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Report of Working Group V (Insolvency Law) on the work of its forty-seventh session (New York, 26-29 May 2015)

Contents

		Paragraphs	*Page*
I.	Introduction	1-3	2
	A. Facilitating the cross-border insolvency of multinational enterprise groups	1	2
	B. Directors' obligations in the period approaching insolvency: enterprise group	2	2
	C. Recognition and enforcement of insolvency-derived judgements	3	2
II.	Organization of the session	4-11	3
III.	Deliberations and decisions	12	4
IV.	Directors' obligations in the period approaching insolvency: enterprise groups	13-22	4
V.	Facilitating the cross-border insolvency of multinational enterprise groups	23-46	6
VI.	Cross-border recognition and enforcement of insolvency-related judgements	47-69	11

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I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), Working Group V (Insolvency Law) agreed to continue its work on the cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16). Discussion of those issues commenced at the forty-fifth session (April 2014) (A/CN.9/803).

B. Directors' obligations in the period approaching insolvency: enterprise groups

2. At its forty-fourth session, the Working Group had also agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group, whose task would be to examine how part four of the Legislative Guide could be applied in the enterprise group context and to identify any additional issues (such as conflicts between a director's duty to its own company and the interests of the group, as well as issues of governing law) that might need to be addressed. The informal expert group reported back in the second half of 2014 with a draft text for consideration by the Working Group at its forty-sixth session (A/CN9/WG.V/WP.125).

C. Recognition and enforcement of insolvency-derived judgements

3. At its forty-fourth session, the Working Group had further agreed (A/CN.9/798, para. 30) that it should seek at an appropriate time a mandate from the Commission to commence work on the recognition and enforcement of insolvency-derived judgements, which had been discussed at the colloquium held in conjunction with the forty-fourth session in December 2013 (A/CN.9/815). At its forty-fifth session, the Working Group agreed (A/CN.9/803, para. 39(b)) that it should seek that mandate from the Commission at its forty-seventh session (2014). At that session, the Commission agreed that, in addition to the two topics concerning treatment of enterprise groups in insolvency, Working Group V's other priority should be to develop a model law or model legislative provisions to provide

for the recognition and enforcement of insolvency-derived judgements, which was said to be an important area for which no explicit guidance was contained in the Model Law. The Commission approved a mandate in accordance with those terms (A/69/17, para. 155). The Working Group commenced its deliberations on the topic at its forty-sixth session.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its forty-seventh session in New York from 26-29 May 2015. The session was attended by representatives of the following States Members of the Working Group: Argentina, Armenia, Austria, Brazil, Bulgaria, Canada, China, Denmark, France, Germany, Greece, India, Indonesia, Israel, Italy, Japan, Kenya, Malaysia, Mexico, Namibia, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Belgium, Chile, Dominican Republic, and Libya.

6. The session was attended by the following non-member States and entities: Holy See.

7. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: World Bank, and World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: Hague Conference on Private International Law (HCCH);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN), Comité Maritime International (CMI), European Law Students Association (ELSA), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, International Bar Association (IBA), International Insolvency Institute (III), Inter-Pacific Bar Association (IPBA), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), New York City Bar (NYCBAR), and Union Internationale des Avocates (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mr. Emil Szczepanik (Poland)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.127);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.128);

(c) A note by the Secretariat on the obligations of directors of enterprise group members in the period approaching insolvency (A/CN.9/WG.V/WP.129);

(d) A note by the Secretariat on the recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.130); and

(e) Observations by France on document A/CN.9/WG.V/WP.128 (A/CN.9/WG.V/WP.131).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) the obligations of directors of enterprise group members in the period approaching insolvency; (b) facilitating the cross-border insolvency of multinational enterprise groups; and (c) the recognition and enforcement of insolvency-derived judgements.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group commenced its deliberations with the obligations of directors of enterprise group members in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.129; followed by the cross-border insolvency of multinational enterprise groups on the basis of document A/CN.9/WG.V/WP.128; and the recognition and enforcement of insolvency-derived judgements on the basis of document A/CN.9/WG.V/WP.130. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Directors obligations in the period approaching insolvency: enterprise groups

13. The Working Group commenced its discussion of this topic on the basis of the draft recommendations and commentary contained in document A/CN.9/WG.V/WP.129. At the outset of the discussion, the Working Group confirmed that it would not be referring the text for adoption by the Commission in 2015, but that it would await further development of the work on enterprise groups to ensure that consistency between the texts was achieved. The Secretariat was requested to prepare a revised text based on the conclusions noted below for the forty-eighth session of the Working Group.

Recommendations 267-268

Purpose clause

14. The Working Group adopted the purpose clause, with the following revision of paragraph (d): changing the word "ensuring" to "taking reasonable steps to ensure".

Draft recommendation 267

15. The Working Group indicated its preference for Variant 2 of draft recommendation 267, and adopted it with the following revisions:

(a) Deletion of the words "the position of the enterprise group member in the enterprise group and the degree of integration between enterprise group members";

(b) Ensuring that the references to maximization of the value of the enterprise group as a whole or some of its parts were consistent throughout the purpose clause and draft recommendation 267, subparagraph (b);

(c) In the second sentence of subparagraph (b), changing the last phrase to read "are no worse off than if that group member had not been managed so as to promote such a solution"; and

(d) Changing the word "ensuring" in draft recommendation 267, subparagraph (b) to "taking reasonable steps to ensure".

Draft recommendation 268

16. The Working Group adopted draft recommendation 268 with the following revisions: deleting the text and square brackets around "[possible]" and deleting the brackets and retaining the text "not inconsistent with the obligations of the director to the group member of which they are director".

Commentary

17. A suggestion was made that the notion of balancing the interests of group members against each other in paragraph 7 of the commentary should be more nuanced, possibly through clarifying that it would only apply to mediating opposed rights where the director had conflicting obligations. In addition, it was proposed that the safeguard that creditors and other stakeholders should be no worse off than if the enterprise group solution had not been pursued should be reflected.

18. In respect of paragraph 23 of the commentary, it was suggested that the word "may" should be deleted in the last sentence. Further, in the third sentence of paragraph 25, it was suggested to add the phrase "relevant information regarding" after the word "disclose", and to substitute the word "reasonable" for the word "desirable". It was also suggested that the phrase "a good board process" in paragraph 27 was unclear and that reference should be made instead to good corporate governance.

Recommendations 269-270

Purpose clause

19. The Working Group adopted the purpose clause for draft recommendations 269 and 270 as drafted.

Draft recommendation 269

20. The Working Group agreed that the heading for the contents of the legislative provisions should be "Conflict of obligations" and that "[Conflicting obligations]" should be deleted. It was noted that there should be conformity between the heading of the commentary and the heading of the draft recommendation.

Draft recommendation 270

21. The Working Group indicated a preference for Variant 3 and approved the drafting with the following revisions:

(a) In subparagraph (a), deleting the word "exact" and adding the words "and extent" after the word "nature";

(b) In subparagraph (b), adding the words "including, in particular, the nature and extent of the conflict" after the phrase "relevant information";

(c) In subparagraph (d), retaining the text in the first set of square brackets, "Seeking the appointment of", and deleting the brackets surrounding it as well as the second bracketed text "[Appointing]"; and

(d) In subparagraph (e), deleting the phrase "and resignation will not exacerbate the situation".

22. A proposal to add to an appropriate location in draft recommendation 270 the words "submitting the decision for approval by a body or bodies that are not exposed to the conflict of interest" was not supported.

V. Facilitating the cross-border insolvency of multinational enterprise groups

23. The Working Group commenced its discussion of the topic on the basis of the text in document A/CN.9/WG.V/WP.128. A number of different views were expressed as to how discussion on the different parts of the text might be approached. It was acknowledged that if some of the domestic issues outlined in part I were not addressed, it might be difficult to address the cross-border issues in part II. It was observed that the purpose of the work was to limit the number of parallel proceedings commenced with respect to enterprise group members, and where that was not feasible, to increase coordination and cooperation. It was proposed that the possibility of improving domestic insolvency regimes in order to achieve those two goals should be examined, commencing with discussion of part II of the text; that discussion should assist in identifying which of the provisions in part I were needed. The Working Group agreed with that approach.

24. It was suggested that the new instrument should take the form of an addendum to the Model Law on Cross-Border Insolvency (the Model Law). It should focus

initially on the powers of the receiving court. Further, the text should contain a few key articles and should avoid changes to the existing provisions of the Model Law that were not strictly related to cross-border insolvency of enterprise groups. It was observed that the goal was not to change the existing Model Law or Legislative Guide, but rather to identify gaps and additional provisions needed to facilitate the effective treatment of cross-border insolvency of multinational enterprise groups.

25. The Working Group agreed to first consider draft articles 3 to 5 dealing with recognition, and draft articles 6 to 8 concerning relief and protection of creditors. Reference was made to paragraph 9 of the working paper and the need to consider the relevance of provisions such as articles 3 to 14 of the Model Law, in particular the disconnection clause in article 3.

Recognition

26. The discussion of draft articles 3 to 5 gave rise to a number of concerns and reservations of a general nature. The first concerned the basis on which proceedings commenced in the originating jurisdiction, whether based on COMI, establishment, or some other criteria. If the recognition regime proposed were restricted to recognizing proceedings from the jurisdiction of the COMI or establishment of a debtor, that situation was already covered by the Model Law and there was no need to add the requirements set out in draft article 3, paragraph 3. However, if the Working Group were seeking to go further as proposed in draft article 3 and to recognize a proceeding commenced on a basis, for example, that it was necessary and integral to an enterprise group solution, a number of issues would need to be considered and the criteria for recognition augmented. It was observed that: a recognition standard based upon what was necessary and integral might be imprecise and lack certainty for creditors; the possibility of having a group solution was a forward-looking standard that did not emerge until after insolvency, while COMI was ascertained on the basis of existing information; and whilst there was only one COMI for each group member, there were multiple possibilities for locating a group solution.

27. There was also a possibility that there could be competing group solutions and it might be appropriate to consider for recognition purposes why the group solution was being sought and which group members were relevant to achieving that solution. The requirement that a group solution “is being developed” or “has been developed” created uncertainty on the basis, for example, that it was unclear what stage of development was required for the purposes of recognition, whether the solution should cover all relevant group members or whether creditors had approved the solution. There was also concern as to how a group insolvency solution might be developed, and in particular, how group members might participate in that development. It was observed that while a solvent entity might participate as envisaged in recommendation 238 of part three of the Legislative Guide, it was not clear how insolvent group members might participate. It was suggested that such participation might occur by providing standing for group members to appear and be heard in the coordinating court without subjecting themselves to the jurisdiction of that court. In such a scenario, it was not intended that participation would equate to commencement of insolvency proceedings.

28. Ensuring the protection of creditors was also a key concern; the solution might in part be provided by draft article 8 and the requirement for adequate protection, although it was also suggested that a standard of "no worse off" might be appropriate. A different view was that the "no worse off" standard was a liquidation test that applied on a territorial basis and should not be applied in a cross-border situation. A related concern was in respect of the consistency of the use of the "no worse off" standard in the work on directors' obligations and in respect of the cross-border insolvency of multinational groups. It was also observed that whilst it may be possible to assess whether an individual group member may be no worse off under a group solution, it would be difficult to assess whether that standard had been met for all members of an enterprise group.

29. As drafted, recognition was mandatory once the requirements of draft article 3 were met, but it was questioned whether there should be some overarching judicial discretion based upon, for example, protection of creditors and other stakeholders or failure to meet the goal of maximization of value or that present harm to local creditors was not outweighed by the potential gains of a group solution as implemented. It was observed that assessing maximization of value could be difficult depending on the type of proceeding (e.g. liquidation or reorganization) and the context in which it was being assessed, i.e. as part of a local proceeding or a global solution.

30. Another issue concerned the role of the court in the context of a group solution. A proposal was made that where proceedings were sought to be commenced in a jurisdiction other than the COMI of the debtor, the COMI court should have a role in approving the commencement of those proceedings. By way of clarification, it was suggested that the draft was not proposing commencement of proceedings in a jurisdiction with no connection to the debtor (see para. 44 of A/CN.9/829), nor was the draft text intending to require a State to cede jurisdiction over a debtor located in its jurisdiction.

31. The Working Group also expressed the following specific views on draft articles 3 to 5 of A/CN.9/WG.V/WP.128.

Article 3. Recognition of a foreign group proceeding

32. The following suggestions were made in respect of article 3. In subparagraph 3(a), a preference was expressed for the phrase "is being developed" rather than "has been developed"; and on subparagraph 3(c), views were expressed supporting both alternatives in square brackets. One view was that, in the absence of the foreign group proceeding emanating from the COMI jurisdiction, the proceedings should be a necessary and integral part of the group insolvency solution. The contrary view was that it was sufficient that the foreign group proceeding be participating in the enterprise group insolvency solution, as it might be difficult for the recognizing judge to determine at that stage whether the foreign proceeding was a necessary or integral part of the group insolvency solution.

33. It was proposed that an additional subparagraph be added to paragraph 3 to ensure that evidence should be adduced of all foreign group proceedings pending for enterprise group members, unless the Working Group was of the view that this requirement was already included in subparagraph 3(a). If that evidentiary requirement were added to subparagraph 3(a), it was noted that it should also be

added to draft article 5, paragraph 4. A further suggestion was made that the substantive elements of paragraph 3 should be moved to draft article 5, paragraph 1.

34. It was suggested that showing a reasonable prospect of implementing a group insolvency solution might prove difficult and that the focus should be on a reasonable prospect of developing a group insolvency solution. It was noted that, in some circumstances, the absence of recognition might prove a barrier to the development or implementation of a group solution.

35. It was further proposed that an additional subparagraph (d) could be added to draft article 3, as follows: "Each group member sought to be represented by the foreign group proceeding has agreed to participate in that proceeding. Where such a group member is subject to insolvency proceedings in the court of its COMI, evidence shall be procured that that court has not prohibited participation of that group member in the foreign group proceeding." That proposal sought to confirm that all group members participating in the group solution had agreed to do so and had not been prohibited from doing so, thereby preserving a role for the COMI court and dealing with one of the concerns raised above.

36. Related proposals concerned revision to the definitions in draft article 2, subparagraphs (h) and (i) to address some of the concerns identified above. It was suggested that draft subparagraph (h) should define "foreign group proceeding" as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the enterprise group insolvency solution is being developed and coordinated." In addition, it was suggested that the last sentence of subparagraph (i) defining "enterprise group insolvency solution" should be revised to read: "An enterprise group insolvency solution shall be coordinated through one or more proceeding, each in a State that is the centre of main interests of at least one enterprise group member." The rationale of those revisions was to focus on recognition of the coordinating proceeding; proceedings pending for individual group members could be recognized under the Model Law and no further provisions were required for that purpose. Another proposal was that subparagraphs (h) and (i) of draft article 2 should refer to a proceeding that was in a State that was the COMI of at least one group member and that was a necessary and integral part of the enterprise group insolvency solution. Those proposals received some support.

Article 4. Presumptions concerning recognition

37. If the text were to be developed as an addendum to the Model Law, it was suggested that draft article 4 was not required. It was proposed that the words "or principal place of business" in draft article 4, paragraph 3 be deleted as that notion was inconsistent with the place of central administration mentioned in the Guide to Enactment and Interpretation of the Model Law and there would be no need for preferential treatment of an unincorporated entity.

Article 5. Decisions to recognize a foreign group proceeding

38. It was suggested that subparagraph 1(a) was not required as its content was already reflected in the definition of a foreign group proceeding, and that subparagraph 1(b) was not required for similar reasons. It was suggested that changes in the status of the enterprise group insolvency solution should be added to

the matters listed in paragraph 4. It was noted that draft article 5 did not specify, contrary to article 17 of the Model Law, whether the proceeding was recognized as a main or non-main foreign proceeding. Accordingly, it was suggested that this specification should be made.

39. It was proposed that a new subparagraph should be inserted between subparagraphs 1(a) and (b) of draft article 5 along the following lines, "The foreign group proceeding was commenced on the basis of the centre of main interests or the establishment of the foreign group member or (if permissible under the laws of the enacting State) any other basis, including the presence of assets of the foreign group member or voluntary submission by the foreign group member to the jurisdiction of the court of the foreign State." Some support was expressed in favour of that proposal. Reservations were expressed in respect of the mere presence of assets as an appropriate basis for commencement or recognition.

Summary of discussion on recognition

40. After a lengthy and complex discussion, the Working Group reached several working assumptions with regard to the thinking on the fundamentals of the proposals made and the objections raised. It was reaffirmed that a connection was required between the debtor and the jurisdiction in which insolvency proceedings with respect to that debtor were commenced. In addition, there was agreement that the basic goal of the work was to expand the provisions of the Model Law and the Legislative Guide to provide more solutions for cross-border insolvency of multinational enterprise groups, and that the first goal was to adopt a recognition regime, which would include recognition that a group solution was being sought or developed. It was acknowledged, however, that there were some reservations as to the detail of that regime. The questions of how and when the group solution would be developed were left for further discussion. It was acknowledged that a group solution might be developed in several ways, including informally through foreign representatives, with the participation of other relevant group members, through cooperation and coordination between courts, and through some means, as yet unspecified, of involving creditors.

Relief

41. It was noted that, unlike the Model Law, the draft regime in A/CN.9/WG.V/WP.128 did not provide for mandatory relief upon recognition.

42. In response to various concerns expressed, it was explained that, for the time being, the focus of the relief provisions was on a single group member and not on a number of group members; as to the governing law, the recognizing court would apply the governing law in the same way as under the Model Law. It was also explained that in the text set forth in A/CN.9/WG.V/WP.128, the reference to the group member to which the measures under draft articles 6 and 7 would be applicable was the group member subject to the insolvency proceeding the recognition of which was requested or obtained. The view was expressed that if a group solution could be developed, it would need to be implemented in a decentralized manner and that the treatment of assets and creditors would be in

accordance with the law applicable to those assets and the creditors. It was also confirmed that significant weight would have to be given to creditors to determine what was in their best interests, as reflected in draft article 8. The relief sought in a particular jurisdiction would be subject to the law of that jurisdiction.

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding

43. It was suggested that draft article 6, subparagraph 1(c) should separate the concepts of administration and realization along the following lines: "Entrusting the administration of all or part of the enterprise group members' assets located in the State to the foreign group member representative or another person designated by the court or their realization in order to protect and preserve … jeopardy." A related proposal was that the two ideas could be reflected in separate subparagraphs.

Article 7. Relief that may be granted upon recognition of a foreign group proceeding

44. It was proposed that the changes referred to in paragraph 43 above should also be made in respect of subparagraph 1(e) of draft article 7. It was added that some distinction might need to be made between realization of some and of substantially all of the assets of the enterprise group member.

45. To address situations in which it might be problematic for the COMI court requested to commence proceedings to refuse to do so, it was proposed that the following changes should be made to subparagraph 1(a): deletion of "commencement or" and insertion after "continuation" of the following phrase ", or where permitted by relevant procedural laws, the commencement". It was suggested that in some jurisdictions both continuation and commencement might be problematic and that the proposed change should also be made in respect of both continuation and commencement. It was also noted that the same changes should apply to draft article 6, paragraphs 1 and 2 and to draft article 7, subparagraph 1(b).

46. The Working Group noted that it would continue with its consideration of A/CN.9/WG.V/WP.128 at its forty-eighth session. The Secretariat informed the Working Group that it would provide a revised version reflecting the proposals made to amend draft articles 2 to 8.

VI. Cross-border recognition and enforcement of insolvency-related judgements

47. The Working Group commenced its discussion of this topic on the basis of the draft model law on the recognition and enforcement of insolvency-related judgements contained in document A/CN.9/WG.V/WP.130 (draft model law).

Preamble

48. A proposal to make it clear that the adoption of the draft model law would not imply that the Model Law did not permit the enforcement of insolvency-related judgements received some support. It was also suggested that the relationship

between the two instruments could be clarified in the substantive provisions of the draft model law. It was observed that since both instruments were model laws, the question of any overlap between them would have to be addressed by the enacting State.

Article 1. Scope of application

49. Several observations were made in respect of the need to take into consideration existing international and regional instruments, as well as those under development, in order to avoid overlap and to ensure that there were no gaps in terms of the scope of application of the draft model law. The Working Group agreed that these considerations should be borne in mind as the work developed.

50. It was suggested by some that the scope of application as well as the definition of "insolvency-related judgement" be quite open, with few conditions and that grounds to refuse recognition be dealt with in draft article 10. Some reservations were expressed.

51. A number of proposals were made with respect to the drafting of article 1, paragraph 1, including simplifying the current text to read instead: "This Law applies to the recognition and enforcement of an insolvency-related judgement by a foreign representative or other person entitled to seek enforcement of such a judgement." A contrary view was expressed that the scope of application should cover both inbound and outbound requests for recognition and enforcement and that subparagraph 1(b) should thus be retained.

52. Another proposal was to adopt drafting based on article 1, paragraph 1 of the New York Convention, along the following lines: "This Law applies to the recognition and enforcement of insolvency-related judgements ordered in proceedings taking place in a State that is different to the State of execution."

53. The Secretariat was requested to prepare alternative versions of draft article 1 reflecting the above suggestions for future consideration by the Working Group.

Article 2. Definitions

(a) "Foreign proceeding"

54. It was noted that in order to align the draft definition with that contained in the Model Law, the word "foreign" should be inserted before the word "court". In addition, in order to avoid any issues relating to the current status of the foreign proceeding, the words along the lines of those in square brackets should be included and the brackets deleted. There was also a suggestion that a definition of "foreign court" and "proceeding" could be added to the draft model law; it was noted that in the context of the European Insolvency Regulation, the question of whether the court was the insolvency court or another court was not relevant.

(b) "Foreign representative"

55. The Working Group did not have comments on the draft definition in subparagraph (b).

(c) "Judgement"

56. Some support was expressed in favour of requiring a judgement to be final, although it was noted that such an addition would be inconsistent with the reference to provisional measures. It was noted that draft article 10, subparagraph (a) dealt with the question of finality as a ground for refusing recognition. Concern was expressed as to the inclusion of administrative decisions, although it was noted that if such decisions were not included, it could create a gap in some jurisdictions. It was also suggested that the only provisional measures that should be included were protective and conservatory measures.

(d) "Insolvency-related judgement"

57. A suggestion to simplify draft subparagraph (d) included retaining the first sentence and, in the second sentence, deleting the words in the chapeau following "if it has an effect upon the insolvency estate of the debtor" to the end of the third sentence (possibly including the content of the third sentence in a guide to enactment), and adding language to better define the meaning of the word "effect" along the lines of that contained in draft subparagraph (v), variant 1. A different view was that the second sentence of the chapeau of subparagraph (d) should be retained as drafted, with a slight revision to (ii) to delete the words "and legal basis". Another suggestion was to add the substance of footnote 6 either in the text or in a guide to enactment of the draft model law, while an additional proposal was made to emphasize that the list was not exclusive by including the phrase "inter alia" in the final phrase of the chapeau.

58. Various concerns were expressed with respect to some of the matters included in subparagraph (d). It was suggested, for example, that items (vi), (vii), (x) and (xii) were closely related to the question of recognition under the Model Law and should not be included here; and since item (ii) might be based on contract, general rules of enforcement should apply rather than the draft model law. It was observed that a gap might be created by limiting judgements to those issued after commencement, as it would exclude preservation measures granted between application for, and commencement of, insolvency proceedings.

59. No clear preference was expressed in favour of variant 1 or 2 of item (v). Further, a suggestion was made that it could be helpful to add a catch-all paragraph along the lines of "any judgement related to insolvency that is not enforceable under another instrument".

60. A reservation was expressed as to draft item (vi) of subparagraph (d) because it might cause a conflict between the current draft model law and the Model Law. With respect to item (viii), it was suggested that the current drafting might be too narrow, as it would not allow a cause of action to be pursued by a party to whom it had been assigned by, for example, the foreign representative. A reservation was also expressed as to the inclusion of provisional measures.

Articles 3 to 7 and 11 to 12

61. The Working Group had no comments on draft articles 3 to 7 and 11 to 12. Article 8. Recognition and enforcement of an insolvency-related judgement

62. The Working Group identified some issues for further consideration, including which party could seek recognition and enforcement under an insolvency-related judgement; and the issue of the finality of the judgement in relation to subparagraph 2(b) of the draft article.

63. The following specific drafting proposals were made:

(a) To include the contents of footnote 18 in the text of draft article 8 at the end of paragraph 1 as follows: “Enforcement may be by way of the rights created or recognized by the judgement or order to be pleaded by way of defence.”;

(b) To merge paragraph 1 and the chapeau of paragraph 2;

(c) To revise draft subparagraph 2(b) to add words along the lines of “certified statement of the final character of the judgement”; and

(d) To clarify the meanings of “recognition” and “enforcement” in the draft article, as not all judgements required enforcement.

Article 9. Decision to recognize and enforce an insolvency-related judgement

64. A proposal was made to delete subparagraph (a) as redundant. Concern was again expressed as to the relationship between the procedure for recognizing an insolvency-related judgement and the procedure for recognizing foreign proceedings under the Model Law; in particular, it was questioned what would happen to the recognition of an insolvency-related judgement if the underlying insolvency proceedings were found to be manifestly contrary to public policy under the Model Law.

Article 10. Grounds to refuse recognition of an insolvency-related judgement

65. The Working Group recalled its agreement (see paragraph 49 above) to take into consideration existing instruments and those under development in its deliberations on the draft text. It was further recalled that the mandate given to the Working Group was very broad and not constrained by existing mechanisms for recognition and enforcement of insolvency-related judgements, including existing grounds for refusing such recognition and enforcement.

66. A proposal was made to add an additional variant 3 to draft subparagraph (i) along the lines of: “Where the party against whom recognition is sought is the debtor in the proceedings giving rise to the insolvency-related judgement, if such proceedings were not initiated at the debtor’s COMI. In all other cases, where the judgement party did not have its COMI in, or where it did not consent to the exercise of the jurisdiction of, the originating State.” Although that proposal received some support, serious reservations as to its inclusion were expressed, in particular, that a blanket refusal to recognize on the basis that the insolvency-related judgement did not emanate from the debtor’s COMI would be too restrictive to be useful in practice.

67. An additional proposal was made to change subparagraph (h) to read along the following lines: “Recognition of the insolvency-related judgement has been refused by a judgement from the State where the foreign proceeding has been opened, or if no judgement on recognition has been rendered in the State where the foreign proceeding has been opened, the court from which recognition is sought determines

that the insolvency-related judgement is not susceptible to recognition under the laws of the State where the foreign proceeding has been opened."

68. Other suggestions included: the need to add as a ground for refusal a failure to meet the requirements of article 8, paragraph 2; that draft article 10, subparagraphs (f) and (g) should be limited to those circumstances where the prior or earlier judgement had final and binding effect; the need to address the potential overlap between subparagraphs (c), (d) and (e); to add a reference in subparagraph (d) to the content of the insolvency-related judgement being manifestly contrary to public policy; and whether reference should be added to address the treatment of in rem judgements.

69. The Working Group acknowledged that its deliberations at the current session represented a preliminary exchange of views and that all of the proposals made with respect to the draft text would be reflected as additional variants in a future iteration of the text.