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Report of Working Group V (Insolvency Law) on the work of its fiftieth session (Vienna, 12-16 December 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 groups[1] 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. 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), forty-eighth (December 2015) (A/CN.9/864) and forty-ninth (May 2016) (A/CN.9/870) sessions and continued its deliberations at the fiftieth session.

B. Recognition and enforcement of insolvency-related judgments

2. At its forty-seventh session (May 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-related judgments. The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864) and forty-ninth (May 2016) (A/CN.9/870) sessions and continued its deliberations at the fiftieth session.

II. Organization of the session

3. Working Group V, which was composed of all States members of the Commission, held its fiftieth session in Vienna from 12-16 December 2016. The session was attended by representatives of the following States Members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte D'Ivoire, Czechia, Denmark, El Salvador, France, Germany, Greece, Hungary, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Libya, Mexico, Nigeria, Pakistan, Panama, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

4. The session was attended by observers from the following States: Algeria, Croatia, Cyprus, Dominican Republic, Estonia, Iraq, Lithuania, Malta, Morocco, Netherlands, Portugal, Republic of Moldova, Slovakia, Tunisia and Viet Nam.

5. The session was attended by observers from the European Union.

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

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

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[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)).

(b) *Intergovernmental organizations:* Asian-African Legal Consultative Organization (AALCO); and

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), European Investment Bank (EIB), European Law Institute (ELI), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA) and Union Internationale des Avocats (UIA).

7. The Working Group elected the following officers:

Chairman: Wisit Wisitsora-At (Thailand)

Rapporteur: Hugo Sánchez (Chile)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.141);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions (A/CN.9/WG.V/WP.142);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: commentary and notes on the draft legislative provisions (A/CN.9/WG.V/WP.142/Add.1);

(d) A note by the Secretariat on the recognition and enforcement of insolvency-related judgments: draft model law (A/CN.9/WG.V/WP.143); and

(e) A note by the Secretariat on the recognition and enforcement of insolvency-related judgments: commentary and notes on the draft model law (A/CN.9/WG.V/WP.143/Add.1).

9. 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 recognition and enforcement of insolvency-related judgments; and (b) facilitating the cross-border insolvency of multinational enterprise groups.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

10. The Working Group decided to commence its deliberations on the recognition and enforcement of insolvency-related judgments on the basis of documents A/CN.9/WG.V/WP.143 and A/CN.9/WG.V/WP.143/Add.1, followed by the cross-border insolvency of multinational enterprise groups on the basis of documents A/CN.9/WG.V/WP.142 and A/CN.9/WG.V/WP.142/Add.1. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.143 and Add.1)

Article 1. Scope of application

11. The Working Group approved the substance of draft article 1.

Article 2. Definitions

12. The Working Group agreed to defer its consideration of the definitions in draft article 2 until it had reviewed the remaining text of the draft model law.

Article 3 and 3 bis. International obligations of this State

13. The Working Group supported the substance of draft article 3.

14. The Working Group expressed support in favour of retaining draft article 3 bis with the square brackets around the phrase "in force" removed and the text retained.

15. A proposal was made to add the following additional paragraph to article 3 bis: "A treaty applies [to a judgment] for the purposes of paragraph 1 if it is a treaty to which this State is a party, and is one which is open to accession to the State in which the judgment was rendered." That new language was proposed with a view to clarifying that the disconnection clause in the draft model law would apply if only the receiving State was a party to the overlapping international treaty, but the State of origin had the opportunity to accede to that treaty. It was further suggested that such a solution would preserve the integrity of the systems of recognition and enforcement adopted in possible conflicting international treaties without posing an insurmountable obstacle for the actual implementation of those systems in relation to the two States concerned by the cross-border enforcement of the judgment. That proposal received some support, however, in response several reservations were expressed, including that the treaty would have to be in force and it would not suffice for the originating State to have the opportunity to accede to the treaty that was thought to be overlapping. It was further observed that since a treaty would take priority over a model law in any event, article 3 would be sufficient to prevent any such conflicts.

16. A proposal was made to merge draft articles 3 and 3 bis into one. That proposal received some support, but no specific text was suggested.

17. After discussion, the Working Group agreed that both draft articles 3 and 3 bis should be retained, that the square brackets surrounding the phrase "in force" should be removed and the text retained, and that the proposed text for an additional paragraph in article 3 bis be retained in square brackets.

Article 4. Competent court or authority

18. The issue was raised as to whether article 4 should be worded in the form of a traditional attributive clause of competence, for example: "A request or application for recognition or enforcement of an insolvency-related judgment shall be submitted to the [*insert name of court*]."

19. The Working Group agreed that the text of article 4 should be retained as drafted, but that further consideration would need to be given to how the article would apply in cases where the foreign judgment was raised as a defence or other incidental matter in a court other than a court specified as competent to deal with these matters in draft article 4.

20. A proposal was made to add a second element to article 4 along the following lines: "A court shall also have jurisdiction in proceedings where the outcome depends

on the determination of an incidental question of recognition or where that question is raised as a defence.” The Working Group agreed in principle to that text as an addition to the existing text of draft article 4.

Article 5. Authorization to seek recognition and enforcement of an insolvency-related judgment in a foreign State; Article 6. Additional assistance under other laws; and Article 7. Public policy exception

21. The Working Group approved the substance of draft articles 5, 6 and 7.

Article 8. Interpretation

22. Although a proposal to delete the phrase “and the observance of good faith” was made, the Working Group agreed to retain article 8 as drafted.

Article 9. Affect and enforceability of an insolvency-related judgment in the originating State

23. The Working Group agreed to revise paragraph 1 in line with article 4 (3) of the most recent draft of the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments (the draft Hague Conference text), which read as follows: “A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.”

24. With respect to paragraph 2, after discussion, the prevailing view was that variant 1 should be retained.

Article 10. Application for recognition and enforcement of an insolvency-related judgment

25. With respect to paragraph 1, various views were expressed regarding the phrase “including by way of defence” at the end of the paragraph. One view was that that drafting was sufficient to enable the issue of recognition to be raised by way of defence before both a court of insolvency jurisdiction and of civil jurisdiction. Another view was that it might be better to delete that phrase and reflect its contents in a separate provision along the lines of: “The recognition of an insolvency-related judgment may be raised by an insolvency representative or any other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment by way of defence in the course of proceedings taking place in the court referred to in article 4 or in another court of this State, and should be accompanied by the documents specified in article 10 (2).” Support was expressed in favour of having such a separate provision and limiting it to recognition of the insolvency-related judgment. It was observed that such a provision would have to be aligned with article 4 or that text along the lines of article 11 (d) might be appropriate in resolving the issue. The Working Group agreed that such a provision needed further consideration.

26. The Working Group expressed its support for variant 2 of subparagraph 2 (b). Support was also expressed in favour of deleting the square brackets and retaining the text “as required by the law of this State” in subparagraph 2 (c) and retaining subparagraph 2 (d) without square brackets.

Article 11. Decision to recognize and enforce an insolvency-related judgment

27. Some support was expressed in favour of replacing subparagraph (a) with a cross-reference to article 9 and for aligning subparagraph (b) with the definition of “foreign representative” in article 2 (b) and thus broadening the reference to “person or body.”

28. With respect to subparagraph (d), there was support for retaining the phrase in square brackets, but keeping it in square brackets subject to resolving the drafting of article 4, as noted above.

29. A question was raised as to whether recognition of the proceeding to which the insolvency judgment was related should be a prerequisite for recognition of that insolvency-related judgment. In response, it was observed that such a prerequisite was not required and that any question concerning the legitimacy of the proceeding to which the insolvency judgment was related should be addressed in terms of the grounds for refusal in article 12. It was also observed that there should be the possibility of refusing recognition if the proceeding to which the insolvency judgment was related raised issues of public policy in the receiving State. After discussion, it was agreed that such a prerequisite ought not to be required for recognition of the insolvency-related judgment.

Article 12. Grounds to refuse recognition and enforcement of an insolvency-related judgment

30. A proposal to use mandatory rather than permissive text in the chapeau was not taken up by the Working Group.

Subparagraph (a)

31. There was support for retaining subparagraph (a) as drafted on the basis that it reflected the equivalent provisions of the draft Hague Conference text. It was agreed that explanations in respect of the scope and meaning of the subparagraph, in particular relating to “notification” and “appearance”, should be included in the guide to enactment of the model law.

Subparagraph (b)

32. One view was that the words in square brackets should be deleted, while another view was that that phrase should be retained. Although it was noted that that phrase had been deleted in the most recent version of the draft Hague Conference text, after discussion, there was no agreement by the Working Group, and subparagraph (b) was retained as drafted, but placed in square brackets for future consideration.

Subparagraphs (c) and (d)

33. The Working Group agreed to delete the word “prior” in subparagraph (c), and in subparagraph (d) to retain all of the text in square brackets and delete the brackets, and to align the drafting with article 7 (1)(f) of the draft Hague Conference text, that is, “between the same parties on the same subject matter.” A suggestion to add a reference to “the same subject matter” in subparagraph (c) was not supported, nor was a proposal to delete the reference to “the same subject matter” in subparagraph (d).

Subparagraph (e)

34. Support was expressed in favour of the substance of subparagraph (e), and of retaining all of the text without square brackets. It was observed that one issue to be kept in mind was how the current draft text would operate in the context of enterprise groups, where there might be a question not only of interference with the debtor’s insolvency proceedings, but also with planning proceedings in which the debtor may be participating in order to develop a group solution.

Subparagraph (f)

35. Some concerns were expressed both with respect to whether the subparagraph was too broadly or too narrowly drafted. An additional concern expressed was that the subparagraph should be deleted in the interests of limiting possible exclusions to recognition in order to achieve the goal of the draft text; reference was made to the limited grounds for refusal in Article V (2) of the New York Convention (1958). Although those concerns received some support, the Working Group agreed after discussion to retain the text of subparagraph (f) as drafted. It was observed that the guide to enactment might clarify that different treatment of creditors did not necessarily equate with unfair treatment of creditors.

Subparagraphs (g)(i) to (iii)

36. The Working Group agreed that those provisions should be redrafted as proposed in note 34 of A/CN.9/WG.V/WP.143/Add.1 so as to avoid the use of a double negative in the chapeau. A proposal to delete subparagraphs (g)(i) to (iii) did not receive sufficient support.

37. Concern was expressed regarding the meaning of the phrase “express consent” in subparagraph (g)(i), and whether it meant, for example, that there was explicit consent prior to the proceedings, explicit consent during the proceedings, tacit consent, or submission to the proceedings. A proposal to clarify the meaning of “express consent” was to adopt drafting based upon article 12 (a)(i), along the following lines: “exercise jurisdiction based on the party entering an appearance and presenting their case without contesting jurisdiction in the originating court, provided that the law of the originating State permitted jurisdiction to be contested.” Although it was noted that article 5 (1)(e) of the draft Hague Conference text referred to express consent, the drafting proposal received some support. After discussion, it was agreed that the word “express” should be placed in square brackets pending further consideration, including of how that term might be explained in the guide to enactment.

38. A proposal was made to amend subparagraph (g)(ii) to read: “Exercised jurisdiction on a basis on which a court in this State may recognize and enforce the insolvency-related judgment.” Although some support was expressed for that proposal, after discussion, it was agreed that it should not be adopted, and that subparagraph (g)(ii) should be retained as drafted.

39. Although there was some concern that subparagraph (g)(iii) might appear somewhat redundant in light of subparagraph (g)(ii), there was support for retaining them as distinct subparagraphs, even if there was a degree of overlap between them. A view was expressed that subparagraph (g)(iii) granted States a separate ground to refuse recognition of decisions based on exorbitant grounds of jurisdiction. A different view was that subparagraph (g)(iii) did not provide grounds for refusal additional to those in subparagraph (g)(ii).

Subparagraphs (g)(iv) to (v)

40. A number of concerns were expressed with respect to subparagraphs (g)(iv) and (v) including: their relationship with articles 21 (g) and 25 of the Model Law on Cross-Border Insolvency; that subparagraph (g)(iv) was limited to the party against whom the judgment was issued when there could be situations where the judgment related to insolvency proceedings concerning the judgment creditor and not only the judgment debtor; and that the subparagraphs might be better expressed as a separate provision rather than as part of subparagraph (g). One solution to clarify the relationship of these subparagraphs with the Model Law might be to preface the subparagraphs with a qualification along the lines of: “Without limiting any form of

cooperation under the Model Law on Cross-Border Insolvency". No clear preference was expressed as between variants 1 and 2 of subparagraph (g)(v). The Working Group was encouraged to develop a proposal on how the two subparagraphs might be redrafted to reflect those concerns.

41. After further discussion, there was support for a proposal to delete both subparagraphs and insert a separate draft article along the following lines: "For greater certainty, the relief available under [*insert a cross-reference to the legislation enacting article 21 of the Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment. It was observed that clarification might be required of whether the reference to "judgment" was to an insolvency-related judgment.

Subparagraph (h)

42. There was support for a proposal to adopt and revise the first sentence of subparagraph (h) as follows: "The judgment is related to a proceeding that has not been, could not be or could not have been recognized under the [*the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*]."

Article 13. Equivalent effect

43. The Working Group agreed to retain article 13 as drafted.

Article 14. Severability

44. A proposal to replace "shall" with "may" did not receive support and article 14 was retained as drafted.

Article 15. Provisional relief

45. The Working Group agreed to remove the square brackets and to retain article 15 as drafted.

Additional matters

46. The issue raised at the end of A/CN.9/WG.V/WP.143/Add.1 relating to article 12 of the draft Hague Conference text was not taken up by the Working Group.

47. A proposal to add an article establishing a procedure for a party in interest to object to an application for recognition and for the receiving court to request additional information from, and to hear, that party on the merits was not taken up.

Article 2. Definitions

(a) "Foreign proceeding"

48. The Working Group agreed that the text should recognize a foreign judgment related to both a foreign insolvency proceeding and an insolvency proceeding taking place in the receiving State. To give effect to that decision, the definition of "foreign proceeding" was to be changed along the lines noted in note 2 (i) of A/CN.9/WG.V/WP.143/Add.1.

(b) "Foreign representative" and (d) "Foreign court"

49. The Secretariat was requested to consider the two definitions in the context of the change made to article 2 (a), as well as the implications of that change throughout the text, and to suggest appropriate revisions for future consideration by the Working Group.

(c) “Judgment”

50. A number of proposals were made with respect to the definition of “judgment”: (a) to delete “whatever it may be called”; (b) to delete the language in square brackets at the end of the definition; (c) to add “on the merits” after “any decision”; and (d) to add a specific exclusion to the end of the definition in the following terms: “An interim measure of protection is not a judgment.”

51. In support of the proposal to include “on the merits” and to expressly exclude interim measures, reference was made to the decision of the Working Group at its forty-ninth session to “delete all references to provisional or protective and conservatory measures” (A/CN.9/870, para. 55) from the draft text. It was suggested that although all such references had been deleted from the text contained in A/CN.9/WG.V/WP.143, specific language was required in the text to ensure that such measures were not included. A further reason for excluding provisional measures was said to be that their inclusion might be inconsistent with the Model Law on Cross-Border Insolvency and might operate to discourage States from enacting that text.

52. Although some support was expressed in favour of including “on the merits”, concerns were expressed that many judgments issued in the course of insolvency proceedings might not be considered to be judgments on the merits, but would nevertheless be judgments that were important to the conduct of the insolvency proceedings and that should be recognized under this draft instrument. In addition, the term “on the merits” was thought not to provide sufficient legal clarity to avoid litigation.

53. As to the addition of text specifically excluding interim measures, while there was some support for including it, there was considerable support for not adding that phrase to the definition. In support of not including the text, it was observed that many key judgments issued in the course of insolvency proceedings might be considered to be of a provisional nature rather than final judgments; and excluding such decisions from this draft instrument would greatly reduce its usefulness. Further, it was observed that, in any event, in accordance with article 9 (1), such a decision could have no greater effect in the receiving State than it had in the originating State.

54. The Working Group agreed that there was no clear support to delete “whatever it may be called” but that the phrase in square brackets at the end of the definition should be deleted. After discussion, the Working Group agreed that in order to facilitate further consideration at a future session, both the phrase “on the merits” and the sentence concerning interim measures should be added to the text and placed in square brackets. The Working Group did not take up a proposal to consider a definition of “judgment” as follows: “Judgment means any decision or order issuing from a foreign court in a duly recognized foreign proceeding.”

(e) “Insolvency-related judgment”

55. To reflect the change made to the definition in subparagraph (a), it was proposed that this definition should be of “an insolvency-related foreign judgment”. That proposal received some support.

56. Another proposal was to replace subparagraph (e) with the following:

> “(e) ‘Insolvency-related judgment’, in respect of a judgment, has the meaning given by Article 2A.

"Article 2A

"1. A judgment is 'insolvency-related' if it satisfies the following conditions:

"(a) It has a connection with a foreign proceeding;

"(b) It was given on or after the commencement of the foreign proceeding to which it is connected;

"(c) It serves the interests of the general body of creditors; and

"(d) The proceedings from which the judgment derives could not have been brought but for the insolvency or those proceedings find their source in rules specific to insolvency law.

"2. Insolvency-related judgments include, inter alia, judgments:

"(i) *(insert subparagraphs 2 (e)(i)-(v) in A/CN.9/WG.V/WP.143)*."

57. After discussion, the proposal set out in the paragraph above was amended as follows: (a) replacing "general body of creditors" in subparagraph (c) with "insolvency estate" and (b) replacing "rules specific to insolvency law" in subparagraph (d) with "the law related to insolvency." A further amendment to the proposal was to add text to allow States the flexibility to add other examples of insolvency-related judgments to the non-exhaustive list referred to in paragraph 2 of that proposal.

58. In reviewing the text of the definition in A/CN.9/WG.V/WP.143 and the proposal, a number of questions were raised with respect to the criteria for a judgment to be insolvency-related: (a) should the connection to insolvency proceedings be a close one?; (b) were judgments issued on commencement (e.g. the decision commencing insolvency proceedings), as well as after commencement to be included?; (c) which insolvency estate was being referred to in subparagraph (c) of the revised proposal?; and (d) should those criteria be formulated as conditions or factors to be taken into account in determining whether the definition was satisfied?

59. After further consideration, the Working Group heard a proposal for a new approach to the definition of "insolvency-related judgment" in article 2 (e), which provided for two alternatives as follows:

"2 (e): 'Insolvency-related judgment' means:

[***"Alternative A*:**

"a judgment that is related to an insolvency proceeding and was issued after the commencement of that proceeding.

"Insolvency-related judgments include, inter alia, judgments determining whether:

"(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;

"(ii) A transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate;

"(iii) A representative of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate;

"(iv) Sums not covered by (i) or (ii) are owed to or by the debtor or its insolvency estate; or

"(v) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved.

"For the purposes of this definition, an 'insolvency-related judgment' includes instances in which the cause of action was pursued by:

"(i) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

"(ii) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

"and the judgment on that cause of action would otherwise be enforceable under this Law.]"

[***"Alternative B*:**

"a judgment that satisfies the following conditions:

"(i) It has a connection with an insolvency proceeding;

"(ii) It was given on or after the commencement of the insolvency proceeding to which it is connected;

"(iii) It affects the interests of the insolvency estate; and

"(iv) The proceedings from which the judgment derives could not have been brought but for the insolvency or those proceedings find their source in law related to insolvency.

"Insolvency-related judgments include, inter alia, judgments determining whether:

"(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;

"(ii) A transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate;

"(iii) A representative of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate;

"(iv) Sums not covered by (i) or (ii) are owed to or by the debtor or its insolvency estate, and the cause of action relating to the recovery or payment of those sums arose after insolvency proceedings commenced in respect of the debtor; or

"(v) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved.

"For the purposes of this definition, an 'insolvency-related judgment' includes instances in which the cause of action was pursued by:

"(i) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

"(ii) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

"and the judgment on that cause of action would otherwise be enforceable under this Law.]"

60. Although the view was expressed that including those two alternatives could provide a basis for the future deliberations of the Working Group, concerns were also expressed that the Working Group should continue to attempt to resolve the differences between the two alternatives and seek to achieve consensus on a single definition. After discussion, there was support to add the two proposals and to request the Secretariat to analyse the differences between them with a view to providing a consolidated alternative text for future consideration.

V. Cross-border insolvency of multinational enterprise groups: draft legislative provisions (A/CN.9/WG.V/WP.142 and Add.1)

61. The Working Group agreed to commence its discussions on Chapter 2 of the text contained in A/CN.9/WG.V/WP.142.

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

62. The Working Group expressed a preference for variant 2 of draft article 3, and supported the substance of the text.

Article 4. Cooperation to the maximum extent possible under article 3

63. It was noted that subparagraph (f) would need to be considered in the context of the Working Group's conclusion on draft article 21. It was proposed that some additional matters might be added to the draft article, including: (a) recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and (b) approval of the treatment of intergroup member claims, including the possibility of mediation or arbitration to resolve such claims.

64. Support was expressed for including a reference to mediation and arbitration, for variant 2 of subparagraph (g) and for removing the square brackets in subparagraph (b) and retaining the text. A reference to cross-filing and intergroup member claims was also supported, with the suggestion that reference to those matters might be more appropriate in a guide to enactment.

Article 5. Effect of communication under article 3

65. The Working Group supported the substance of draft article 5 with the second sentence of subparagraph (f) being moved to the chapeau. A suggestion was made that the title might be adjusted to include the words "limitation of the".

Article 6. Coordination of hearings

66. The Working Group supported the substance of draft article 6.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

67. The Working Group supported the substance of draft article 7.

Article 7 bis. Cooperation and direct communication between a [*insert the title of a person or body administering a reorganization or liquidation with respect to any enterprise group member under the law of the enacting State*]**, foreign courts, foreign representatives and a group representative**

68. The Working Group supported the substance of draft article 7 bis, with removal of the square brackets, noting that the reference to article 1 might need to be reconsidered when the substance of article 1 had been agreed.

Article 8. Cooperation to the maximum extent possible under articles 7 [and 7 bis]

69. The Working Group adopted the substance of draft article 8, agreeing to remove the square brackets in the chapeau and subparagraph (e), and adopting variant 2 of subparagraph (b). With respect to subparagraph (c), it was observed that that matter was typically addressed in cross-border insolvency agreements and might not be required in article 8. Since no further comment was made, the substance of subparagraph (c) was retained and the square brackets removed.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

70. The Working Group agreed to the substance of variant 2 of draft article 9.

Article 10. Appointment of a single [or the same] insolvency representative

71. The Working Group agreed to delete the remainder of paragraph 1 after the words “different States”; to retain “or the same” without square brackets; and to redraft paragraph 2 in language appropriate for a model law.

Chapter 3. Conduct and recognition of a planning proceeding

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

72. There was agreement in the Working Group that the text should not use the terms “solvent” or “insolvent” (thus the phrase “whether solvent or insolvent” should be deleted in paragraph 1), but should rather focus on group members with respect to which insolvency proceedings had commenced and would thus be, in keeping with the language of part 3 of the Legislative Guide, “subject to insolvency proceedings”. It was further agreed that the text should focus on forms of participation available to those subject to insolvency proceedings and to those not subject to insolvency proceedings; in the case of the latter, they should not be prevented from taking part in a group insolvency solution, but the text should clarify the manner in which other provisions of the text might apply to them, particularly draft articles 13, 15 and 17.

73. There was support for variant 2 of paragraph 2 with the following changes: (a) “merely implies” should be replaced with “merely means”; and (b) the word “otherwise” should be deleted. Other proposals were: (a) to retain the formulation from variant 1 that “participation does not subject the group member to the jurisdiction of the courts of this State”; and (b) that the phrase “unless otherwise provided in this law” should be added to the beginning of variant 2.

74. With respect to paragraph 3, there was agreement to delete the word “insolvent” and to revise the drafting along the following lines: “may participate in a proceeding under paragraph 1 unless a court in that other State precludes it from so doing.”

Article 12. Appointment of a group representative

75. Some preference was expressed by the Working Group in favour of variant 2. Suggestions were made to improve that text including by: (a) clarifying the procedure through which the group representative was appointed; (b) ensuring that the group representative was authorized to not only seek recognition and participate in a foreign proceeding, but also to seek relief; and (c) expanding the text to enable a group representative to be able to participate in a foreign proceeding relating to a group member not participating in the planning proceeding.

76. The Secretariat was requested to provide a revised text of draft article 12 for future deliberations.

Article 13. Relief available to a planning proceeding

77. In terms of paragraph 1, it was agreed that the two square bracketed phrases in the opening lines should both be retained and the brackets removed, and that the references to insolvent and solvent group members should be deleted. In discussing the group member to which the provision should apply, the Working Group considered the broader question of what constituted participation for the purposes of the draft text. It was observed that the two main issues to be examined were what participation would entail and which group members could participate and in what manner.

78. On the first issue, it was observed that participation should be voluntary (including the right to opt out at a later stage) and should not involve submission to the jurisdiction of the planning court. Further, participation should include the following rights: (a) to appear; (b) to make submissions; (c) to be heard; (d) to participate in negotiations; (e) to be notified of progress made in proceedings; (f) to enter into agreements or settlements, including a group insolvency solution; and (g) to seek approval of a group insolvency solution in the relevant jurisdiction.

79. On the second issue, it was observed that there were at least three modes of participation: (a) as a group member not subject to insolvency proceedings anywhere, including as part of the group insolvency solution process; (b) as a group member for which the insolvency proceedings commenced become the planning proceeding; and (c) as a group member for which insolvency proceedings are commenced in another State (e.g. based on centre of main interests (COMI) or establishment). For those in (a), participation might entail the rights set out in paragraph 76 above. Those in (b) would be subject to the jurisdiction of the court conducting the planning proceeding. For those in (c), the group member would have various rights as outlined above, but the court of the planning proceeding may be able to stay both individual enforcement actions against the assets of that group member, as well as continuation or commencement of insolvency proceedings sought to be opened with respect to that group member in the State of the planning proceeding, where required to assist the development of the group insolvency solution. With respect to (c), it was observed that additional measures may be required in chapter 2 to enable the foreign court in the COMI State to accede to the relief suggested in the State of the planning proceeding.

80. There was agreement that relief under article 13 was available exclusively in the planning proceeding State.

81. In order to clarify the group members covered by article 13, a suggestion was made to revise paragraph 1 by including the phrase "subject to and participating in" before both references to "planning proceeding". A different view was that paragraph 1 should only refer to group members subject to insolvency proceedings.

82. A question was raised as to whether another group member with its COMI in the State of the planning proceeding would be considered to be subject to or participating

in the planning proceeding. It was observed that, to some extent, the answer may depend upon the availability of procedural coordination as recommended in part 3 of the Legislative Guide.

83. In respect of subparagraph 1 (c), support was expressed in favour of retaining the word “any” without square brackets and deleting the phrase “in this State”. Further, in respect of subparagraph 1 (g), there was support for the suggestion to delete the word “existing” and the word “continued”.

84. In respect of paragraph 2, some support was expressed in favour of retaining the text in the second set of square brackets on the basis that it would be easier to determine than the test in the first option. It was observed that the notion of relief interfering with the administration of a proceeding from article 15 (4) might provide a better test for paragraph 2.

85. With respect to the structure of the text, it was suggested that it might be preferable to arrange the provisions to focus first on the planning proceeding and the provision of relief in the State of that proceeding, as well as the ability of the group representative to seek relief in support of that proceeding, then to deal with recognition issues and, separately, with the rights of other group members in the State of the planning proceeding and in foreign States. A related proposal was to prepare a separate provision dealing with those group members not subject to insolvency proceedings.

Article 14. Recognition of a planning proceeding

86. In respect of paragraph 1, there was support for removing the brackets and retaining the phrase “in this State”.

87. With regard to paragraph 2 (a), some slight preference was expressed for retaining the phrase “designated as a planning proceeding” and deleting the square brackets.

88. In paragraph 3 (a), it was suggested that “has agreed to participate” should be changed to “is participating or has participated”; another view was that the more flexible standard of “has agreed to participate” should be retained in order to accommodate situations such as where recognition was required as a matter of urgency to preserve assets before group members had actually participated. A concern was expressed with regard to paragraph 3 (b) that such a requirement could become burdensome and the information outdated. In respect of paragraph 3 (c), it was agreed to retain the text at the end of the paragraph and remove the square brackets.

89. After discussion, it was agreed that the focus should be upon providing evidence of which group members were participating in the planning proceeding at the time of the application for recognition without that affecting the question of whether such a participating member might opt out at some future point. The evidence might relate to agreement to participate and the exercise of some other element of participation, such as the right to appear and be heard. It was also agreed that the question of group members opting in and out of participation might need to be addressed separately.

Article 15. Interim relief that may be granted upon application for recognition of a planning proceeding

90. The Working Group agreed to return to article 15 after considering the articles on the substance of the recognition process.

Article 16. Decision to recognize a planning proceeding

91. Noting that there was no specific public policy exception in the draft text, and that the need for such an article might depend on the form in which the text was adopted, the Working Group agreed that the text should be subject to a public policy exception.

92. In response to a question as to whether a planning proceeding and a main proceeding were synonymous, it was recalled that the definition of "planning proceeding" in draft article 2 required that it be a main proceeding. The added element that it was to be the proceeding in which the group insolvency solution was to be developed was noted.

Article 17. Relief that may be granted upon recognition of a planning proceeding

93. There was some support for the suggestion that the phrase "or at any time thereafter" should be added after "planning proceeding" at the end of the first phrase in paragraph 1. Another suggestion was that the party requesting relief should be broader than the "group representative". In addition, so as to align paragraph 1 with the text approved in respect of draft article 13, there was support for retaining both texts in square brackets in paragraph 1 and removing the brackets. It was agreed that appropriate relief under this article would be the relief provided under article 13 and that it might need to be specified in this article rather than relying on the cross-reference as currently drafted. Further, text limiting the available relief to participating group members might need to be added to the provision. In an additional effort to align the text with that of article 13, it was agreed that the words at the end of the chapeau should be adjusted to read, "may grant any of the following relief".

94. It was observed that relief might be required at three different points in the process to develop a group insolvency solution: (a) the point at which the court is aiming to freeze the situation and preserve the integrity of the assets of a participating group member whilst enabling it to carry out normal business activities; (b) the point at which creditors would be notified of the planning proceeding, of the need to make claims and, following development of the group insolvency solution, the seeking of approval; and (c) following voting on a group insolvency solution, its implementation. It was agreed that those three stages should be borne in mind when developing the relief provisions of the draft text.

95. With respect to paragraph 2, concern was expressed that the measures contained in it related only to the time after approval of a group insolvency solution. A different view was that such measures might apply earlier in the proceeding and that to remove the paragraph from article 17 might be premature at this stage. It was observed that paragraph 2 was similar to article 13 (1)(e), and that while 13 (1)(e) was subject to the qualifications present in the chapeau of article 13, article 17 (2), as a separate paragraph, was not subject to those conditions, although they were replicated in the chapeau of article 17. It was agreed to reconsider placement of paragraph 2 once the Working Group had reviewed the remainder of the text. The question of which creditors' interests would need to be protected could also be considered at a later stage.

Article 18. Participation of a group representative in a proceeding [under [*identify laws of the enacting State relating to insolvency*]][in this State]

96. Although there was some support for a suggestion to broaden the ability to participate to any proceeding concerning an enterprise group member by deleting the phrase "that are participating in the planning proceeding", there were concerns that that change might go too far and that further consideration of the proposal was

required. The Working Group agreed to retain the text as drafted for future consideration.

97. There was some support for expanding article 18 to include all types of proceeding, although it was noted that, if that were to be done, the article would need to be aligned with article 12.

Article 19. Protection of creditors and other interested persons

98. In respect of paragraph 1, there was support for the suggestion that the phrase "including the debtor" should be replaced by a reference to the group member subject to the relief to be granted. A proposal to add a reference in paragraph 2 to the provision of security as a specific example of the conditions that might be granted was supported.

Article 20. Approval of local elements of a group insolvency solution

99. The Working Group agreed to keep the reference to establishment and remove the square brackets in paragraphs 1 and 4 on the basis that there may be situations where there was a need to approve elements of a group insolvency solution in a jurisdiction where a relevant group member had an establishment; however, that was not to suggest that that approach would be required in all situations. In addition, there was support to add a reference in paragraph 1 to the group member participating in the planning proceeding and to remove the square brackets around that phrase in paragraph 4 and retain the text.

100. With respect to paragraph 4, a proposal was made to replace the phrase "be approved and by whom" at the end of the paragraph with "take effect". A similar proposal was to replace the remainder of the final sentence after the phrase "in that situation" with the following: "the relevant elements of the group insolvency solution may be made binding and effective as required by local law". A third proposal was to delete paragraph 4 entirely. After discussion, there was some support for the second proposal, with further guidance to be provided in a guide to enactment on what that requirement might mean in practice.

Article 15. Interim relief that may be granted upon application for recognition of a planning proceeding

101. There was agreement to align paragraph 1 of article 15 with the text approved in respect of draft articles 13 and 17 by retaining both phrases in square brackets and removing the brackets. It was also agreed that text limiting the available relief to participating group members might need to be added to the provision. With respect to the relevant subparagraphs of article 13 (1), inclusion of all subparagraphs with the exception of subparagraph (e) received varying degrees of support. It was noted that subparagraph (e) was closely related to article 17 (2) and could be further considered in light of the comments made in respect of that article above. The need to ensure the alignment of the relief provisions was noted, as was the need to consider whether additional forms of interim relief might be required.

Chapter 4. Treatment of foreign claims in accordance with applicable law

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

102. The Working Group was of the general view that the text of draft article 21 was acceptable. There was agreement that, in response to the question raised in note 54 of A/CN.9/WG.V/WP.142/Add.1, the protections included in the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on

insolvency proceedings (recast) were too cumbersome and should not be included in this text. A proposal to add a sentence along the following lines at the end of paragraph 1 received support: "Such undertaking shall be subject to the formal requirements, if any, of the State of the opening of the planning proceeding and shall be enforceable and binding on the insolvency estate." Some concern was expressed as to whether that additional text should be limited to the planning proceeding, since article 21 was intended to apply more broadly.

103. Additional matters were raised in respect of which the text might require more detail, including: (a) the procedures that might be required before the court decided to stay or decline to open the non-main proceedings under paragraph 2; and (b) whether this drafting was sufficiently broad to apply in the case of a debt restructuring in addition to sale of assets in a global distribution.

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

104. Concerns were expressed with respect to the scope of article 22 including: (a) whether the commencement of main proceedings could be renounced on the basis of a commitment made in another proceeding concerning the same group member or a different group member; (b) whether the commencement of main proceedings could be renounced on the basis of a commitment made in a proceeding in a non-COMI State; (c) whether the claims of creditors of one group member could be addressed in a proceeding in the COMI of another group member; (d) what standards a court declining to open a main proceeding under paragraph 2 might use to evaluate whether the interests of creditors were properly protected; (e) how a decision made by a non-COMI court would be implemented through the COMI court; (f) outside of the planning proceeding context, which jurisdictions might be eligible to host a proceeding in which such a commitment might be given; and (g) what happened in a situation where the commitment was not respected.

105. It was observed that some of the issues raised might be addressed by reference to other articles of the draft text, such as article 1 (2) which, inter alia, preserved the jurisdiction of the COMI court at all times, and article 19 (1) dealing with the protection of creditors and other interested persons. Moreover, a consideration of how such mechanisms had been used in practice was thought to be instructive and could provide a source of guidance for inclusion in the guide to enactment.

106. Concern was expressed as to the structure of the draft text and the status of articles 22 and 23 as supplemental. It was recalled that the proposal to add those provisions to the draft text had been made on the basis that they should be supplemental and it was emphasized that that had been the basis for their further consideration. The Working Group agreed to continue on the basis of that working assumption.

107. The Working Group agreed that draft article 22 was not acceptable as drafted and the Secretariat was requested to provide a revised text for future deliberations, taking into account the concerns raised.

Article 23. Additional relief

108. There was support in the Working Group for the substance of article 23 as drafted, subject to the following proposals: (a) to delete the reference to paragraph 1 in the first line of article 23 (2); (b) to add in paragraph 1 after the words "planning proceeding" the phrase "particularly where the group representative has made a commitment under article 22"; and (c) in order to create in paragraph 2 a link to that addition in paragraph 1, to add the words "subject to the same condition" at the

beginning of paragraph 2. It was acknowledged that article 23 would need to be reconsidered in light of the concerns expressed in respect of article 22 and how they might be addressed in the draft text.

Preamble

109. The Working Group approved the substance of the preamble. There was support for a suggestion to incorporate language addressing the importance of protecting the interests of the creditors of each individual participating group member and not trade those interests off as against the interests of the group members taken together; whether that language should be placed in the preamble or elsewhere in the text could be considered at a later stage.

Article 1. Scope

110. There was agreement to place paragraph 2 in a separate article. Support was expressed for a proposal to simplify the drafting of paragraph 1 and formulate a more typical scope article along the following lines: “This law applies to judicial cooperation in the context of the cross-border insolvency of multinational enterprise groups.”

Article 2. Definitions

111. With respect to subparagraphs (a) to (c), it was noted that although they were based on Part 3 of the Legislative guide, they might helpfully be included in this text unless the specific terms were not used.

112. The Working Group approved the substance of subparagraph (d) as drafted. With respect to “group representative” in subparagraph (e), there was agreement to delete the remainder of the definition after “planning proceeding”.

113. In respect of subparagraph (f) on “group insolvency solution”, proposals were made to change the word “add” in subparagraph (f)(ii) to “preserve”, “preserve or enhance” or “preserve and maximize”, and to change “that would be likely to” to “with the goal of”.

114. In regard to the definition of “planning proceeding” in subparagraph (g), it was recalled that the three requirements of the definition were essential elements of the draft text. It was agreed that the drafting might be revisited to improve it and to remove any ambiguity. A suggestion to add a definition of “participation” was not supported; it was noted that the addition of a substantive provision might be a better approach.

Additional issues — Principles 4 and 5

115. The general view was that those principles were already covered in the draft text and should not be included as additional articles. It was noted that clearer guidance on the procedural mechanisms used under this model law might be developed once the text reached a more advanced state.