


**United Nations Commission
 on International Trade Law**
Forty-ninth session

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**Report of Working Group V (Insolvency Law) on the work
 of its forty-ninth session (New York, 2-6 May 2016)**
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I. Introduction

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

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups¹ 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 and part three of the UNCITRAL Legislative Guide on Insolvency Law and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835) and forty-eighth (December 2015) (A/CN.9/864) sessions and continued its deliberations at the forty-ninth session as indicated in this report.

B. Recognition and enforcement of insolvency-derived judgements

2. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-derived judgements. The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835) and forty-eighth (December 2015) (A/CN.9/864) sessions and continued its deliberations at the forty-ninth session as reflected in this report.

C. Obligations of directors of enterprise group companies in the period approaching insolvency

3. At its forty-fourth session, the Working Group 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 that 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 an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's duty to its own company and the interests of the group) would be helpful (A/CN.9/798, para. 23). The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829) and forty-seventh (May 2015)

¹ A/CN.9/763, paras. 13-14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, para. 259(a)).

(A/CN.9/835) sessions and continued its deliberations at the forty-ninth session as reported below.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its forty-ninth session in New York from 2 to 6 May 2016. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Armenia, Austria, Canada, China, Czech Republic, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, India, Indonesia, Israel, Italy, Japan, Kenya, Mexico, Namibia, Nigeria, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Albania, Chile, Cyprus, Dominican Republic, Iraq, Libya, Netherlands, Sweden and Syrian Arab Republic.

6. The session was also attended by observers from the European Union and the Holy See.

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

(a) *Organizations of the United Nations system*: World Bank;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students Association (ELSA), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), New York City Bar Association (NYCBA) and Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Wisit Wisitsora-At (Thailand)

Rapporteur: Anna-Letu Haitembu (Namibia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.136);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: summary (A/CN.9/WG.V/WP.137);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: compilation of principles and draft articles (A/CN.9/WG.V/WP.137/Add.1);

(d) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.138);

(e) A note by the Secretariat on directors' obligations in the period approaching insolvency: enterprise groups (A/CN.9/WG.V/WP.139); and

(f) A proposal by the United States on the cross-border recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.140).

10. 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) facilitating the cross-border insolvency of multinational enterprise groups; (b) the recognition and enforcement of insolvency-derived judgements; and (c) directors' obligations in the period approaching insolvency.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its deliberations on the cross-border insolvency of multinational enterprise groups on the basis of documents A/CN.9/WG.V/WP.137 and A/CN.9/WG.V/WP.137/Add.1, followed by the recognition and enforcement of insolvency-derived judgements on the basis of documents A/CN.9/WG.V/WP.138 and A/CN.9/WG.V/WP.140 and directors' obligations in the period approaching insolvency on the basis of A/CN.9/WG.V/WP.139. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.137 and Add.1)

Draft legislative provisions on the cross-border insolvency of enterprise groups

Chapter 1. General provisions

12. In respect of article 1, the Working Group noted that a provision on scope would be drafted for future consideration and that the material contained in the introduction to document A/CN.9/WG.V/WP.137/Add.1 could be included.

Principles 1 bis and 1

13. The Working Group stressed the importance of including those principles in the draft text. Various suggestions were made as to how they might be included, such as in a preamble or as draft articles. After discussion, it was agreed that principles 1 bis and 1 should be redrafted as articles for future consideration, taking into account the Working Group's discussion and conclusions on the remainder of the text.

Article 2. Definitions

14. The Working Group noted that the definitions in paragraphs (a) to (c) were taken from part three of the Legislative Guide on Insolvency Law (“Legislative Guide”) and were included in working paper A/CN.9/WG.V/WP.137/Add.1 for information; if not ultimately required in the draft text, they could be deleted at a later stage. There was general support in the Working Group for retaining the more comprehensive definition reflected in variant 2 of paragraph (d), but it was noted that including a reference to “a separate legal entity” was potentially inconsistent with the definition in paragraph (a), and particularly with the words “regardless of its legal form.” To address that inconsistency, it was proposed that the definition should be revised along the following lines: “‘Enterprise group member’ means an enterprise as defined in paragraph (a), which forms part of an enterprise group as set out in paragraph (b).” That proposal was widely supported.

15. It was noted that, although some concerns were expressed with respect to the meaning of the terms “control or significant ownership”, the Working Group had previously decided in the context of part three of the Legislative Guide that those terms did not require further clarification.

16. In respect of paragraph (e), there was support for variant 1 with the following revisions:

- (a) Retaining the text contained in square brackets and deleting the brackets;
- (b) Deleting the phrase “in this State”; and
- (c) Replacing the phrase “other group members” with “one or more group members.”

17. The Secretariat was requested to redraft paragraph (e) along the following lines: “‘Group Representative’ means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding in which one or more other group members are participating for the purpose of developing a group insolvency solution.”

18. In reference to paragraph (f), the Working Group supported variant 1 with a revision to the first subparagraph changing “more than one group member” to “one or more group members.”

19. Regarding paragraph (g), the Working Group expressed its support for variant 2. It was suggested that some clarification of the meaning of “main proceeding” was required. It was also suggested that the text from footnote 15 could be added, although a number of reservations were expressed on the basis that it might be difficult to sufficiently substantiate whether additional group members were likely to participate. After discussion, the Working Group did not support the addition of the text from footnote 15.

Chapter 2. Cooperation and coordination

Article 9. Cooperation and direct communication between a court of this State and foreign courts or group representatives

20. The Working Group agreed that a reference to the foreign representative should also be added to both paragraphs of draft article 9 to make the provision

more comprehensive. After discussion, support was also expressed in favour of deleting all text in square brackets in paragraph 2.

Article 10. Cooperation to the maximum extent possible under article 9

21. A proposal to delete the phrase “participating in a [planning proceeding] [group insolvency solution]” from paragraphs (c) and (d) was supported. However, a proposal to delete the phrase “to facilitate the implementation of a group insolvency solution” in paragraph (g) was not supported.

Article 12. Effect of communication under article 9

22. Although there was support for the deletion of draft article 12, after discussion it was agreed that it should be retained with a view to further discussing possible modification at a future session. One delegation suggested that the meaning of the word “compromise” in subparagraph (a) be clarified. It was stated that it could be understood as a debt reduction or, alternatively, as a modification of the courts’ usual practice.

Article 13. Coordination of hearings

23. It was noted that the substance of draft article 13 was explained in paragraphs 38 to 40 of Chapter III of part three of the Legislative Guide. Support was expressed for the provision as drafted. One delegation expressed the view that hearing coordination with a foreign court could include joint hearings.

Article 14. Cooperation and direct communication between [group representatives] and foreign courts

24. The Working Group agreed to the article as drafted, with the addition of a reference to the foreign representative in addition to the group representative.

Article 15. Cooperation to the maximum extent possible under article 14

25. There was support in the Working Group for the deletion of the phrase “participating in a [planning proceeding] [group insolvency solution]” from paragraphs (a) and (d). A proposal to delete the phrase “to facilitate the implementation of a group insolvency solution” in paragraph (b) was not supported. In paragraph (e), the Working Group agreed to retain the phrase “a group insolvency solution” and remove the square brackets around it, and to delete the alternative phrase “[reorganization plans]”. A general observation was made that in revising the draft provisions, there should be consistency in the references to “development and implementation of a group insolvency solution.” The Working Group took note of a concern raised that the text should not inadvertently exclude a group representative from any communication taking place between courts and foreign representatives, and agreed that appropriate safeguards might be developed for future consideration.

Article 17. Authority to enter into agreements concerning the coordination of proceedings

26. It was observed that the use of the phrase “agreement concerning the coordination of proceedings” (based upon article 27(d) of the Model Law on Cross-Border Insolvency) (“Model Law”) was included in this iteration of the draft

article following a suggestion at the previous session of the Working Group that it should replace the phrase “cross-border insolvency agreements”. There was agreement that the relationship of the final text to the Model Law would determine how those agreements should be described.

Article 18. Appointment of a single [or the same] insolvency representative

27. After discussion, the Working Group agreed that rather than choosing one of the words in square brackets, draft article 18 should instead refer to both “appointment and recognition” as well as to “administer and coordinate”. It was further agreed to retain the reference to “a single [or the same]” for further consideration, and to retain the phrase “where a group insolvency solution is being developed” without the square brackets. Although it was acknowledged that the requirement that the insolvency representative must be qualified for appointment in each of the relevant States might be difficult to satisfy, it was decided that that proviso in paragraph 1 should nevertheless be retained as drafted.

Chapter 3. Facilitating the development and recognition of a group insolvency solution

A. Provisions relevant to a State in which a planning proceeding commences

Article B. Participation by enterprise group members in an insolvency proceeding in this State; appointment of a group representative

28. In response to concerns raised in respect of the inclusion of a reference to solvent entities, it was suggested that an explanation clarifying what the participation of solvent entities might mean should be elaborated. There was agreement that such participation could not substantively modify the rights of creditors of solvent entities, nor that it would subject the solvent entity to the insolvency law. Neither did the inclusion of solvent entities in draft article B imply that the solvent entity would need to apply for commencement of insolvency proceedings in order to participate in a planning proceeding. It was suggested that the following proposals would make that understanding more explicit:

(a) Adding text along the following lines: “Participation of solvent group members does not imply that such members would be subject to the insolvency law.”;

(b) Describing the participation of solvent members as purely procedural; and

(c) Avoiding the use of the word “participation” with respect to solvent entities and instead specifying their rights, such as with respect to the planning proceeding, e.g. the right to appear and to be heard, and to be involved in negotiations.

29. It was recalled that further clarification of the issues outlined in the paragraph above was already contained in footnote 4 of document A/CN.9/WG.V/WP.137, which referred to part three of the Legislative Guide, paragraphs 11 to 14 and 152, as well as recommendation 238. After discussion, there was support for permitting solvent group members to be involved in the development of a group insolvency solution. To the extent that the proposals outlined in the paragraph above did not completely resolve the concerns raised, it was agreed that the Working Group could

return to this matter; the Secretariat was requested to prepare text reflecting those concerns for future consideration by the Working Group.

30. In respect of the two variants of paragraph 3, some support was expressed in favour of variant 1 as providing more concise text than variant 2. Support was also expressed in favour of variant 2 since it more closely tracked the text of article 5 of the Model Law. After discussion, it was agreed that both variants would be retained for future consideration. One delegation suggested that in variant 2, it would be necessary to distinguish the meaning of “participation by the group representative” and the meaning of “participation by the group members”.

Principle 4, paragraph 2 and principle 5, sentence 2

31. There was agreement on the substance of the principles, but as the Working Group had not yet agreed on the form of the text being developed, it was not possible at this stage to determine whether the principles should be redrafted as substantive provisions or should be included in commentary.

Article D. Relief available to a planning proceeding in this State

32. Concerns were expressed as to the scope of article D, paragraph 2 and its relationship to articles 6 and 7. It was observed that the goal of article D, paragraph 2 was to enable the planning proceeding court to make the orders necessary to support the development of a group insolvency solution. Articles 6 and 7, on the other hand, related to recognition of the planning proceeding in other States, and the relief that those States might provide to support the development of the group insolvency solution through the planning proceeding.

33. One proposal to clarify the scope of article D, paragraph 2 was to move the phrase “in this State” from the end of the chapeau to be inserted following the phrase “assets or operations”. That change would have the effect of focusing on what a court in that jurisdiction could do to support the development of a group insolvency solution through that State, including making orders with respect to the assets in that State of debtors with a centre of main interests (“COMI”) in another State. There was support in the Working Group for that proposal.

34. A further proposal was to add a new paragraph 3 along the following lines: “Concerning the assets or operations of an enterprise group member with a COMI in another State, relief under this article may only be granted if this is not incompatible with the laws of that State.” With respect to that proposal, it was observed that in the event of a conflict between an order issued by the planning proceeding court and an order issued by the court of the State in which the affected debtor had its COMI, the practical solution could be that the COMI court declined to recognize or enforce the order of the planning proceeding court. That approach would preserve the pre-eminence of the COMI principle as reflected in draft article 1 bis. In addition, it was recalled that the definition of a planning proceeding already reflected the Working Group’s agreement that a planning proceeding related only to group members that were not precluded by their COMI court from participating in that proceeding (as defined in article 2(g)). With respect to the issue of preclusion, it was noted that a court could at any time prevent a group member with its COMI in the State of that court from participating in a planning proceeding in another jurisdiction. It was suggested that article D, paragraph 2 should be read in the

context of the definition of a “planning proceeding”. In addressing the scope of article D, the view was expressed that care should be taken to ensure that the approach to relief taken in this instrument was not inconsistent with the provisions on relief and coordination of proceedings in the Model Law.

35. Although some reservations were expressed about various subparagraphs of article D, paragraph 2, it was agreed that the Working Group would consider those issues in greater detail at a future session.

36. After discussion, the Secretariat was requested to revise article D, paragraph 2 taking into account the considerations noted above.

B. Provisions relevant to a State in which recognition of a planning proceeding is sought

Article 3. Recognition of a planning proceeding

37. The Working Group agreed to the following revisions to draft article 3:

(a) To retain references to “a planning proceeding” rather than to a “group insolvency solution”;

(b) To retain variant 1 of paragraph 3 and to delete variant 2; and

(c) To add an additional subparagraph (c) along the following lines: “A statement to the effect that the group member has its COMI in the jurisdiction where the planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group.” It was recalled that the latter element was a reflection of the definition of “group insolvency solution” in draft article 2(f).

Principle 4, paragraph 1

38. Since no clear view emerged in the Working Group as to whether principle 4, paragraph 1 should be retained, deleted or redrafted as an article, it was decided to retain it for further consideration, with the addition of the word “planning” before the word “court” in subparagraph (ii).

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

39. Although a proposal was made to delete draft article 6 as being redundant in light of draft article D, it was observed that since draft article 6 related to the provision of interim relief in the context of a recognition application, it might therefore address issues not covered by article D, paragraph 2. After discussion, it was agreed that draft article 6 should be retained for further consideration in the context of a revised version of the draft instrument.

40. A proposal was made to add text after the phrase “at the request of the group representative” in the chapeau (of both draft articles 6 and 7) along the following lines: “and the group member for which relief was sought”; that suggestion did not receive support.

41. A proposal to retain in paragraph 1(d) the reference to “planning proceeding” rather than “group insolvency solution” was supported. It was also agreed that the

phrase in square brackets at the end of paragraph 1(d) relating to safeguards should be retained.

Article 5. Decision to recognize a planning proceeding

42. Reservations were expressed with respect to the need for subparagraph 1(f) and it was agreed that it could be deleted. A proposal was made to place paragraphs 3 and 4 in a separate provision on the basis that they did not deal specifically with the issue of recognition.

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

43. A concern regarding the relationship between draft articles 6, 7 and D was reiterated (see para. 32 above). To address that concern it was proposed that the three provisions could be merged, although it was again pointed out that the three articles might apply to different situations. It was noted that, to some extent, the answer to that concern might relate to the form of the final text.

44. It was observed that the current draft of article 7 did not distinguish between granting relief with respect to those debtors subject to the planning proceeding and group members participating in that proceeding, and noted that there may be some difference in the relief that might be granted to those group members in the context of recognition of the planning proceeding.

45. In response to a concern about the ability of the recognizing court to grant the relief provided in draft paragraph 1(f) in accordance with the applicable law, it was suggested that that question might be addressed in the same manner as under the Model Law, i.e. by way of a single article along the lines of article 3 of the Model Law.

46. The Working Group agreed on the substance of draft article 7 and that it should be retained for further discussion in the context of the revised version of the draft instrument.

Article D. Participation of a group representative in a proceeding in this State

47. Although some support was expressed in favour of adding to the draft provision the text suggested in footnote 43 of document A/CN.9/WG.V/WP.137/Add.1, there was also support for an alternative proposal to qualify the proceedings in which the group representative could participate along the lines of “that are relevant to development and implementation of a group insolvency solution.” In response to those proposals, it was recalled that a distinction was made in the Model Law between participation under article 12 and intervention under article 24. There was agreement that the group representative should be able to participate in insolvency proceedings in accordance with article 12 of the Model Law, but some concern as to intervention under article 24. It was explained that in the Model Law context, the foreign representative could act on behalf of the debtor and therefore the ability to intervene under article 24 was appropriate. Under draft article D, paragraph 1, however, the group representative acted only on behalf of the planning proceeding, and unless the group representative and the foreign representative were the same person, a power of intervention might not be appropriate for the group representative. The Working Group agreed that the issue required further consideration.

Article 8. Protection of creditors and other interested persons

48. In response to a suggestion that the draft article should identify the entity whose creditors were being referred to, it was suggested that that would depend on what the relief granted related to. That issue might be born in mind for future consideration. The Working Group generally agreed with the content of draft article 8.

Article E. Approval of local elements of a group insolvency solution

49. In respect of the approval of a group insolvency solution under draft article E, the Working Group agreed that the group insolvency solution developed in the planning proceeding would require approval by other relevant courts, that the group representative should submit the group insolvency solution to relevant courts for approval, that the entire group insolvency solution should be provided to the court in the approving State, but that approval might relate only to the portion relevant to the creditors in that State. It was acknowledged that the approval process might vary in different States, depending on the requirements of local law — for example, in some States it might be approved by creditors, while in others it might be approved by the court. The Working Group agreed that the draft article should be clarified to reflect that understanding.

Principle 8

50. The Working Group agreed to retain the content of principle 8 and to reassess it in the context of a future iteration of the text.

Chapter 4. Treatment of foreign claims in accordance with applicable law**Articles F and G. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main and main proceedings**

51. After a preliminary discussion of draft articles F and G, there was some general acceptance of the draft text, although different views were expressed as to how the provisions might be interpreted and whether any additional safeguards might be required. One suggestion in that regard was that the relevant safeguards in the recast of the European Insolvency Regulation² might provide some guidance. It was agreed that both paragraphs of draft articles F and G might be developed in tandem, since they were substantially similar. It was also suggested that paragraph 2 of draft articles F and G might need to be further considered in the context of the decisions made with respect to draft articles 7, paragraph 1 and D, paragraph 2. Finally, in the absence of clear indication that this article provided an exception to insolvency laws (for example, priority rights) some raised the issue of whether article F, as currently drafted, was sufficient to allow insolvency representatives to commit to foreign creditors that their treatment would not be worse than they would have received had local proceedings commenced.

² Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

V. Cross-border recognition and enforcement of insolvency-related judgements (A/CN.9/WG.V/WP.138)

Article 1. Scope of application

52. The Working Group expressed a preference in favour of variant 2 of draft article 1. A proposal to delete the phrase “of execution” at the end of paragraph 1 and substitute “where recognition and enforcement are sought” received support.

Article 2. Definitions

(a) “Foreign proceeding”

53. There was agreement to retain paragraph (a) as well as to delete the square brackets and retain the text contained in them, acknowledging that that definition was based on the definition in article 2(a) of the Model Law.

(b) “Foreign representative”

54. The Working Group approved the definition of “foreign representative” as drafted.

(c) “Judgement”

55. After detailed discussion, the Working Group agreed to delete all references to provisional or protective and conservatory measures. A preference was expressed in favour of variant 2 of paragraph (c). With respect to the inclusion of decisions issued by administrative authorities, the Working Group agreed to further consider focusing on the nature of the decision rather than the body issuing it; it was recalled that the Model Law and the Legislative Guide both referred to bodies competent under the insolvency law to supervise proceedings and issue decisions relating to those proceedings. Focusing on the nature of the decision would also facilitate inclusion of decisions that were issued by what might be considered administrative authorities in some States, but which nevertheless might be reviewed and approved by a court, and in some cases related to proceedings that had been recognized under the Model Law. The Secretariat was requested to prepare a revised text based upon those considerations.

(d) “Insolvency-related judgement”

56. The Working Group considered this definition on the basis of documents A/CN.9/WG.V/WP.138 and A/CN.9/WG.V/WP.140. Some support was expressed in favour of the drafting approach adopted in WP.140. There was agreement that “insolvency-related judgements” were judgements that were closely related to foreign proceedings and were issued after commencement of those proceedings. With respect to the draft definition in WP.138, reservations were expressed with respect to the presumption in the second sentence of the chapeau, although support was expressed in favour of the substance of that sentence. Concerning the chapeau in WP.140, there was agreement that there should be some language expressing the relationship between this and other instruments, but that that might be addressed in a separate article rather than in the definition. Some

support was expressed in favour of the approach in WP.140 of specifying that insolvency-related judgements included judgements determining a series of issues.

57. With respect to those issues, some preference was expressed in favour of the approach of WP.140, although concerns were raised as to whether all of the issues listed in draft article 2 (d) of WP.138 had been included in the draft of article 2 (d) proposed in WP.140. In that regard, it was clarified in particular that draft article 2, subparagraph (d)(vii) of WP.138 was not included in WP.140 because of concerns about maintaining consistency with other relevant instruments. In respect of draft article 2, subparagraphs (d)(viii) and (xiii) of WP.138, a proposal was made to combine them into a single subparagraph in the draft definition. There was support in favour of and against retaining the phrase in square brackets in subparagraph (d)(ii). It was explained that draft article 2, subparagraph (d)(v) of WP.140 proposed a compromise which would include both options A and B in the draft text for enacting States to choose the appropriate one.

58. The Secretariat was requested to prepare a single text, possibly with variants, based upon both documents and taking into account the issues outlined above for consideration at a future session of the Working Group.

(e) “Foreign court”

59. The Working Group approved the definition of “foreign court” as drafted.

(f) “Proceeding”

60. The Working Group agreed to delete the definition of “proceeding” but to note that the language relating to an “administrative authority that performs a judicial function” might be useful in respect of other provisions.

Article 3 and 3 bis. International obligations of this State

61. A number of observations and proposals were made with respect to draft articles 3 and 3 bis. They included:

(a) A proposal that the following text be added: “This Law would not apply to judgements or insolvency-related judgements which are governed by any treaty in force or other form of agreement to which both enacting and receiving States are party.”;

(b) To delete the phrase “insolvency-related” in draft article 3 bis;

(c) To delete paragraph 2(b);

(d) To replace:

(i) Paragraph 1 of 3 bis with: “This Law shall not apply to a judgement which is covered by the subject-matter scope of the Hague Convention of 30 June 2005 on Choice of Court Agreements and [*insert the name of any convention on the recognition and enforcement of judgements that might result from the Hague Conference on Private International Law’s working group on the judgements project (“HCCH judgements project”)*]”; and

(ii) Paragraph 2 of 3 bis with: “A judgement is to be treated for the purposes of paragraph 1 of this article as covered by the subject-matter scope of the said

Conventions: (a) even where the particular insolvency-related judgement is not enforceable under either of the Conventions because of the particular circumstances of the case; and (b) where the receiving State has adopted the treaty.”;

(e) A preference was expressed in favour of drafting based upon the final clause of the first sentence of the chapeau of article 2, subparagraph (d) in WP.140; and

(f) To add text along the following lines to the end of paragraph 1 of 3 bis: “or where the provisions on recognition and enforcement of insolvency proceedings apply to that judgement.”

62. In assessing the above proposals, support was expressed in favour of (b), (c) and (f), while strong reservations were expressed in respect of (d)(i). The Working Group agreed to retain both draft articles 3 and 3 bis, with deletion of the phrase “insolvency-related”, deletion of subparagraph 2(b) of 3 bis, and inclusion in square brackets of the text in proposal (f) above.

Article 3 ter. Conflict between the law of this State and the law of the State in which the insolvency-related judgement was issued

63. Given the decision it made in respect of draft article 1, the Working Group agreed to delete draft article 3 ter.

Article 4. Competent court or authority

64. The Working Group approved the substance of draft article 4.

Article 5. Authorization to seek enforcement of an insolvency-related judgement in a foreign State

65. A proposal to replace the phrase “to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency]” with the words “to seek recognition and enforcement of an insolvency-related judgement” received support.

Article 6. Additional assistance under other laws

66. Although there was some support for deleting the phrase at the end of the draft article “under other laws of this State”, after discussion the prevailing view was that the article should be retained as drafted.

Article 6 bis. Public policy exception

67. Various proposals were made in respect of draft article 6 bis. One was to delete the word “manifestly” on the basis that it might set too high a standard for refusal. In response, it was pointed out that “manifestly contrary to public policy” was a phrase found in many international texts and that to delete it in this context would create uncertainty and raise questions of interpretation. The prevailing view was that “manifestly” should be retained. There was general support for retaining “including” rather than “[or]” and for deleting the square brackets around the word. Although there was some support for deleting the phrase “of this State” at the end of the provision in order to encourage a broader interpretation of procedural fairness

without referring to national law, the prevailing view was that that phrase should be retained. After discussion, the Working Group agreed to retain article 6 bis as amended above and to remove the square brackets around it.

Article 7. Interpretation

68. The Working Group approved the substance of draft article 7.

Article 7 bis. Effect and enforceability of an insolvency-related judgement in the State in which it was issued

69. Although there was some support for the deletion of draft article 7 bis, there was support for retaining it on the basis that it represented a compromise reached in the Working Group to focus on the enforceability of a judgement rather than its finality. It was agreed that draft article 7 bis should be retained and the square brackets around it removed. A suggestion to merge draft article 7 bis with draft article 8 bis was widely supported.

Article 8. Application for recognition and enforcement of an insolvency-related judgement

70. The Working Group agreed that paragraph 1 should refer to recognition and enforcement of an insolvency-related judgement, and that the word “certified” in subparagraph 2(a) should be retained and the square brackets around it removed.

71. It was further agreed that in subparagraph 2(b) the focus should be on the enforceability of the judgement. As to the text of that subparagraph, there were suggestions that the word “information” might be too broad and might be replaced with a requirement for evidence or a reliable statement. Concerns were expressed that the requirement to provide information on time limits for seeking review might prove costly for the applicant and was therefore not desirable. The Secretariat was requested to provide a revision of subparagraph 2(b) taking into account those considerations.

Article 8 bis. Postponement or refusal of recognition and enforcement

72. There was broad agreement in the Working Group that draft article 8 bis should be retained and, as noted above, merged with draft article 7 bis. Noting the content of footnote 24, it was agreed that the sentence proposed should be included in the draft article to permit conditional recognition and enforcement of an insolvency-related judgement.

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

73. The Working Group approved the substance of draft article 9, with the understanding that the cross-references might need to be updated in accordance with decisions made at this session, and that references to “recognitions and enforcement” should be made consistent throughout the document.

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

74. With respect to paragraphs (a) and (b), a question was raised as to how they related to some of the provisions already discussed, in particular draft articles 6 bis

and 8 bis. The Working Group agreed that those paragraphs should be retained and considered in the context of a future iteration of the text. The Working Group approved the substance of paragraphs (c) to (g) as drafted.

75. With respect to paragraph (h), a question was raised as to the sequence in which the events referred to occurred and how it would be interpreted, for example, if the insolvency proceeding referred to commenced following recognition but before enforcement of the insolvency-related judgement. It was agreed that that issue might need further consideration by the Working Group in light of a future iteration of the text.

76. The Working Group considered paragraphs (i) and (j) on the basis of documents A/CN.9/WG.V/WP.138 and A/CN.9/WG.V/WP.140. After discussion, it was agreed as follows:

(a) Paragraph (i)(i)(2) in WP.140 relating to judgements on directors' obligations should be included in the draft instrument;

(b) The word "express" should be added before "consent" in paragraph (i)(ii); and

(c) There was a preference for paragraph (j) as drafted in WP.140.

77. The Secretariat was requested to prepare a revised text of draft article 10 containing new variants of paragraphs (i) and (j) based upon those comments, as well as including paragraph (k) of WP.140.

Article 10 bis. Equivalent effect

78. Noting that draft article 10 bis was based on article 13 of the text emanating from the fifth meeting of the HCCH judgements project and that it might be useful to include in the draft text, the Working Group agreed to retain draft article 10 bis and remove the square brackets around the text.

Article 11. Protection of creditors and other interested persons

79. The Working Group agreed to consider this draft article in the context of a future iteration of the text.

Article 12. Severability

80. The Working Group agreed to retain draft article 12 and to remove the square brackets around the text.

81. In response to a suggestion to add a new provision along the lines of article 12 of the HCCH judgements project, it was observed that that issue might be partly addressed by draft article 1, but could be further considered in the context of a revised text.

Article 13. Provisional relief

82. The Working Group agreed to retain draft article 13. It was noted that the following observations might need to be considered in preparing a revised text:

(a) Including a reference to the party who might request that relief;

(b) The procedure for obtaining relief, including whether there would be a hearing and requirements for notice (noting the content of draft article 13(2)); and

(c) The need for additional examples including orders not addressed to any particular party but rather in respect of assets.

83. At the conclusion of its deliberations on cross-border recognition and enforcement of insolvency-related judgements, the Working Group requested the Secretariat to prepare a revised version of the draft instrument for consideration at a future session.

Article H

84. After discussion, there was general acceptance to retain draft article H for further review, perhaps considering the relationship between the relief provided in that article and draft articles 7 and D, as also noted above in respect of draft articles F and G.

85. At the conclusion of its discussion of document A/CN.9/WG.V/WP.137/Add.1, the Secretariat was requested to prepare a set of draft model provisions that addressed both the inbound and the outbound elements of the draft instrument; the question of whether those provisions would be included in any addendum to the Model Law or the Legislative Guide would be considered at a future date.

VI. Obligations of directors of enterprise group companies in the period approaching insolvency (A/CN.9/WG.V/WP.139)

86. The Working Group noted the revisions to the text provided in document A/CN.9/WG.V/WP.139 and agreed to keep it under consideration pending further development of the work on enterprise group insolvency. A number of specific drafting suggestions were made, including that:

(a) Recommendations 269 and 270 should use the same phrase as recommendation 255 “from the point in time referred to in recommendation 257” rather than referring to “in the period approaching insolvency”;

(b) Recommendation 267 (a) should replace the word “director” with a reference to the person specified in recommendation 258;

(c) The words in square brackets at the end of recommendation 268 (b) should be moved to 268 (f) to include in that subparagraph a consideration of whether formal proceedings should be commenced;

(d) The commentary should include a reference to the instrument being developed on enterprise groups and suggest that directors be encouraged to have reference to it;

(e) The last sentence of paragraph 7 of the commentary should include material explaining who might benefit from the safeguards, such as creditors and other stakeholders; and

(f) The square brackets in paragraphs 10 and 27 of the commentary could be removed.

VII. Other business

87. Noting the importance of micro, small and medium-sized enterprise (MSME) insolvency and the wide support expressed in the Working Group for work to be undertaken on that topic, the Working Group agreed to recommend that the Commission clarify, at its forty-ninth session, the mandate given at its forty-seventh session³ to Working Group V as follows:

“Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed.”

88. The Working Group was advised that a meeting of the open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues and to study adoption of the model law (A/CN.9/798, para. 19) had taken place. A list of issues to frame the preparation of a report to the Working Group was outlined. Participants at the meeting were requested to advise the Secretariat at their earliest convenience of their interest in contributing to the development of that study. The Secretariat will provide updates on progress with the development of that study as appropriate.

³ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 156.