



General Assembly

Distr.: Limited
31 August 2009

Original: English

**United Nations Commission on
International Trade Law
Working Group V (Insolvency Law)
Thirty-seventh session
Vienna, 9-13 November 2009**

UNCITRAL Legislative Guide on Insolvency Law

Part three: Treatment of enterprise groups in insolvency

Note by the Secretariat

I. Introduction

1. This document sets forth explanatory notes with respect to the revisions of the recommendations contained in A/CN.9/WG.V/WP.90 and Add.1 and raises a number of questions for consideration by the Working Group concerning those recommendations and possible additional recommendations.

II. Domestic treatment of enterprise groups in insolvency

A. General issues

2. The draft recommendations on the domestic treatment of enterprise groups are based upon a fundamental principle that the insolvency law should recognize the existence of enterprise groups, as defined in the glossary, and accord them special treatment as outlined in recommendations 199-239 in order to achieve a more efficient and effective outcome for the group as a whole and for individual members because of their group connection. The existence of such a principle in national law becomes especially important when looking to facilitate cooperation and coordination of enterprise group insolvencies in the international context. However, there is no general recommendation to that effect, along the lines of the general principles contained in part one of the Legislative Guide, recommendations 1-5. The Working Group may wish to consider whether a statement of that fundamental principle should be included as a recommendation.



3. The fundamental principle might also be reflected in relevant purpose clauses. For example, the purpose clause on procedural coordination might include, in paragraph (a), words to the effect of “with a view to achieving a better, more effective result for the enterprise group”.

B. Post-commencement finance

4. Draft recommendations 211-216 were revised during the thirty-sixth session of the Working Group, but not further considered for lack of time.

5. Draft recommendation 213 refers to the consent of creditors to the provision of post-commencement finance in accordance with recommendations 211 and 212. It is perhaps implied that they are the creditors of the insolvent group member providing the finance, but given the group context and the interest of creditors of both receiving and providing members, it might be clearer to stipulate which creditors are intended. The same approach might be helpful in draft recommendation 214 which deals with the obtaining of post-commencement finance in accordance with recommendation 63.

C. Avoidance proceedings

6. In accordance with the discussion by the Working Group at its thirty-sixth session (A/CN.9/671, paragraph 97), a new purpose clause reflecting more clearly the group context is proposed for consideration.

D. Substantive consolidation

7. Draft recommendation 221 has been revised, to improve the drafting, from “The insolvency law may specify that the court may exclude specified assets and claims from an order for substantive consolidation” to “The insolvency may permit the court to exclude specified assets and claims from an order for substantive consolidation.”

8. While draft recommendation 221 addresses exclusions from an order for substantive consolidation, it does not indicate how those exclusions would be treated in practice. Limited explanation is given in paragraph 171 of the commentary. The Working Group may wish to consider whether the draft recommendation or the commentary should provide more detail, and if so, the explanation to be included.

9. At its thirty-sixth session, the Working Group discussed the need to address the issue of a secured creditor or employee enhancing their position when an order for substantive consolidation was made. The issue is addressed in paragraph 160 of the commentary and draft recommendation 225 has been included for consideration by the Working Group.

10. Draft recommendation 226 addresses the recognition of security interests in substantive consolidation, requiring that they should “as far as possible” be recognized in substantive consolidation. Issues associated with secured creditors are discussed in paragraphs 159-162 of the commentary. The Working Group might

wish to consider whether that discussion provides sufficient guidance as to what recognition to the extent possible might mean in practice.

11. Draft recommendation 227 addresses the recognition of priorities in substantive consolidation, also requiring that they should be recognized “as far as possible”. The commentary, paragraph 163, includes a limited explanation. The Working Group may wish to consider whether further material should be provided to explain what recognition to the extent possible might mean in practice, in order to provide guidance to readers unfamiliar with substantive consolidation and its effects.

E. Insolvency representative

12. Draft recommendation 237 included a reference which limited the substance of the article to what was permitted under applicable law. That reference has been deleted on the basis that the purpose of the Guide is to influence the substance of applicable law and, as far as possible, change it to reflect the recommendations. The purpose of draft recommendation 237 is to foster coordination and cooperation. To the extent applicable law defeated the types of cooperation referred to, the recommendation would be devoid of meaning. Limiting a recommendation to what is permitted by applicable law is not an approach used elsewhere in the Guide. The Working Group may wish to consider whether the deletion of that phrase is appropriate.

F. Reorganization plans

13. Draft recommendation 238 addresses the proposal of coordinated reorganization plans, but goes no further. The Working Group may wish to consider whether the draft recommendation should also address approval and other aspects of those plans, perhaps by reference to the other recommendations of the Guide and the issues addressed in the commentary.

III. International treatment of enterprise groups in insolvency

A. General issues

14. To build upon the issue noted above with respect to recognition of the enterprise groups in domestic law, the Working Group might wish to consider whether it might be desirable to include a statement to the effect that, as a general principle, these recommendations on international treatment are intended to facilitate global solutions to the insolvency of enterprise groups.

B. Coordination involving the courts

15. A new purpose clause has been added to draft recommendations 240-247 to address the general issue of coordination.

16. The draft recommendations have been rearranged to include in the first group (recommendations 240-247), those that relate to the court. Cooperation and

communication strictly between insolvency representatives is now set forth in section 3, recommendations 248-250.

17. Draft recommendations 242 and 250, with respect to cooperation to the maximum extent possible, have been revised (taking into account the slightly different context of each recommendation) in accordance with the decision of the Working Group in order to align them with the domestic provision, draft recommendation 237, concerning cooperation between insolvency representatives.

18. Draft recommendation 246 is based upon a version approved by the Working Group at its thirty-sixth session (A/CN.9/671, paragraph 38). The Working Group may wish to consider whether, given that the draft recommendation refers to the content of domestic law, it is appropriate to retain the references to the foreign court in paragraphs (b) and (d).

19. Draft recommendation 247 has been revised to include a second sentence based upon what was previously contained in a footnote, as requested by the Working Group at its thirty-sixth session (A/CN.9/671, paragraph 41). It also includes a third sentence to address, in the context of coordinated hearings, the need to ensure that each court reaches its own decision free of influence of any other court.

20. The Working Group might wish to consider whether a further recommendation along the lines of article 16(2) of the Model Law, providing a presumption as to authenticity of documents, might be useful in the context, in particular, of coordinated hearings, where documents might be shared between the different courts. It might also have some bearing on sharing of documents between courts under the draft recommendations on coordination.

C. Cooperation involving insolvency representatives

21. New purpose clauses have been added to draft recommendations 248-250, addressing cooperation between insolvency representatives and to draft recommendations 251-252, addressing appointment of a single or the same insolvency representative.

22. Draft recommendation 252 has been added at the request of Working Group (A/CN.9/671, paragraph 51) to reflect the approach taken to conflicts in the domestic context under draft recommendation 234.

D. Cross-border insolvency agreements

23. A new purpose clause has been added to the recommendations on cross-border insolvency agreements.

24. Draft recommendation 253 includes certain words in square bracket following a suggestion at the thirty-sixth session (A/CN.9/671, paragraph 48). For the reasons noted above with respect to draft recommendation 237, the inclusion of the words “to the extent permitted by applicable law” have the potential to render the recommendation devoid of meaning, as they would defeat what the recommendation is seeking to promote. The second set of words “or in the manner required by

applicable law” might usefully be retained to reflect form requirements included in applicable law. The other words in square brackets (“involving two or more members of an enterprise group in different States”) are included in draft recommendations 253 and 254 to align them with the formulation used in other draft recommendations.
