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Report of Working Group V (Insolvency Law) on the work of its thirty-first session (Vienna, 11-15 December 2006)

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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 in 2006 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. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-first session in Vienna from 11 to 15 December 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Belarus, Canada, China, Colombia, Croatia, Czech Republic, Ecuador, France, Germany, Iran (Islamic Republic of), Italy, Lithuania, Mexico, Pakistan, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

3. The session was also attended by observers from the following States: Congo, Denmark, Dominican Republic, Ireland, Latvia, Libyan Arab Jamahiriya, Malaysia, Netherlands, Philippines and Slovakia.

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

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

(b) Intergovernmental organizations: Asian Development Bank (ADB), European Bank for Reconstruction and Development (EBRD), European Commission (EC), and Organization for Economic Cooperation and Development (OECD);

(c) International non-governmental organizations invited by the Working Group: American Bar Association (ABA), American Bar Foundation (ABFN), Center for International Legal Studies (CILS), Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), INSOL International, International Bar Association (IBA), International Insolvency Institute (III), and International Working Group on European Insolvency Law.

5. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms. Jasna Garašić (Croatia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.73);

(b) A note by the secretariat on the treatment of corporate groups in insolvency (A/CN.9/WG.V/WP.74 and Add.1 and 2).

7. 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 corporate groups in insolvency;
5. Other business;
6. Adoption of the report.

I. Deliberations and decisions

8. The Working Group began discussion of the treatment of corporate groups in insolvency on the basis of documents A/CN.9/WG.V/WP.74 and Add.1 and 2, and other documents referred therein. The deliberations and decisions of the Working Group on this topic are reflected in section II below.

II. Consideration of the treatment of corporate groups in insolvency

9. As a preface to discussion in the Working Group, it was noted that documents A/CN.9/WG.V/WP.74, and addenda 1 and 2, discussed the treatment of corporate groups in insolvency on the basis of the relevant recommendations contained in the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and parts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law). It was suggested that those texts should constitute the starting point for the discussions of the Working Group. It was also suggested that the Glossary contained in document A/CN.9/WG.V/WP.74 might be revised in the future in line with the progress of work, so as to provide uniform reference terminology for the Working Group.

A. Introduction

10. Delegations were invited to provide additional information on the treatment of corporate groups in insolvency that might complement the information made available to the Working Group.

11. It was indicated that the structure of corporate groups could vary greatly and be especially intricate, in particular, in the case of transnational corporate groups. Recent developments added further elements of complexity, for instance, in case of special forms of intra-group control, such as special purpose entities and joint ventures, as well as in the case of agreements for the temporary control of one company over another. It was added that economic activities, which were traditionally subject to a separate discipline, such as banking and insurance, were also increasingly performed in the context of corporate groups, thus adding an additional layer of complexity to their discipline.

12. It was confirmed that, while most jurisdictions refrained from offering a general definition of corporate groups, such definition often existed for special purposes, such as tax and accounting rules. In the insolvency field, the "separate entities approach" was prevalent, but certain instruments were available, under given conditions, to trigger the cross-liability of the companies belonging to the same corporate group.

13. In some jurisdictions that had recently reformed or attempted to reform their insolvency law to recognize the notion of corporate groups, it was observed that difficulties were encountered in the definition of that notion because of the need to achieve a balance between ensuring predictability and transparency and reflecting economic reality. It was suggested that reference to the notion of ownership, typically in terms of percentage of shares owned by the parent company, would provide a more certain basis for the definition of corporate groups. On the other hand, reference to the notion of control, while based on less objective parameters, would give more flexibility in addressing the diverse economic realities expressed by the operations of corporate groups.

14. The view was expressed that corporations served many important social, commercial and legal purposes. The provision of limited liability, in particular, facilitated the raising capital for business purposes, enabled creditors to rely on the assets and liabilities of the corporate entity with which they dealt, and provided certainty in commercial relations. It was noted that those purposes were baseline commercial and legal principles in many nations, and that to interrupt reliance and the expectations that arose from those principles would require some extraordinary rationale. It was further suggested that the circumstances for disregarding those principles rarely occurred.

B. Domestic issues

1. Application for commencement of insolvency proceedings

15. The Working Group considered how the provisions of the Legislative Guide with respect to commencement of insolvency proceedings might apply in the context of corporate groups and the changes, if any, that might be required with respect to the applicable commencement standard, the debtors against whom proceedings could be commenced and the parties who might make an application to commence.

16. As a starting point, the Working Group considered the position of an insolvent parent and an insolvent subsidiary and the question of whether or not an application could be made in respect of both debtors, referred to as a joint application. Although there were examples of laws that would permit such an application to be made, the general practice was for parallel applications to be made, in some cases at the same time, with various possibilities for treating the applications together for administrative purposes.

17. A second example involved the question of whether a joint application could be made with respect to an insolvent parent and a solvent subsidiary. Under some laws, a joint application could be made in respect of more than one member of a corporate group if only one member of the group was insolvent, provided that that

insolvency had the potential to affect other members of the group; other examples were given where the insolvency of the parent could affect the solvent subsidiary because they were closely economically integrated, there was intermingling of assets or a specified degree of control or ownership. A different view emphasized the need to protect solvent members of a group and ensure their viability, notwithstanding the insolvency of the parent, as well as the need to protect the interests of creditors (including intra-group creditors), particularly those of solvent group members and ensure predictability for all creditors of members of a group with respect to the commencement of insolvency proceedings.

18. Reference was made to recommendations 15 and 16 of the Legislative Guide, which established the commencement standards for debtor and creditor applications respectively and formed the basis upon which an application could be made in respect of each member of a group that satisfied the standard, including imminent insolvency in the case of a debtor application. The reference to the debtor in recommendation 15 might be interpreted to include more than one member of a group in the same application. To some extent recommendation 15 could also cover the example of the insolvent parent and the solvent subsidiary, where the insolvency of the parent affected the financial stability of the subsidiary and it was likely to become insolvent following the insolvency of the parent (i.e. imminent insolvency). It was also suggested that if certain members of the group were left out of a debtor application under recommendation 15, it was always possible that they might subsequently be the subject of an application by creditors under recommendation 16.

19. Where recommendation 15 did not apply to both the parent and the subsidiary, however, it was suggested that the issue for consideration was whether there was any need to provide an exception that would allow the solvent subsidiary to be included in the insolvency of the parent and if so, what would be the basis of that exception. One view was that recommendation 15 (a) was sufficient and only those members of a group that could satisfy the insolvency test should be the subject of an application for commencement of insolvency proceedings. A different view was that a general concept of insolvency for groups might usefully be developed that would enable the financial status of the group as a whole to be considered and would resolve any difficulties that might be encountered by creditors seeking to commence insolvency proceedings against different members of a group. A further view was that recommendation 15 was not sufficient and that a more flexible test was required to ensure timely commencement of insolvency proceedings that might involve a solvent subsidiary in the insolvency of a parent in certain circumstances.

20. It was suggested that those circumstances might include the ones set forth in A/CN.9/WG.V/WP.74/Add.1, paragraph 12, such as intermingling of assets, unity of the group as a whole or consent of the parties. It was also suggested that, with respect to a debtor application, the debtor might be in a position to determine which members of the group should be included in the application; this would not apply in the case of a creditor application.

21. It was indicated that the treatment in the Legislative Guide of applications by a regulatory or other governmental body for commencement of insolvency proceedings should apply also in the case of corporate group insolvency.

22. A question was raised with respect to the possibility of a parent company applying for the commencement of insolvency proceedings against a subsidiary.

23. The general view was that that would be possible in certain cases, such as where the parent and the subsidiary shared the same representative and when the parent company was a creditor of the subsidiary and therefore able to apply as such. However, it was suggested that the adequate treatment of corporate groups in insolvency proceedings demanded further consideration of the matter. It was pointed out that when a group started to fail it might not be possible to distinguish solvent members from insolvent members, since in most cases all members of a corporate group would eventually be involved in insolvency proceedings. Moreover, the corporate group might have an interest in protecting the assets of solvent members in the context of a comprehensive reorganization plan. In considering the answer to the question, it was further suggested that a careful balance should be sought between the different stakeholders, including creditors of the solvent member and shareholders that were not members of the corporate group.

24. It was suggested that different recommendations might need to be made with respect to reorganization and liquidation proceedings. In particular, it might be desirable to recognize the wish of the parent company to have a comprehensive reorganization plan involving all the members in the group. After discussion, there was no consensus on the need for an exception to recommendations 15 and 16 of the Legislative Guide to permit application by a parent company in respect of a subsidiary.

2. Effects of commencement

(a) Appointment of a single insolvency representative

25. The view was expressed that the appointment of a single insolvency representative to proceedings in respect of more than one member of a corporate group would be desirable since it would ensure coordination of the administration of the various members, reduce related costs and facilitate the gathering of information on the corporate group as a whole. However, it was noted that the appointment of a single administrator might give rise to conflicts of interests, and that simplification of the structure of the administration should not be sought to the detriment of any of the interests involved.

26. The general view was that in a number of cases, especially in the context of corporate group reorganization, the appointment of a single administrator would be desirable, but that provision should be made for the appointment of separate administrators or co-administrators for each member of the group where conflicts of interest might arise.

(b) Cases where management remains in office after commencement

27. It was noted that the provisions of the Legislative Guide that allowed the management to remain in office after the commencement of insolvency proceedings would find application also in the case of insolvency of corporate groups.

(c) Application of the stay to a solvent corporate group member

28. The view was expressed that recommendations 39 to 51 of the Legislative Guide on the effects of commencement and, in particular, application of a stay, could apply in the case of the insolvency of one or more members of a corporate group to those members against which insolvency proceedings were commenced.

29. A question was raised with respect to the possibility of extending the application of those recommendations to solvent members of that corporate group, in the event that not all members were subject to insolvency proceedings.

30. It was suggested that in some jurisdictions that extension, with particular regard to the effects of a stay or suspension, would be possible, and that that possibility was reflected in recommendation 48 of the Legislative Guide. While further consideration might be given to the protection of creditors of the solvent members, it was suggested that adequate protection for those creditors might be found in the relevant provisions of the Legislative Guide. In particular, it was suggested that recommendation 51 might have some application beyond secured creditors in such circumstances. A different view was that in other jurisdictions the extension of the effects of a stay or suspension to solvent members might not be possible, as in some cases it might conflict with the protection of property rights, at both the constitutional and international level. Additionally, it was suggested that certain jurisdictions might have difficulties in granting insolvency-related relief, such as a stay or suspension, against a solvent member. However, effects similar to those of a stay might be obtained in those jurisdictions by requesting a provisional measure in conjunction with the commencement of insolvency proceedings against other members of that corporate group.

31. After discussion, there was agreement that the effects of a stay should not be automatically extended to solvent members of a corporate group. However, it was also the view that in certain cases, for example to protect an intra-group guarantee, such extension could be available at the courts' discretion and subject to certain specific conditions.

(d) Joint administration

32. The Working Group considered the possibility of joint administration of proceedings commenced against one or more members of a corporate group. Although jurisdiction was generally determined by reference to the location of each member of a group, joint administration was possible as a matter of practice in a number of jurisdictions to facilitate efficient administration. Some of the problems that might be raised by joint administration were considered and it was pointed out, for example, that issues could arise, even in a domestic context, where the parent and subsidiary were located in different places and different courts were competent to consider the respective insolvency applications. Creditors of the different members of a group might also be located in different places, raising issues of representation and location of creditor committees. In some States, different proceedings could be consolidated or transferred to an appropriate court. In one example, that appropriate court might be the court with competence to administer insolvency proceedings against the parent of a group.

(e) Use and disposal of assets

33. The question of whether the assets of a solvent member of a group could be used to fund the ongoing operations of an insolvent member, pending resolution of the insolvency proceedings, was raised. Reference was made to recommendation 54 of the Legislative Guide, which addressed the use of third party owned assets in the possession of the debtor. It was suggested that while that recommendation might cover some issues involving the use of the assets of one group member by another group member, the issue in the group context was potentially broader and would involve use of assets not in the possession of the debtor. The general view expressed was that such use of assets could not be supported unless the owner of those assets, the solvent member, could be included in the insolvency proceedings. Such support might raise questions of avoidance, particularly where the supporting member subsequently became insolvent, and also raised concerns for creditors of the supporting member.

(f) Post-commencement finance

34. The question with respect to post-commencement finance was related to the question on use and disposal of assets: could the assets of a solvent member of a group be used to obtain financing for an insolvent member from an external source or to fund the insolvent member directly and, if so, what were the implications for the recommendations of the Legislative Guide concerning priority and security. For example, would a solvent subsidiary be entitled to priority under recommendation 64 if it were to provide funding to its insolvent parent or would that transaction be subject to subordination as intra-group lending? It was observed that while post-commencement finance was important in the context of individual proceedings, as noted in the Legislative Guide, it was even more critical in the group context; if there were no ongoing funds there was very little prospect of reorganizing an insolvent group. Notwithstanding that importance, the view was expressed that using group assets to obtain financing was possible where all members of the group were insolvent; this would be covered by the recommendations of the Legislative Guide. Difficulties arose, however, where it was suggested that the assets of a solvent member be used to fund an insolvent member or as the basis for obtaining external funding. The general view expressed was that that should not be permitted, although it was acknowledged that there might be situations where such funding could be provided if the creditors of the solvent member consented.

3. Reorganization of two or more members of a group

35. The Working Group considered whether it would be possible for an insolvent group to be reorganized through a single plan. While several insolvency laws permitted the negotiation of a single plan, under others it was only possible as a matter of practice if different insolvency proceedings against group members could be coordinated. A further approach enabled a single plan to be negotiated through procedural consolidation of all proceedings against group members. It was noted that proceeding by way of a single plan had the potential to ensure savings across the group's insolvency proceedings. With respect to voting on and approval of a plan, different approaches were taken. Under one approach, the different interests of corporate group members and their creditors could be grouped in classes and voting

requirements, in terms of majorities within classes and of classes would remain the same as in proceedings for approval of a plan for a single debtor. Another approach provided for a unified plan with different majority requirements designed to facilitate approval. The consequences of failure to approve such a unified plan was liquidation of all insolvent members of the group covered by the plan. After discussion, it was agreed that there would be benefit in permitting a single reorganization plan to be negotiated, subject to the same requirements for approval and to the same protections as included in the Legislative Guide.

4. Remedies

(a) Consolidation

36. The Working Group noted that the remedies discussed in A/CN.9/WG.V/WP.74/Add.1, paragraphs 24 to 45 (extension of liability, contribution orders and substantive consolidation or pooling) could essentially be divided into those that required a finding of fault and those that relied upon the establishment of certain facts with respect to the operations of the corporate group. It was suggested that in the case of misfeasance of management of a debtor other more appropriate remedies might be available, including removal of management or allowing creditors, as opposed to the debtor, to prepare a reorganization plan.

37. It was noted that the remedies discussed in paragraphs 24 to 45 were available in only limited circumstances and were rarely used as they had the potential to disrupt certain fundamental principles relating to a corporate entity, that is, limited liability and the ability of creditors to rely on the corporate entity (and the rights, duties and obligations that attach to it). The view was expressed that the Working Group should not try to establish a standard for when those fundamental principles would be interrupted as the grounds for doing so, if at all, would be fact-intensive and vary depending upon legal cultures and legal systems. It was added that increasing the recovery of some creditors was an insufficient ground in and of itself for interrupting those fundamental principles. The situations in which it was suggested such remedies might be appropriate included those where there was such an intermingling of assets that it was impossible to untangle the ownership of individual assets and consolidation would benefit all creditors, and where creditors had dealt with the members of a corporate group as a single economic unit and did not rely upon their separate identity in extending credit. While those insolvency laws that included provision for consolidation relied upon the court to assess the existence of appropriate conditions, another approach allowed an insolvency representative to consolidate where certain requirements were met and all creditors consented to the consolidation.

38. In support of consolidation, it was observed that, since intra-group trading was increasingly a norm, consolidation could enable an insolvency representative to focus on external debts of the group because intra-group debts disappeared as a result of consolidation.

39. The scope of consolidation was discussed with respect to whether such an order could include both insolvent and solvent members of a group. Although that remedy was generally used in the context of members against which insolvency proceedings had commenced, it was noted that under some laws it might be possible to include solvent members (paragraph 35 of A/CN.9/WG.V/WP.74/Add.1).

Additional situations in which consolidation might be appropriate were suggested, including where consolidating the members might lead to greater return of value for creditors, whether because of the structural relationship between the members and the manner in which they conducted their business and financial relationship or because of the value of assets common to the whole group, such as intellectual property in a process conducted across numerous group members and the product of that process. Such an approach could serve the goal of consolidation as a tool for enhancing the overall distribution to creditors. In response, it was said that substantive consolidation seldom increased recovery for all creditors; rather, it generally effected a levelling of recoveries by decreasing the recoveries of some creditors and increasing the recoveries of others. The only situation in which substantive consolidation was likely to result in increased recovery for all creditors was where it was impossible to untangle the ownership of individual assets across the group. A further situation might occur where there was no real separation between the members of a group, with the group structure being maintained solely for dishonest or fraudulent purposes.

40. The possibility of achieving consolidation by agreement through a reorganization plan was also suggested. Some laws permitted a plan to include proposals for a debtor to be consolidated with other members of a group, whether insolvent or solvent, which could be implemented if creditors approved the plan. The same result could be achieved in practice in other jurisdictions which did not have strict requirements concerning the plan, although it was noted that problems might arise where a solvent member of a group was to be included in such a proposal.

41. It was suggested that a further issue to be considered was how secured and priority creditors should be treated in consolidation, particularly where the priority creditors of one group member (such as employees) would interact in consolidation with the secured creditors of another group member. One solution mentioned was to exclude external secured creditors from the process of consolidation and cancel the interests of secured creditors internal to the group. Another issue to be considered was that of timing, as consolidation could take place at an early stage of the proceedings or later when it emerged that to do so would enhance the value to be distributed to creditors.

42. Where consolidation orders were to be made by a court, it was agreed that there needed to be clear criteria against which judges could assess the relevant issues.

(b) Avoidance

43. It was recalled that the Legislative Guide included a number of recommendations on avoidance, including recommendations 90 and 91 on transactions with “related persons”. “Related person” was a term defined in the glossary to the Legislative Guide and could include members of a corporate group. It was pointed out, however, that since recommendation 90 referred only to the length of the suspect period for transactions with related persons, additional provisions might be needed for such transactions in the corporate group context.

44. It was noted that certain domestic legislation established a rebuttable presumption that transactions among corporate group members and between those

members and the shareholders of that corporate group would be detrimental to creditors, and could therefore be avoided. However, it was also said that a number of those transactions might be entered into for legitimate purposes and should not automatically be subject to that treatment. It was added that a broad application of avoidance might hinder access to financing in the context of reorganization.

45. It was suggested that further consideration should be given to the relationship between avoidance of intra-group transactions, substantive consolidation and the ability of the single administrator to deal with intra-group transactions, as well as between avoidance and subordination.

(c) Subordination

46. It was noted that in certain circumstances the existence of a special relationship between the enterprise in insolvency proceedings and a creditor could lead to subordination of that creditor's claim to claims of other creditors. It was suggested that that special relationship might also exist between members of the same corporate group, leading to the possible subordination of intra-group credits.

47. In response, it was noted that automatic subordination of intra-group credits might be perceived as a punitive measure and lead to unfair results as many intra-group transactions had a legitimate purpose. It might also ultimately disadvantage the creditors of the members holding subordinated credits. In that respect, it was suggested that the appropriateness of subordination as a remedy might differ as between liquidation and reorganization.

5. Definition of a "domestic corporate group"

48. Having completed its discussion of the remedies, the Working Group considered a possible definition or description of the term "corporate group" on the basis of the material included in the glossary in A/CN.9/WG.V/WP.74.

49. It was agreed that while it might be difficult to reach a definition that could be used both for insolvency and other purposes, it was nevertheless important to reach a common understanding of what might identify a "corporate group". It was pointed out that solutions to the treatment of corporate groups in insolvency could not be reached by way of a definition, nor should that definition lead to legal consequences. It was suggested that a working definition should be wide enough to include different types of corporate groups common to different countries and regions, such as family-controlled corporate groups, and enterprises that were not incorporated as these were commonly part of a group. One proposal was that a corporate group could be understood as a number of enterprises associated by common or interlocking holdings or allied by control or the capacity to control, where the enterprise need not be incorporated and capacity to control could include those corporate groups based on a contractual arrangement. That suggestion was generally supported.

C. International issues

1. Centre of main interests (COMI)

50. The Working Group considered the concept of COMI and how criteria additional to the presumptions contained in article 16 of the UNCITRAL Model Law on Cross-Border Insolvency might be developed. It was noted that in those jurisdictions where the concept of COMI was used, whether under the EC Regulation on insolvency proceedings or the Model Law, it was a developing concept and a number of factors sufficient to rebut the presumption of the registered office had been identified. Those factors included the location of centres of production and command and control, of bank accounts and accounting services and the place where design, marketing and other economic activities took place.

51. It was noted that neither the EC Regulation nor the Model Law addressed the concept of COMI in terms of corporate groups. In practice, the COMI of each member of a corporate group could be located in a different jurisdiction, leading to proceedings being commenced in each jurisdiction on the basis of the various factors noted above. It was pointed out that in cases where the COMI of a number of group members was found to be in one jurisdiction, there was the potential for creditors, including employees, who were located in jurisdictions different to that of the COMI to be disadvantaged, for instance with respect to filing claims and participating in hearings. It was also pointed out that it was not always possible to ascertain what the COMI of members of a corporate group might be before the insolvency proceedings commenced.

52. Although the discussion proceeded from experience with the Model Law and the EC Regulation, it was suggested that a broader approach to COMI in the group context should be adopted, as those texts did not apply universally. Some support was expressed in favour of developing a concept of "group COMI" that would enable proceedings covering all insolvent members of a group to be filed in one jurisdiction. One suggestion was that the concept of "group COMI" might incorporate notions of centre of main interest, establishment and presence of assets, as well as taking into account creditor connections and issues of control.

53. It was questioned whether definition of such a concept was possible and how it would be recognized and enforced universally. It was pointed out that most jurisdictions established criteria or connecting factors that gave a debtor the standing to commence insolvency proceedings in a particular jurisdiction. It was recalled that those factors had been discussed in the context of the Legislative Guide (Part two, chapter one, paras. 12 to 19). Even if one court took the view that the COMI of the corporate group fell under its jurisdiction and it could therefore hear applications with respect to other members of that group, other courts would not necessarily concur with that decision in the absence of a binding obligation to do so. In addition, different views might be taken with respect to the inclusion of an enterprise in a corporate group, particularly an international corporate group; for example, some courts might regard as a subsidiary what others might regard as a domestic company, notwithstanding its connection to members of a group located elsewhere.

54. The difficulties of achieving an agreed definition suggested the need to focus on facilitating coordination and cooperation between the various courts in which

insolvency proceedings against different members of a corporate group might be commenced, whilst acknowledging the desirability of avoiding a multiplicity of proceedings in the corporate group context.

2. Definition of an "international corporate group"

55. The Working Group considered how an international corporate group might be defined and the characteristics that would distinguish it from a domestic corporate group (see above, paras. 48-49). It was pointed out that a definition that focused on common characteristics and found wide international support was desirable.

56. One proposal was that an international corporate group could be understood as an ensemble of companies subject to the legislation of different countries, bound by capital or control and organized in a coordinated manner. In order not to exclude unincorporated entities and possibly individuals from such a group it was suggested that, as in the discussion of the domestic context, the term "enterprises" could be substituted for "companies". A further proposal included additional references to the types of connections that might be found between members of a corporate group, such as shared assets, shared management and the control or ability to control the interests of one or more members of the group by making binding decisions with respect to their financial and economic activities.

57. It was suggested that the international nature of a group should be more clearly described. What was required was not simply the existence of offices of group members in different jurisdictions, but rather economic activity or the presence of assets that would be sufficient to establish jurisdiction for the purposes of commencing insolvency proceedings in those different jurisdictions.

58. After discussion, the Secretariat was requested to develop a definition of what might constitute an "international corporate group", taking into account the various observations made.

3. Remedies

(a) Joint administration

59. One view was that joint administration was as essential in the international context as in the domestic context to ensure that members of a corporate group could be jointly administered, facilitating timely reorganization, greater return of value to creditors and minimization of costs. It was pointed out, however, that while in the domestic context there might be procedures that would enable proceedings commenced in different jurisdictions to be brought together, such procedures did not generally exist at the international level. At that level, proceedings in different jurisdictions would involve diversity of assets, creditors, laws, priorities and so forth. Additional questions concerned the choice of jurisdiction from which joint administration should be conducted, the treatment that might be applicable to solvent members in different jurisdictions and the ability of the insolvency representatives to operate in different jurisdictions, particularly those in which they were not qualified under the relevant law.

60. It was acknowledged that in some situations there might be a need for parallel proceedings to address some of these difficulties, although in general a multiplicity of proceedings should be avoided in order to facilitate coordination and cooperation.

Adoption of the Model Law would provide the local rules necessary to achieve that cooperation. There was some agreement that while joint administration should be recommended, further proposals on how it could be achieved might not be possible at this stage of the discussion.

(b) Consolidation

61. It was noted that, while benefits could arise from the consolidation of insolvency proceedings in the context of cross-border insolvency, the international dimension added further complexity, such as the need to adopt criteria for currency conversion, which suggested the need for an even higher threshold than for domestic proceedings. Other issues that might create difficulty related to different procedures for distribution and the recognition of claims, as well as to the differences that might arise from territorial as opposed to universal approaches to insolvency.

62. It was noted that consolidation in the cross-border context might require harmonization of the treatment of security interests in the various jurisdictions, which varied considerably, to the point that certain security interests might have no equivalent in other legal systems.

4. Post-commencement finance

63. The general view was expressed that access to post-commencement finance was key to the success of reorganization, and that such access was possible only in cases where the lender obtained adequate guarantees of recovery of its capital. It was added that those guarantees might not be available in certain jurisdictions which emphasized the protection of pre-commencement security interests, as well as in other jurisdictions lacking the commercial framework to support post-commencement finance, thus hindering reorganization of corporate group members located in those jurisdictions.

64. Concerns were raised as to the feasibility of introducing in certain legal systems the notion of an overarching rank of security interests for the benefit of the lender of the post-commencement finance, sometimes referred to as a "super-priority". In that respect, it was added, difficulties might be encountered where enforcement of a reorganization plan contemplating such "super-priority" would be sought in courts other than those of the jurisdiction in which the plan was approved, and especially when the change in the ranking of security interests would affect assets held by solvent members of the corporate group. In that context, it was noted that providing adequate protection for the interests of the creditor of the solvent subsidiary, as well as preventing the exploitation of the solvent subsidiary for the exclusive benefit of the insolvent parent company, would also be desirable goals.

65. It was suggested that some of those concerns might be addressed through the use of protocols, subject to the approval of all courts concerned. In response, it was noted that, while such an approach would ensure adequate representation of all stakeholders, it might also be excessively time-consuming, especially in light of the strict timeline dictated by the financial needs of an insolvent corporate group.

66. Alternatively, it was suggested that a solution might be sought along the lines of certain procedures applicable to cross-border merger of companies. That would

entitle courts with jurisdiction over the relevant assets to pass a judgment on the balancing of the various interests at stake and request adequate guarantees to ensure the desired balance was achieved.

67. The Working Group concluded that further discussion of the matter would be desirable and that such discussion should take place on the basis of recommendations 63 to 68 of the Legislative Guide and their application in the international context of corporate groups.

D. Scope of future work

68. The secretariat informed the Working Group on the progress of the work relating to the use of protocols in cross-border insolvency and of the preparation of a report on that topic for consideration by the Commission at its fortieth session in 2007.

69. It was agreed that the Working Group's current discussion of the treatment of corporate groups in insolvency suggested the need for further work. The UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross-Border Insolvency provided a sound basis for the unification of insolvency law and the integrity of those texts should be maintained in any future work. Therefore, the current work was intended to complement those texts, not to replace them.

70. It was suggested that 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. The possible outcome of that work might be in the form of legislative recommendations supported by a discussion of the underlying policy considerations.

71. Referring to the decision of the Commission at its last session (A/61/17, para. 209 (b)), it was agreed that, within the given mandate, the Working Group would act flexibly in the manner in which the work on domestic and international post-commencement financing would be conducted.