the enterprise group, paragraphs 26-30; and Regulation of enterprise groups, paragraphs 31-39**

19. The Working Group approved the substance of paragraphs 17 to 39.

## **C. Addressing the insolvency of enterprise groups: domestic issues**

### **1. Introduction, paragraphs 1-4**

20. The Working Group approved the substance of paragraphs 1 to 4.

### **2. Application and commencement**

#### **(a) Introduction and joint application for commencement**

*Commentary, paragraphs 5-21*

21. A proposal to delete the third sentence of paragraph 6 because it might prove confusing, was not supported on the basis that it provided background to the issue and examples of the approach adopted by some insolvency laws, consistent with the approach generally taken by the Legislative Guide.

*Purpose clause*

22. In response to a suggestion that footnotes 22 and 23 conveyed new explanations or repeated information set forth in other recommendations or in the commentary, and might not be required, it was noted that such explanations and reminders were found elsewhere in the footnotes included in the Guide and served

to emphasize several key points. The Working Group approved the substance of the purpose clause as drafted.

*Draft recommendation 199*

23. The Working Group approved the substance of draft recommendation 199.

*Draft recommendation 200*

24. The Working Group supported the proposal in paragraph 2 of document A/CN.9/WG.V/WP.92/Add.2, retaining the text proposed in square brackets in the chapeau and removing the brackets. With respect to paragraph (b), the Working Group agreed with a proposal to redraft it to ensure greater clarity, as follows:

“(b) A creditor, provided that:

- (i) It is a creditor of each group member to be included in the application; and
- (ii) Each of those group members satisfies the commencement standard of recommendation 16.”

*Draft recommendation 201*

25. The Working Group approved the substance of draft recommendation 201.

**(b) Procedural coordination**

*Commentary, paragraphs 22-37*

26. A proposal to substitute the words “others with legally recognized interests” in paragraph 22 with the words “parties in interest” was supported. A further proposal to replace the word “reversal” in paragraph 37 with the word “termination” to align it with draft recommendation 208 was also supported.

*Purpose clause*

27. The Working Group approved the substance of the draft purpose clause.

*Draft recommendation 202*

28. The Working Group approved the substance of draft recommendation 202.

*Draft recommendation 203*

29. To improve the drafting of footnote 26, a proposal to revise the second sentence was approved as follows: “Accordingly, an order for procedural coordination may require action by one or more than one court.”

*Draft recommendation 204*

30. A proposal that draft recommendation 204 should include a reference to creditor committees and the possibility of establishing a single committee in appropriate cases, as noted in paragraph 26 of the commentary, or of the need for

coordination if there was more than one creditor committee, was supported. The Working Group approved the substance of draft recommendation 204 as follows:

“Procedural coordination may involve, for example, appointment of a single or the same insolvency representative; establishment of a single creditor committee, as appropriate; cooperation between courts, including coordination of hearings; cooperation between insolvency representatives, including information sharing and coordination of negotiations; joint provision of notice; coordination between creditor committees; coordination of procedures for submission and verification of claims; and coordination of avoidance proceedings. The scope and extent of the procedural coordination should be specified by the court.”

31. The Working Group noted that paragraph 26 would require some revision and in particular, deletion of the final sentence, as well as addition of references to the discussion of creditor committees in part two of the Guide and more discussion of the need to protect the interests of creditors and the circumstances in which a single creditor committee might be appropriate.

*Draft recommendation 205*

32. It was noted that while draft recommendation 203 made reference to the possibility of a court ordering procedural coordination on its own initiative, draft recommendation 205 only addressed the timing issue with respect to an application under draft recommendation 206 and not with respect to the time when the court might initiate procedural coordination. A proposal to consider an additional recommendation addressing that issue was not supported.

*Draft recommendations 206-209*

33. The Working Group approved the substance of the draft recommendations.

*Draft recommendation 210*

34. A suggestion that the draft recommendation should also refer to the modalities of giving notice and the time frame within which it should be given did not receive support. The Working Group approved the substance of the draft recommendation.

**3. Treatment of assets on commencement of insolvency proceedings**

**(a) Introduction and protection and preservation of the insolvency estate, paragraphs 38-51**

35. The Working Group approved the substance of paragraphs 38-51.

**(b) Use and disposal of assets, paragraphs 52-54**

36. The Working Group approved the substance of paragraphs 52-54.

**(c) Post-commencement finance**

*Commentary, paragraphs 55-74*

37. It was noted that the reference to the glossary in paragraph 56 should refer to the glossary at the commencement of the Legislative Guide, rather than to the

glossary to part three. It was also noted that the reference to “related parties” should be replaced with the term “related persons”. The Working Group approved the substance of paragraphs 55-74.

*Purpose clause*

38. The Working Group approved the substance of the draft purpose clause.

*Draft recommendation 211*

39. The Working Group approved the substance of draft recommendation 211.

*Draft recommendation 212*

40. The Working Group supported the proposal in paragraph 6 of document A/CN.9/WG.V/WP.92/Add.2 to replace the word “is” in paragraph (b) with either “will be” or “is likely to be”. After discussion, the prevailing view was that “will be” was preferred. The Working Group approved the substance of the draft recommendation with that revision.

*Draft recommendations 213-216*

41. The Working Group approved the substance of the draft recommendations.

**(d) Avoidance proceedings**

*Commentary, paragraphs 75-82*

42. The Working Group approved the substance of paragraphs 75-82.

*Purpose clause and draft recommendations 217-218*

43. The Working Group approved the substance of the purpose clause and the draft recommendations.

**(e) Subordination, paragraphs 83-91**

44. The Working Group approved the substance of paragraphs 83-91.

**4. Remedies**

**(a) Introduction, extension of liability and contribution orders, paragraphs 92-104**

45. The Working Group approved the substance of paragraphs 92-104.

**(b) Substantive consolidation**

*Commentary, paragraphs 105-137*

46. A proposal to delete the final sentence of paragraph 136 was not supported. A proposal to ensure that references to “consolidation”, particularly in paragraphs 106-107, be revised to “substantive consolidation” was supported. The Working Group approved the substance of paragraphs 105-137 with that revision.

*Purpose clause*

47. The Working Group approved the substance of the purpose clause.

*Draft recommendations 219-220*

48. The Working Group approved the substance of the draft recommendations.

*Draft recommendation 221*

49. The Working Group supported the proposal in paragraph 8 of document A/CN.9/WG.V/WP.92/Add.2, with the final word “ordered” being replaced with the word “appropriate”. As a matter of drafting, it was agreed that dividing the draft recommendation into two subparagraphs providing that the insolvency law should (a) permit the court to exclude specified assets, and (b) specify the circumstances in which those exclusions might be appropriate, would assist with clarity and understanding. It was also agreed that the commentary should be expanded to include additional examples of situations in which exclusions might be appropriate, including where there were burdensome assets, such as assets carrying an environmental liability or assets that would be difficult or costly to administer, or where the consequences of fraud might be exacerbated if certain assets were to be included in the order for substantive consolidation.

*Draft recommendations 222-223*

50. The Working Group approved the substance of the draft recommendations.

*Draft recommendation 224*

51. The Working Group supported the proposal in paragraph 11 of document A/CN.9/WG.V/WP.92/Add.2 to treat claims “as if they were claims against the single insolvency estate” in paragraph (c) of the draft recommendation.

*Draft recommendations 225-227*

52. The Working Group approved the substance of the draft recommendations.

*Draft recommendation 228*

53. The Working Group supported the proposal in paragraphs 12-15 of document A/CN.9/WG.V/WP.92/Add.2 to revise the draft recommendation. As a matter of drafting, it was noted that the recommendation should refer to the calculation of the suspect period “retroactively”. The draft recommendation was adopted as follows:

“228. (1) The insolvency law should specify the date from which the suspect period with respect to avoidance of transactions of the type referred to in recommendation 87 should be calculated when substantive consolidation is ordered with respect to two or more enterprise group members.

(2) The specified date from which the suspect period is calculated retroactively in accordance with recommendation 89 may be:

(a) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or

commencement of insolvency proceedings with respect to each such group member; or

(b) A common date for all enterprise group members included in the substantive consolidation, being either (i) the earliest of the dates of application for, or commencement of, insolvency proceedings with respect to those group members; or (ii) the date on which all applications for commencement were made or all proceedings commenced.”

*Draft recommendations 229-230*

54. The Working Group approved the substance of the draft recommendations.

*Draft recommendation 231*

55. The Working Group supported the proposal in paragraph 16 of document A/CN.9/WG.V/WP.92/Add.2 to align the draft recommendation with draft recommendation 210 and approved the substance of the draft recommendation on that basis. A proposal to add a reference to the right to be heard and to appeal was not supported on the basis that those matters were already addressed in recommendations 137 and 138.

**5. Participants**

*Commentary, paragraphs 138-145*

56. The Working Group approved the substance of paragraphs 138-145.

*Purpose clause*

57. The Working Group approved the substance of the purpose clause.

*Draft recommendations 232-235*

58. The Working Group approved the substance of the draft recommendations. In response to a question concerning the party responsible for making the determinations under draft recommendation 232, it was recalled that that issue should be considered in the context of recommendation 118 and the mechanism adopted by insolvency law for appointment of the insolvency representative.

*Draft recommendation 236*

59. The Working Group noted the proposal in paragraph 18 of document A/CN.9/WG.V/WP.92/Add.2 to align the draft recommendation with draft recommendations 235, 241 and 250. With respect to the use of “should” or “may”, the Working Group agreed, after discussion, that both words could be deleted, as the remaining draft “The insolvency law should specify that cooperation ... be implemented” would be sufficient. It was noted that that change should also be made to draft recommendation 250.

60. The Working Group also agreed with the proposal to relocate the reference to communication with creditors to paragraph (c). With respect to the proposal concerning paragraph (d), the prevailing view was to retain the text “Coordination with respect to the proposal and negotiation of reorganization plans”, with the

brackets removed. The Working Group adopted the substance of the draft recommendation with those modifications.

#### **6. Reorganization of two or more enterprise group members**

*Commentary, paragraphs 146-152*

61. The Working Group approved the substance of paragraphs 146-152.

*Draft recommendations 237-238*

62. The Working Group agreed that the reference to “two or more enterprise group members” in draft recommendation 238 should be revised to “one or more” on the basis that a solvent group member could participate in a reorganization plan concerning only one group member, as well as in a plan concerning multiple group members. The Working Group approved the substance of draft recommendations 237-238 with that modification.

### **D. Addressing the insolvency of enterprise groups: international issues**

63. The Working Group continued its deliberations on enterprise groups in insolvency in the international context as set forth in A/CN.9/WG.V/WP.92/Add.1.

#### **1. Introduction, paragraphs 1-6**

64. The Working Group approved the substance of paragraphs 1-6.

#### **2. Promoting cross-border cooperation in enterprise group insolvencies**

##### **(a) Introduction, paragraphs 7-10**

65. The Working Group approved the substance of paragraphs 7-10.

##### **(b) Access to courts and recognition of foreign proceedings**

*Commentary, paragraphs 11-13*

66. The Working Group approved the substance of paragraphs 11-13.

*Purpose clause*

67. The Working Group agreed that the words “two or more” and “where access to the courts and recognition of those foreign proceedings are prerequisites to cooperation between the courts, insolvency representatives and creditors” should be deleted and the square brackets removed. With those deletions, the Working Group approved the substance of the purpose clause.

*Draft recommendation 239*

68. The Working Group noted that the comma after the word “necessary” in paragraph (b) was not included in the original draft of the text approved at its thirty-seventh session (A/CN.9/686, para. 20) and should therefore be deleted. With

that modification, the Working Group approved the substance of draft recommendation 239.

### **3. Forms of cooperation involving courts**

#### **(a) Communication by courts**

*Commentary, paragraphs 14-34*

69. The Working Group approved the substance of paragraphs 14-34, noting that additional footnotes referring to specific paragraphs of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation should be added throughout those paragraphs to draw the reader's attention to the Practice Guide and to underline its importance as a reference tool on cross-border insolvency.

#### **(b) Coordination of the debtor's assets and affairs**

*Commentary, paragraph 35-36*

70. The Working Group approved the substance of paragraphs 35-36.

#### **(c) Appointment of a court representative**

*Commentary, paragraph 37*

71. Some concerns were raised with respect to the qualifications and integrity required of a person to be appointed by the court and issues of conflict of interest. It was emphasized that such a person was not generally an insolvency representative and that recommendations 115-125 therefore were not intended to apply. A proposal to address those issues in detail was not supported, a preference being expressed in favour of leaving those issues to the domestic law and the appointing court. However, the Working Group agreed to revise the fourth sentence of paragraph 37 along the following lines: "The appointing court may consider the qualifications required to perform the functions to be undertaken, as well as issues of conflict of interest and will typically outline the terms under which the appointee is authorized to act and the extent of its powers." Subject to that addition, the Working Group approved the substance of paragraph 37.

#### **(d) Coordination of hearings**

*Commentary, paragraphs 38-40*

72. The Working Group approved the substance of paragraphs 38-40.

*Purpose clause*

73. The Working Group agreed to add the words "and facilitate" after the word "authorize" in paragraphs (a) and (b). With those additions, the Working Group approved the substance of the purpose clause.

*Draft recommendation 240*

74. The Working Group agreed to replace the reference to "that enterprise group" at the end of the draft recommendation with the words "the same enterprise group"

to align it with draft recommendations 242 and 246-249 and approved the substance of draft recommendation 240 with that modification.

*Draft recommendation 241*

75. The Working Group agreed to retain the text in square brackets in paragraph (a) and remove the brackets. To address concerns that the use of the word “including” in the chapeau might operate to limit the provision in some legal systems, it was agreed that words such as “for example” might be added. The Working Group approved the substance of draft recommendation 241 with those modifications.

*Draft recommendation 242*

76. The Working Group agreed to replace the reference to “that enterprise group” at the end of the draft recommendation with the words “the same enterprise group” to align it with draft recommendations 240 and 246-249 and approved the substance of draft recommendation 242 with that modification.

*Draft recommendation 243*

77. The Working Group agreed to delete the words in square brackets in the chapeau. A proposal to replace the word “may” in both sentences of paragraph (d) with “should” was not supported. The Working Group approved the substance of draft recommendation 243 with the modification of the chapeau.

*Draft recommendation 244*

78. The Working Group considered the proposals contained in paragraphs 25 and 26 of document A/CN.9/WG.V/WP.92/Add.2 to revise draft recommendation 244. The Working Group agreed to delete the words in square brackets in the chapeau and to align the chapeau with that of draft recommendation 243 as follows: “The insolvency law should specify that communication between courts and between courts and foreign representatives shall not imply:”. A proposal to revise paragraph (c) to refer to “substantive or procedural rights” and thus align it with the usage in draft recommendation 243, paragraph (f) was supported.

79. The Working Group approved the substance of draft recommendation 244 with those revisions.

*Draft recommendation 245*

80. A proposal to require coordinated hearings to be subject to the conditions set forth in the second sentence of the draft recommendation by replacing “may” with “should” was supported. A further proposal to revise the final sentence was supported as follows: “Notwithstanding the coordination of hearings, each court should maintain its independence in reaching its own decision on the matters before it.” The Working Group adopted the substance of the draft recommendation with those revisions.

**4. Forms of cooperation involving insolvency representatives**

**(a) Cooperation by the insolvency representatives**

*Commentary, paragraphs 41-42*

81. The Working Group approved the substance of paragraphs 41-42.

*Purpose clause*

82. The Working Group approved the substance of the purpose clause with the following revisions: (a) addition of the words “and between insolvency representatives and foreign courts” after the word “representatives” in the chapeau, in order to align it with the substance of the following recommendations; and (b) addition of the words “and facilitate” after the word “authorize” in paragraph (a), to align it with the modifications agreed for the purpose clause to recommendations 240-245.

*Draft recommendations 246-249*

83. The Working Group supported the proposal contained in paragraph 30 of document A/CN.9/WG.V/WP.92/Add.2 to adopt the words “the same” and remove the square brackets. With that modification, it approved the substance of the draft recommendations.

*Draft recommendation 250*

84. The Working Group supported the proposal contained in paragraph 33 of document A/CN.9/WG.V/WP.92/Add.2 to retain the wording in square brackets in paragraph (d) and remove the brackets, in order to align the draft recommendation with draft recommendation 236. For the same reason, the word “may” was deleted from the chapeau. With those modifications, the Working Group approved the substance of draft recommendation 250.

**(b) Appointment of a single or the same insolvency representative**

*Commentary, paragraphs 43-47*

85. The Working Group approved the substance of paragraphs 43-47, with the addition in paragraph 46 of a reference to the paragraphs of part II, chapter III, dealing with appointment of the insolvency representative, and to the explanation of the term “insolvency representative” in the glossary.

*Purpose clause*

86. The Working Group approved the substance of the purpose clause.

*Draft recommendation 251*

87. The Working Group noted the proposal contained in paragraph 35 of document A/CN.9/WG.V/WP.92/Add.2 to revise the draft recommendation and agreed to retain the reference to “applicable law” and remove the square brackets. With that modification, the Working Group approved the substance of draft recommendation 251.

*Draft recommendation 252*

88. A proposal to delete the second sentence of the draft recommendation was not supported. Noting that the draft recommendation was the same as draft recommendation 233, which had been approved as drafted, the Working Group approved the substance of draft recommendation 252.

**5. Use of cross-border insolvency agreements***Commentary, paragraphs 48-54*

89. The Working Group approved the substance of paragraphs 48-54.

*Purpose clause*

90. The Working Group approved the substance of the purpose clause.

*Draft recommendations 253-254*

91. The Working Group approved the substance of draft recommendations 253-254.

**6. Possible additional recommendations**

92. The Working Group considered the proposals contained in paragraphs 38-39 of document A/CN.9/WG.V/WP.92/Add.2 to include an additional recommendation to permit an insolvency representative to act in a foreign State on behalf of the proceedings in which the insolvency representative was appointed (along the lines of article 5 of the Model Law) or to seek information or assistance directly from the foreign court (in accordance with article 25 of the Model Law). After discussion, the Working Group agreed to revise draft recommendation 248 as follows:

“The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with, or to request information or assistance directly from, foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group.”

93. The Working Group requested the Secretariat to make the necessary adjustments to the draft of part three of the Legislative Guide as agreed upon at the current session. The Working Group proceeded to adopt the draft of part three of the Legislative Guide on the treatment of enterprise groups as contained in documents A/CN.9/WG.V/WP.92 and Add.1 and recommended it to the Commission for possible finalization and adoption at its forty-third session in 2010.

## **V. The impact of insolvency of a licensor or licensee on a security right in that party's rights under a licence agreement: discussion in the draft supplement to the Legislative Guide on Secured Transactions dealing with security rights in intellectual property**

94. The Working Group was informed that, in the course of its work on a supplement to the Legislative Guide on Secured Transactions dealing with security rights in intellectual property, Working Group VI (Security interests) had agreed to include text on automatic termination and acceleration clauses in intellectual property licence agreements. Working Group VI (Security interests) further agreed to refer that text to Working Group V for its consideration and approval (see document A/CN.9/685, para. 95), as that text contains references to and seeks to summarize portions of the UNCITRAL Legislative Guide on Insolvency Law.

95. The Working Group considered the text referred to it by Working Group VI (Security interests) and contained in document A/CN.9/WG.VI/WP.42/Add.6, paras. 50-52:

“50. The Insolvency Guide recommends that any contractual clauses that automatically terminate and accelerate a contract upon an application for commencement, or commencement, of insolvency proceedings or upon the appointment of an insolvency representative should be unenforceable as against the insolvency representative and the debtor (see recommendation 70 of the Insolvency Guide). The Insolvency Guide also recommends that the insolvency law should specify the contracts that are exempt from the operation of this recommendation, such as financial contracts, or are subject to special rules, such as labour contracts (see recommendation 71 of the Insolvency Guide).

“51. The commentary of the Insolvency Guide states that some laws uphold these clauses in some circumstances and explains the reasons for this approach. These reasons include ‘the need for creators of intellectual property to be able to control the use of that property and the effect on a counterparty’s business of termination of a contract, especially one with respect to an intangible’ (see part two, chapter II, para. 115 of the Insolvency Guide). For example, automatic termination and acceleration clauses contained in intellectual property licence agreements may be upheld as the insolvency of the licensee may have a negative impact not only on the licensor’s rights but also on the intellectual property right itself. This is the case, for example, where the insolvency of a licensee of a trademark used on products may affect the market value of the trademark and the trademarked products. In any case, clauses included in intellectual property licence agreements that provide, for example, that a licence terminates after X years or upon material breach such as failure of the licensee to upgrade or market the licensed products on time (that is, where the event that triggers the automatic termination is not insolvency) are not affected (see footnote 39, recommendation 72 of the Insolvency Guide).

“52. The commentary of the Insolvency Guide also states that other laws override these clauses and explains the relevant reasons (see part two, chapter II, paras. 116 and 117 of the Insolvency Guide). The commentary further explains that, although some insolvency laws do permit these types of clause to be overridden if insolvency proceedings are commenced, this approach has not yet become a general feature of insolvency laws. In this regard, the commentary speaks of an inherent tension between promoting the debtor’s survival, which may require the preservation of contracts, and affecting commercial dealings by creating a variety of exceptions to general contract rules. The commentary concludes by expressing the desirability that an insolvency law permit such clauses to be overridden (see part two, chapter II, and para. 118 of the Insolvency Guide).”

96. Some concerns were expressed that while not an inaccurate summary of the material in the Insolvency Guide, the paragraphs presented did not reflect the nuanced treatment of those issues in the Insolvency Guide. After discussion, there was support for a proposal to address those concerns by adding the following sentence to refer to the Insolvency Guide. That sentence could be inserted in the appropriate place, possibly following paragraph 50:

“The commentary to the Insolvency Guide explains the perceived advantages and disadvantages of such clauses, the types of contracts that may be appropriate to be exempted and the inherent tension between promoting the debtor’s survival, which may require the preservation of contracts, and introducing provisions which override contractual clauses. The possible application of such provisions to intellectual property is addressed in the commentary at part two, chapter II, paragraph 115 of the Insolvency Guide.”

97. It was suggested that in referring to the recommendations of the Insolvency Guide it might be noted that those recommendations are directed at the content of the insolvency law.

98. The Working Group approved the text of paragraphs 50-52 as presented by Working Group VI with the modifications noted above.

## **VI. Future work**

99. The Working Group recalled its preliminary exchange of views on possible topics for future work at its last session (see document A/CN.9/686, paras. 126-131) and continued its discussion on future work, hearing presentations on a series of proposals by the delegations of the United States, the United Kingdom, Switzerland, INSOL International, the International Bar Association (IBA), the International Insolvency Institute (III) and the Union Internationale des Avocats (UIA) contained in documents A/CN.9/WG.V/WP.93 and Add.1-6 and other documents referred to therein.

100. With respect to the United States proposal concerning, inter alia, the centre of main interests (COMI and related issues, it was observed that although some common threads could be distinguished in the cases being considered, there was an increasing divergence in the manner in which COMI and other related issues were interpreted and determined in different States and thus growing unpredictability

with respect to what might constitute, for example, the COMI of a debtor or foreign proceedings within the meaning of the Model Law. That lack of predictability had economic implications arising from the location in which insolvency proceedings might commence, which would in turn affect the priorities applicable in insolvency proceedings and could affect lending decisions at the outset. It was observed that because COMI and the related issues were the subject of much study and discussion, considerable work had already been done that could assist the Working Group in its deliberations on such a topic.

101. It was noted that the United States proposal included different phases, the latter of which, for the development of a model law on jurisdiction, access and recognition, was closely related to the proposal by the UIA and the IBA to develop a convention addressing, *inter alia*, those issues. There was considerable support for the view that, in line with the approach adopted in previous work of the Working Group, the topics could be approached in a manner that would not preclude the development of a convention. At the outset, the particular type of instrument to be developed could be left open and, if a considerable degree of consensus could be reached, it might be possible to conclude some form of binding instrument. The hope was expressed that the work could be taken to a level of consensus beyond that reached in the Legislative Guide. A different view was that the work should focus only upon providing non-prescriptive guidance and should be developed as additions to existing texts, such as the Legislative Guide and the Practice Guide.

102. With respect to the proposals relating to the liability and responsibility of directors and officers, it was observed that the topic was increasingly important, particularly in the context of enterprise groups. It was noted that provisions on duties and responsibilities might operate as an incentive to management of the debtor to reorganize at an early stage rather than wait until that possibility had passed and liquidation was inevitable. Moreover, the topic had been recognized in the work of regional and international organizations as one to be addressed in the future and particularly in the international context as there was an absence of international standards addressing those duties and responsibilities in the shadow of, or in, insolvency and a real divergence in the approaches adopted under national law. It was observed that the financial crisis had demonstrated not only the global effect of insolvencies, but also that national responses were often insufficient to resolve issues such as those raised with respect to the responsibility of directors and officers. Some concern was expressed as to whether such duties and responsibilities fell within the purview of insolvency law or more commonly within that of company law or criminal law. It was observed, in response, that the proposal was not intended to cover areas of criminal liability or to deal with core areas of company law.

103. It was noted with respect to the proposal on large and complex financial institutions that those institutions had not been covered by UNCITRAL's work to date for various reasons, such as the prevalence of special regulatory regimes which focus on the need to prevent systemic risk, ensure the safety of payment systems and protect depositors. It was suggested however, that the work undertaken by UNCITRAL was of direct relevance to the possible treatment of those institutions in the international context and that UNCITRAL was well placed to address the topic, particularly since it could involve in its deliberations parties with the relevant expertise and experience. A different view, however, was that UNCITRAL may not

be the appropriate organization to undertake such work given the need to involve central banks and supervisory agencies and because work was already being undertaken by other regional and international organizations, including the IMF, the World Bank, the European Commission and the Basel Committee on Banking Supervision, as noted in A/CN.9/WG.V/WP.93, paragraphs 9-15. It was noted that the work of UNCITRAL had been cited in the work of some of those organizations and, on that basis, it was suggested that the Secretariat might be requested to monitor the development of that work with a view to reporting to the Working Group and the Commission, pursuant to its coordination function.

104. After discussion, the Working Group recommended that activity be initiated on two insolvency topics, both of which were of current importance and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability. Those topics were:

(a) The United States proposal as described in paragraph 8 of A/CN.9/WG.V/WP.93/Add.1 to provide guidance on the interpretation and application of selected concepts of the Model Law relating to COMI and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention; and

(b) The proposals of the United Kingdom (set forth in document A/CN.9/WG.V/WP.93/Add.4), INSOL International (as set forth in document A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (as set forth in document A/CN.9/582/Add.6) concerning the responsibility and liability of directors and officers in insolvency and pre-insolvency cases.

105. The Working Group was of the view that work should begin in 2010 because of the current circumstances facing many States as a result of the global financial crisis and the divergent approaches taken by national laws to those issues. The Working Group was also of the view that the proposal documents, together with existing comparative studies and publications would provide a sufficient basis for initiating this activity in 2010.

106. The Working Group recommended that it be given the flexibility to make recommendations to the Commission regarding the scope of its future work and the form it should take and to determine the manner in which the work might be organized and proceed.

107. The Working Group agreed that other proposals that had received support should be referred for the consideration of the Commission.