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Report of Working Group V (Insolvency Law) on the work of its twenty-ninth session (Vienna, 1-5 September 2003)

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* This document was submitted late because of requirements for further consultation and obtaining of a waiver.

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I. Introduction: Summary of the previous deliberations of the Working Group

1. The United Nations Commission on International Trade Law (UNCITRAL), at its thirty-second session, in 1999, had before it a proposal by Australia on possible future work in the area of insolvency law (A/CN.9/462/Add.1). That proposal considered that, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that had expertise and interest in the law of insolvency, the Commission was an appropriate forum for the discussion of insolvency law issues. The proposal urged the Commission to consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

2. Recognition was expressed in the Commission for the importance to all countries of strong insolvency regimes. The view was expressed that the type of insolvency regime that a country had adopted had become a "front-line" factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work at an international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, the fear was expressed that the work might not be brought to a successful conclusion. It was said that a universally acceptable model law was in all likelihood not feasible and that any work needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

3. To facilitate that further study, the Commission decided to convene an exploratory session of a working group to prepare a feasibility proposal for consideration by the Commission at its thirty-third session. That exploratory session of the Working Group was held in Vienna from 6 to 17 December 1999.¹

4. At its thirty-third session, in 2000, the Commission noted the recommendation that the Working Group had made in its report (A/CN.9/469, para. 140) and gave the Group the mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.

5. It was agreed that in carrying out its task the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), the International Federation of Insolvency Professionals (INSOL International) and Committee J of the Section on Business Law of the International Bar Association (IBA).²

6. In order to obtain the views of and to benefit from the expertise of those organizations, the Secretariat, in cooperation with INSOL and IBA, organized the UNCITRAL/INSOL/IBA Global Insolvency Colloquium in Vienna, from 4-6 December 2000.

7. At its thirty-fourth session, in 2001, the Commission had before it the report of the Colloquium (A/CN.9/495). The Commission took note of the report with satisfaction and commended the work accomplished thus far, in particular the holding of the Global Insolvency Colloquium and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, in particular with respect to the form that the future work might take and interpretation of the mandate given to the Working Group by the Commission at its thirty-third session. The Commission confirmed that the mandate should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide. In order to avoid the legislative guide being too general or too abstract to provide the required guidance, the Commission suggested that the Working Group should bear in mind the need to be as specific as possible in developing its work. To that end, model legislative provisions, even if only addressing some of the issues to be included in the guide, should be included as far as possible.³

8. The Working Group on Insolvency Law commenced consideration of this work at its twenty-fourth session (New York, 23 July-3 August 2001), with the first draft of the legislative guide on insolvency law. The report of that meeting is contained in document A/CN.9/504. Work continued at the twenty-fifth (Vienna, 3-14 December 2001), twenty-sixth (New York, 13-17 May 2002) and twenty-seventh (Vienna, 9-13 December 2002) sessions of the Working Group. The reports of those meetings are contained in documents A/CN.9/507, A/CN.9/511 and A/CN.9/529 respectively.

9. At its twenty-seventh session, in response to a request by the Commission at its thirty-fifth session, in 2002, that the Working Group make a recommendation as to the completion of its work,⁴ the Working Group stressed the need to finalize the guide as soon as possible and recommended that, while the draft guide might not be ready for final adoption by the Commission in 2003, nevertheless a draft should be presented to the Commission in 2003 for preliminary consideration and assessment of the policies on which the legislative guide was based. Such an approach would facilitate the use of the legislative guide as a reference tool before final adoption in 2004 and would allow those countries that had not participated in the Working Group an opportunity to consider the development of the guide. It was noted that the Working Group might require a further session in the second half of 2003 and possibly even the first half of 2004 to refine the text for final adoption (A/CN.9/529, para. 17).

10. At its twenty-eighth session (New York, 24-28 February 2003), the Working Group adopted the following recommendation to the Commission (A/CN.9/530, para. 18):

“After five sessions (between July 2001 and February 2003) of extensive study, analysis and deliberation, the Working Group advises the Commission that it has completed its review of the core substance of the draft legislative

guide on insolvency law (as set forth in document A/CN.9/WG.V/WP.63 and Add.1-17) and recommends that the Commission:

“1. Approve the scope of the work undertaken by the Working Group as being responsive to the mandate given to the Working Group to prepare ‘a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches’;

“2. Give preliminary approval to the key objectives, general features and structure of insolvency regimes as set forth in the introductory chapters of part one of the legislative guide;

“3. Direct the Secretariat to make the current draft of the legislative guide available to all United Nations Member States, relevant intergovernmental and non-governmental international organizations, as well as the private sector and regional organizations for comment;

“4. Continue to work collaboratively with the World Bank and other organizations working in the field of insolvency law reform to ensure complementarity and avoid duplication and take into consideration the work of Working Group VI on secured transactions; and

“5. Direct the Working Group to complete its work on the legislative guide and present it to the Commission in 2004 for approval and adoption.”

11. At its thirty-sixth session, in 2003, the Commission considered the draft legislative guide and gave its approval in principle, subject to completion consistent with the key objectives. The Commission requested the Secretariat to make the draft legislative guide available to Member States, relevant intergovernmental and non-governmental international organizations, as well as private sector and regional organizations and individual experts, for comment as soon as possible, and to present it to the Commission in 2004 for approval and adoption.⁵

II. Organization of the session

12. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its twenty-ninth session in Vienna from 1-5 September 2003. The session was attended by representatives of the following States members of the Working Group: Austria, Canada, China, Colombia, France, Germany, Hungary, India, Italy, Japan, Lithuania, Mexico, Morocco, Singapore, Spain, Sudan, Sweden, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

13. The session was attended by observers from the following States: Argentina, Australia, Costa Rica, Czech Republic, Denmark, Ireland, Lebanon, Netherlands, Nigeria, Peru, Republic of Korea, Switzerland, Turkey and Ukraine.

14. The session was also attended by observers from the following international organizations: (a) organizations of the United Nations system: International

Monetary Fund and the World Bank; (b) intergovernmental organizations: Organisation for Economic Cooperation and Development; (c) non-governmental organizations: American Bar Association, American Bar Foundation, Center of Legal Competence, Groupe de réflexion sur l'insolvabilité (GRIP), International Bar Association, International Federation of Insolvency Professionals (INSOL International), International Insolvency Institute and National Law Center for Inter-American Free Trade.

15. The Working Group elected the following officers:

Chairman: Wisit WISITSORA-AT (Thailand)

Vice-chairman: Soogeun OH (Republic of Korea), elected in his personal capacity

Rapporteur: Jorge PINZÓN SÁNCHEZ (Colombia).

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

Note by the Secretariat: draft legislative guide on insolvency law (A/CN.9/WG.V/WP.63 and Add. 1-17)

Draft legislative guide on insolvency law—glossary (A/CN.9/WG.V/WP.67) and

Note by the Secretariat: draft legislative guide on insolvency law (rights of set-off and financial contracts and netting) (A/CN.9/WG.V/WP.68).

17. The following background materials were also made available:

Note by the Secretariat on possible future work on insolvency law (A/CN.9/WG.V/WP.50)

Reports of the Secretary-General on the draft legislative guide on insolvency law (A/CN.9/WG.V/WP.54 and Add.1 and 2, A/CN.9/WG.V/WP.57, A/CN.9/WG.V/WP.58, and A/CN./9/WG.V/WP.61 and Add.1)

Report of the Secretary-General on alternative approaches to out-of-court insolvency processes (A/CN.9/WG.V/WP.55)

Report of the Secretary-General on alternate informal insolvency processes (A/CN.9/WG.V/WP.59)

Report on the UNCITRAL/INSOL/IBA Global Insolvency Colloquium (A/CN.9/495)

Reports of UNCITRAL on its thirty-fourth (A/56/17), thirty-fifth (A/57/17) and thirty-sixth sessions (A/58/17)

Reports of Working Group V (Insolvency Law) on the work of its twenty-second (A/CN.9/469), twenty-fourth (A/CN.9/504), twenty-fifth (A/CN.9/507), twenty-sixth (A/CN.9/511), twenty-seventh (A/CN.9/529) and twenty-eighth sessions (A/CN.9/530).

18. The Working Group adopted the following agenda:

1. Scheduling of meetings.
2. Election of officers.

3. Adoption of the agenda.
4. Preparation of a legislative guide on insolvency law.
5. Other business.
6. Adoption of the report.

III. Summary of deliberations and decisions

19. The Working Group reviewed the draft legislative guide on insolvency law on the basis of documents A/CN.9/WG.V/WP.68, A/CN.9/WG.V/WP.63/Add.2 and 14-17 and A/CN.9/WG.V/WP.67. The Working Group began its deliberations with A/CN.9/WG.V/WP.68 and continued with A/CN.9/WG.V/WP.63/Add.17, Add.14 (commencing with section C. Priorities and distribution) to Add.16, Add.2 and A/CN.9/WG.V/WP.67. The Working Group completed its consideration of those remaining addenda of A/CN.9/WG.V/WP.63, as well as A/CN.9/WG.V/WP.68. With respect to the glossary set forth in A/CN.9/WG.V/WP.67, the Working Group completed its review and revision of the terms up to and including the term “preference”. The deliberations and decisions of the Working Group with respect to the various documents are set forth below.

IV. Preparation of a legislative guide on insolvency law

A. Rights of set-off (A/CN.9/WG.V/WP.68)

Recommendations

20. The Working Group expressed general approval with the current drafting of the purpose provision of the recommendations on rights of set-off. Regarding recommendation 82, there was general agreement that some redrafting was necessary to ensure that a right of set-off would be protected if it arose prior to commencement, irrespective of whether it was validly exercised prior to or following commencement of insolvency proceedings. It was suggested that the guide make a clear distinction between the application of avoidance provisions to a general right of set-off, as provided in recommendation 82, and to set-off in the context of financial contracts, where it could cause disruption to financial markets. In that regard, it was suggested that the discussion of financial contracts in paragraph 193 of document A/CN.9/WG.V/WP.68 in the section on general rights of set-off was likely to lead to confusion and should be revised. It was noted that the Working Group would further consider the definition of “set-off” in the context of the glossary.

B. Financial contracts and netting (A/CN.9/WG.V/WP.68)

Recommendations

21. As a preliminary point, there was broad agreement that further consideration should be given to the use of the terms “financial contract” and “financial institution”. It was suggested that the definition of “financial contract” should be as

broad and flexible as possible to encompass future developments of new types of financial instruments. An opposing view was that a broad definition might not provide sufficient guidance to legislators. A further suggestion was that a sentence might be added to the beginning of paragraph 195 of document A/CN.9/WG.V/WP.68, defining the minimum necessary characteristics of a financial contract so as to provide some guidance to legislators. Support was expressed for the view that the discussion in the commentary and recommendations should apply clearly to both bilateral and multilateral contracts, since in both instances there was the possibility that multiple transactions would be affected by insolvency with a potential for systemic risk in the market. With regard to “financial institutions”, it was agreed that any definition should envisage a wider application than banks and, in response to a suggestion that “financial intermediary” might be preferable, it was pointed out that the term to be used should include parties to a financial contract (which “financial intermediary” would not). It was also suggested that both of those issues might be further addressed in the context of consideration of the glossary. It was urged that caution be exercised in any redrafting, noting that, as a principle, the draft guide should not interfere with the established rules and special regulatory regimes applicable to financial markets and institutions.

22. In terms of the purpose provision of the recommendations, it was suggested that since the original intention of netting-type provisions was to strictly protect financial markets, subparagraph (b) might be placed before subparagraph (a).

23. Some support was expressed for deleting the phrase “promptly after the commencement of insolvency proceedings” from the first sentence of recommendation 83. Otherwise, the Working Group agreed with the substance of recommendations 83-85 as currently drafted.

24. Suggested changes to recommendation 86 were the deletion of both the first bracketed text, on the basis that it was superfluous, and the second bracketed text, which sought to preserve the application of provisions on fraudulent transactions. Those proposals, together with a suggestion to revise the reference to the application of avoidance provisions to end after the words “exempt from avoidance”, deleting the words “under applicable avoidance provisions of the insolvency law”, were supported. A proposal to retain the second bracketed text, on the application of the rules on fraudulent transactions, did not receive support.

25. There was general agreement to delete both bracketed terms in recommendation 87.

26. A suggestion was made that a new recommendation might be added to the section stating that transactions that were not financial contracts were not intended to be covered by the section and would be covered by general netting and set-off law.

27. The Working Group agreed with the substance of recommendations 88 and 89 as drafted, subject to provision of further guidance on the definition of financial contracts in the context of the glossary.

**C. Applicable law governing in insolvency proceedings
(A/CN.9/WG.V/WP.63/Add.17)**

28. The Working Group held a general discussion on the question of including material on applicable law in the draft guide. The prevailing view was that issues of applicable law were of key importance to insolvency proceedings and that material on the issues involved should be included in the draft guide to provide assistance and guidance to legislators and other users. As to the extent of the material to be included, however, some concern was expressed that discussion and finalization of provisions on applicable law should not delay progress on the guide. The Working Group agreed that the recommendations set forth in A/CN.9/WG.V/WP.63/Add.17 provided an appropriate basis for consideration and discussion of the relevant issues.

29. With respect to the purpose clause, it was suggested that subparagraph (a) was not specific to applicable law but rather of general application to the draft guide and therefore should be deleted. Subparagraphs (b) and (c) were considered to be too narrowly focused on legal relationships with the debtor and support was expressed in favour of expanding both paragraphs to cover insolvency proceedings more generally. It was observed that the opening words of subparagraph (d) were also unnecessarily limiting and should be deleted.

30. A proposal on recommendation 1 that received some support was to retain the chapeau as the operative rule and to place subparagraphs (a)-(k) in the commentary that would need to be drafted to accompany the recommendations. A further proposal that also received some support was to retain subparagraphs (a)-(k) in the recommendation, revising them to reflect the sequence and terminology of the draft guide more closely and addressing possible inconsistency between subparagraph (g), as currently drafted, and recommendation 2. Other drafting changes proposed to subparagraphs (a)-(k) were to delete the references to leases in subparagraph (i) and to add references to other key parts of the insolvency proceedings, including rules governing distribution of proceeds and ranking of claims. Further drafting suggestions were that the title should refer to the law applicable to insolvency proceedings and that the operative rule should then be drafted more directly along the lines of “The law of the place where insolvency proceedings are commenced is the law that applies to the conduct, administration and termination of insolvency proceedings”. Those proposals received some support.

31. With respect to the note to the Working Group preceding the text of recommendation 2, some support was expressed for the view that issues of validity should not be addressed in the context of applicable law. It was proposed that the focus of recommendation 2 should be on the recognition of the law of another State rather than the possible application of that law and that the bracketed language referring to the “avoidability of a transaction” was the preferred drafting. A further proposal was that recommendations 2 and 3, if both were retained, should be merged as they both provided exceptions to recommendation 1.

32. Support was expressed for the view that because recommendation 3 was a rule of a substantive nature rather than a rule of applicable law, and bearing in mind the discussion in the Working Group on the issues of set-off and netting, it should be

deleted. As an alternative text, it was proposed that a general rule, to the effect that conflict of laws rules applicable outside of insolvency should not be affected by the commencement of insolvency proceedings, should be included. That proposal received some support.

33. Wide support was expressed for the deletion of subparagraphs (a) and (c) of recommendation 4, with (b) being retained as a general rule. It was observed, however, that the resulting rule was not specific to insolvency and was not therefore required in a guide on insolvency law. Some concern was also expressed that retention of subparagraph (b) in a rule of general application might suggest that the concept of public policy applicable to insolvency was different to that applicable more generally. A further concern was that the reference to the law applicable to legal relationships might be interpreted to cover a choice both of the law of insolvency and the law of a contract and the former possibility should be specifically excluded. On the basis that subparagraph (b) was to be retained, it was proposed that the word “manifestly” and the words “without regard to ... chosen applicable law” in the chapeau be deleted. Those proposals did not receive support.

34. Concern was expressed as to the meaning of recommendation 5 and whether what was intended was a rule relating to the subordination of the insolvency law to the law of other jurisdictions or a purely domestic rule addressing the relationship between the insolvency law and other law. If the latter meaning was intended, it was observed, the rule had no application in the context of conflict of laws, although it might be useful more generally and should be addressed elsewhere in the draft guide. In that regard it was observed that the need to address the relationship between the insolvency law and other law was pointed out in paragraph 20 of A/CN.9/WG.V/WP.63/Add.2. It was proposed that to make the first sentence a clearer rule on determining applicable law, the words “other laws of the jurisdiction” should be amended to “laws of other jurisdictions”. That proposal received some support.

35. With respect to recommendation 6, support was expressed for the view that although the first sentence might be relevant to recommendation 5, it should be deleted from recommendation 6. One view with respect to the last sentence was that, although reflecting a useful principle, it should be discussed in the commentary and not included as part of the recommendation. An alternative view was that the last sentence served an important purpose in encouraging the adoption of appropriate standards and should therefore be retained.

36. The Working Group considered a proposed revision of the recommendations concerning applicable law as follows:

[Note to translators: the following text is from A/CN.9/WG.V/XXIX/CRP.4.]

“Purpose of legislative provisions

The purpose of provisions on the applicable law governing in insolvency proceedings is to:

- (a) facilitate commercial transactions by providing a clear and transparent basis for predicting the law that will apply to insolvency proceedings;

- (b) provide courts with clear and predictable rules for the enforcement of choice of law provisions in contracts with a debtor; and
- (c) provide courts with clear and predictable rules for determining the law applicable to insolvency proceedings.

Contents of legislative provisions

Law of the insolvency proceedings

(1) The insolvency law of the place where insolvency proceedings are commenced should apply to all aspects of the conduct, administration and conclusion of insolvency proceedings, including:

- [(a) eligibility and commencement criteria;
- (b) creation and scope of the insolvency estate;
- (c) treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;
- (d) costs and expenses;
- (e) proposal, approval, confirmation and implementation of a plan of reorganization;
- [(f) treatment of legal acts detrimental to creditors—to be aligned with (2)];
- (g) effect of the commencement of the proceedings upon contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts;
- (h) conditions under which set-off can occur after commencement of insolvency proceedings;
- (i) powers of the debtor, insolvency representative, creditors and creditors' committee;
- (j) claims and their treatment;
- (k) priorities for ranking of claims;
- (l) distribution of proceeds of liquidation; and
- (m) resolution and conclusion of the proceedings.]

Exception to application of law of the insolvency proceedings

(2) As an exception to recommendation (1), the insolvency law may provide that the law of another State applies to the avoidability of a transaction or set-off that occurred or an obligation that was incurred before the commencement of insolvency proceedings.

(Recommendation (3) deleted)

Validity of contractual choice of law provisions

(4) The insolvency law should recognize contractual provisions in which the debtor and its counterparty expressly agree that the law applicable to their

legal relationship under the contract will be the law of a specified jurisdiction without regard to the nexus between the transaction or the parties at issue and the chosen applicable law, except where such a provision is viewed as manifestly contrary to a public policy of the jurisdiction whose law would apply in the absence of such a provision.

Determining the applicable law

(5) The insolvency law should clearly indicate when the insolvency law would be subordinate to the laws of another jurisdiction.

(To be reflected elsewhere in the Guide: The insolvency law should recognize and respect rights, claims and other entitlements valid under non-insolvency law except to the extent it may be necessary to modify or postpone those rights, claims and entitlements in order to achieve the specific goals of the insolvency process.)

(6) Where the law of more than one State is relevant to the application of law other than insolvency law, the insolvency court will need to apply a conflict of laws rule to determine which State's law should apply. The conflict of laws rules should be clear and predictable and should follow modern conflict of laws rules embodied in international treaties and legislative guides sponsored by international bodies."

37. With regard to the purpose provision, it was agreed that the substance of subparagraphs (b) and (c) should be retained with some redrafting to reflect the suggestion that subparagraph (b) was a subset of subparagraph (c) and should therefore be incorporated in subparagraph (c). As a matter of drafting, it was suggested that the words "to insolvency proceedings" be changed to "in the context of insolvency proceedings".

38. After further discussion of subparagraphs (a)-(m) of recommendation 1, it was agreed that they should be retained in the recommendation with the brackets removed. It was also agreed that some alignment of recommendation 1 (f) with recommendation 2 was necessary, perhaps by adoption of language in 1 (f) along the lines of "rules relating to voidness, voidability or unenforceability of legal acts detrimental to creditors". It was also agreed that the term "powers" in recommendation 1 (i) be replaced with the words "rights and obligations" as used elsewhere in the guide.

39. The Working Group agreed that the substance of recommendation 2 was acceptable, subject to some redrafting to make it clear that the intention of the provision was that the law of another State might apply to set-off or to avoidance, rather than to the avoidance of a set-off as the current drafting suggested.

40. With respect to recommendation 4, it was agreed that the public policy standard was the appropriate test and should be retained, with some further consideration to be given to the need to retain the words "... whose law would apply in the absence of such a provision".

41. The suggestion that the word "subordinate" in recommendation 5 be replaced by words to the effect that the insolvency law would "allow the application" of the law of other jurisdictions was supported. It was also agreed that the substance of the note following recommendation 5 be included elsewhere in the guide.

42. After discussion of recommendation 6, the Working Group agreed that the first sentence of the recommendation should be retained in order to provide a rule on the application of law other than the insolvency law, with the words “Where ... is relevant to” to be deleted, and the words “As to” substituted.

43. The UNCITRAL secretariat was requested to reflect the discussion in revising the text of the recommendations on applicable law and to develop a commentary for consideration by the Working Group at its next session. The secretariat was also requested to consult with the Hague Conference on Private International Law.

D. Management of proceedings: priorities and distribution (A/CN.9/WG.V/WP.63/Add.14)

Recommendations

44. Regarding the purpose clause of the recommendations section, suggestions for revision included that, in subparagraph (a), the word “paid” should be replaced by “satisfied”, and that subparagraph (b) should refer to equal treatment of similarly situated creditors, rather than to creditors of the same class. Otherwise, it was agreed that the square brackets should be removed from subparagraph (c) and the current language of the purpose clause should be retained. It was also agreed that the commentary in paragraph 441 and elsewhere should be amended to reflect the discussion in the Working Group on subparagraph (b), detailing different approaches to treatment of classes, including the use of subclasses, and distinguishing a strict application of the *pari passu* principle in the treatment of classes in liquidation from a more flexible approach in reorganization. As a general point, it was agreed that the application of recommendations 166-171 to liquidation and reorganization needed to be clarified.

45. With regard to recommendation 166, it was agreed that the text “, other than secured claims,” should be deleted.

46. While some support was expressed for deleting the underlined text in the first sentence of recommendation 167, the prevailing view was that it should be retained. It was agreed that the second sentence might be redrafted to clarify that the recommendation referred not to the validity of priorities, but to the need to avoid uncertainty regarding the order of priorities by setting out all priorities in the insolvency law. It was observed that a legislative priority granted or calculated by reference to other law would not be invalid simply because it was not included in the insolvency law. It was suggested that a sentence might be added to the end of the recommendation stating that the insolvency law should specify whether and to what extent priorities created under other law might be recognized in insolvency proceedings.

47. The Working Group agreed that footnote 3 to recommendation 168 should be deleted, though there was some support for including in paragraph 424 of the commentary a discussion of the impact of the approach outlined in footnote 3 on an enterprise mortgage, or floating charge, on the one hand and a fixed security interest on the other. It was also agreed that the recommendation should include the surrender of the encumbered asset to the secured creditor as an option in addition to payment of the proceeds of the sale of the encumbered asset. There was also general

support for including in recommendation 168 a second sentence along the lines of the second sentence of recommendation 167 to require disclosure of other priority interests in the insolvency law. A drafting suggestion was to add the words “in liquidation, or pursuant to a reorganization plan” after the words “realization of the security”. It was noted that there were different layers of administrative costs, which might have different ranking and which could be higher in reorganization than in liquidation.

48. A number of drafting suggestions were made concerning recommendation 169. These included in subparagraph (a) deleting the words after “administrative costs and expenses”; clarifying what was meant in subparagraph (b) by the words “claims with priority”; and that, as subparagraph (e) did not represent a payment to creditors, it might be deleted from the recommendation or, alternatively, the chapeau to 169 might be appropriately amended.

49. It was noted that while the underlined language in recommendation 170 referred to subordinated claims where the subordination was contractually agreed, the recommendation might also usefully include other applicable types of subordination, such as equitable subordination. A further suggestion was that the phrase, “unless the senior class agrees otherwise”, should be added to the end of the second sentence, or alternatively moved with that sentence to form a new recommendation. On the same point, it was suggested that, as a general principle, the law should not restrict the parties’ right to contractual autonomy and, therefore, a note might be added to the recommendation section that the general rules stated in recommendations 169-171 might be varied by agreement of the parties.

50. On recommendation 171, it was agreed that the words, “is required to”, should be replaced with “may” or “could”. It was also agreed that, in the interests of not penalizing creditors who had failed to submit a claim for reasons not associated with fault or omission on their part, the second sentence should also refer to safeguards for existing claims that had not yet been submitted. A drafting suggestion was to specify that, in liquidation, distribution should be made promptly and as fully as possible. An alternative view was that the detail in the second sentence of recommendation 171 was too restrictive on the day-to-day management of the estate by the insolvency representative and might be deleted from the text. The UNCITRAL secretariat was requested to prepare a further revision of the recommendations, taking into account the discussion in the Working Group.

E. Resolution of proceedings (A/CN.9/WG.V/WP.63/Add.15)

1. Discharge

Recommendations

51. It was noted that since the draft guide generally referred to natural person debtors rather than to individual debtors, amendments were required for subparagraph (a) of the purpose clause and recommendation 172. The substance of the purpose clause was otherwise found to be acceptable.

52. Several comments were made with respect to the drafting of the chapeau of recommendation 172. Support was expressed in favour of deleting the reference to the debtor being engaged in business activity, on the basis of the agreement in the

Working Group on questions of eligibility and the scope of the draft guide. Support was also expressed in favour of deleting the words “following [liquidation ... proceedings]”, as the question of the timing of the discharge was addressed in subparagraphs (a) and (b).

53. Support was expressed for the view that subparagraph (a) should be treated as establishing the standard of conduct required of the debtor in insolvency proceedings in order for it to be discharged. Wide support was expressed in favour of deleting the bracketed texts “[is honest]” and “[acts in good faith]”, on the basis that those standards proved difficult to implement in practice. It was agreed that the reference to acting fraudulently should be retained and possibly combined with a more objective formulation along the lines of “has performed its obligations under the insolvency law”.

54. With respect to subparagraph (b), support was expressed in favour of retaining both options for determining the period of commencement of the discharge. A further suggestion was to refer to the closing of the proceedings. Support was expressed in favour of deleting the words “during ... to satisfy its obligations”.

55. It was observed with respect to subparagraph (c) that it should address those debts that, by their very nature, should be exempted from any discharge given to the debtor. While noting that the choice of debts to be excluded from a discharge was essentially a matter for States to decide, it was proposed that the only exclusions to be referred to in the recommendation should be those associated with tort claims, family provisions or debts based on a penalty where the alternative was a jail sentence. Other examples could perhaps be discussed in the commentary. In addition, the recommendation should encourage transparency and certainty by requiring all such exclusions to be referred to in the insolvency law.

56. It was observed that the examples included in subparagraph (d) were not appropriate, particularly since preventing the debtor from carrying on business was inconsistent with the idea of providing a discharge; if the debtor was not fit to carry on business it probably should not be discharged. It was proposed that the examples should be deleted or restricted in scope, such as serving on a board of directors as opposed to simply carrying on business. It was pointed out, however, that the intent of subparagraph (d), in many jurisdictions, was not related to the question of whether or not the debtor should be discharged, but rather to restrictions that would apply to the debtor based upon its conduct in the insolvency proceedings.

57. It was noted that the structure of recommendation 172 might require some revision on the basis that subparagraphs (a)-(d) did not reflect different choices as suggested by the chapeau; rather, subparagraphs (a) and (b) were alternatives, but subparagraphs (c) and (d) could apply irrespective of the choice between (a) and (b).

58. The Working Group considered a proposed revision of recommendation 172 to address discharge in liquidation as follows:

“(172) Where the insolvency law allows the insolvency of natural person debtors, the issue of discharge of the debtor from liability for pre-commencement debts should be addressed.

(a) The discharge may not apply until after the expiration of a specified period of time following commencement, during which period the debtor is expected to cooperate with the insolvency representative;

(b) The debtor may be discharged completely and immediately where the debtor has not acted fraudulently and has cooperated with the insolvency representative in performing its obligations under the insolvency law;

(c) Where certain debts are excluded from the discharge, such debts should be kept to a minimum to facilitate the debtor's fresh start and should be set forth in the insolvency law;

(d) Where the discharge is subject to conditions, those conditions should be kept to a minimum to facilitate the debtor's fresh start."

59. Regarding the revision of recommendation 172, the Working Group agreed that the chapeau be amended to read, "Where natural persons are eligible as debtors under the insolvency law"; that subparagraph (a) remain unchanged; that the words "completely and immediately" be deleted from subparagraph (b); that the current text of subparagraphs (c) and (d) was acceptable; and that a new subparagraph (e) be added to the recommendation to address the issue of revocation of the discharge in circumstances where, for example, it had been obtained by fraud. With respect to the relationship between subparagraphs (a) and (b), it was suggested that subparagraph (b) could be redrafted to take effect when the time period referred to in subparagraph (a) had expired. The two subparagraphs would provide that a time period could be specified, during which the debtor must cooperate with the insolvency representative, and when that period had expired, the discharge would become effective, provided the debtor had cooperated and not acted fraudulently.

60. After discussion, the Working Group requested the UNCITRAL secretariat to prepare a further revision based on the considerations discussed.

61. With respect to recommendation 173, it was observed that the effect of the plan would determine the outcome in terms of discharge and that laws provided for the plan to have different effects. For that reason, some support was expressed in favour of placing the text in the reorganization chapter. A different proposal, which also received support, was to place the text in recommendation 175. It was agreed that the application of the recommendation to both legal person and natural person debtors should be clarified and that the application of the discharge could apply either from the time the plan became effective or from the time it was fully implemented. Where the discharge applied from the time the plan became effective, the commentary should point out that many laws permitted the discharge to be set aside where the plan was not fully implemented.

2. Conclusion of proceedings

Recommendations

62. After discussion, the Working Group agreed with the substance of the purpose clause as drafted. A suggestion was made to include a reference to provision of notice of conclusion of proceedings to interested parties.

63. As a matter of drafting, it was suggested that the opening words of recommendation 174 could be made clearer by referring, for example, to when the estate had been fully liquidated or realized and distributed, rather than "administered". In response, it was pointed out that the word "liquidated" might preclude conclusion in cases where assets were returned to the creditor and it was

suggested that that eventuality should be covered by whatever phrase was chosen. It was agreed that the reference to the discharge of the insolvency representative should be deleted.

64. With respect to recommendation 175, support was expressed for the proposal that only the first sentence was required, as the remaining sentences addressed issues included in the discussion of conversion of reorganization proceedings. With respect to the time at which conclusion might take place, it was pointed out that full implementation might take a considerable amount of time and that an earlier option should be permitted in cases where, for example, the court could determine that there was a reasonable prospect of full implementation. That suggestion was supported. A further suggestion was to include in the first sentence the words “no later than” before the phrase “when the reorganization plan is fully implemented”.

F. Rights of review and appeal (A/CN.9/WG.V/WP.63/Add.16)

1. The debtor

65. The Working Group agreed that the issue of the debtor’s rights of appeal and review should be addressed in the draft guide, since those rights were generally fundamental rights protected by law.

66. It was also agreed that the debtor’s right to seek review or appeal against decisions made in the insolvency proceedings would be limited to those decisions in which the debtor had a direct interest or which affected the rights and obligations of the debtor. It was noted that the right of the debtor had to be balanced against the interests of creditors and, if the right was not limited to those matters in which the debtor had such an interest, there was the potential for the proceedings to be unjustifiably frustrated and delayed and for the incurring of significant costs, with resultant damage to the interest of creditors. It was also agreed that the scope of the right would be more limited in liquidation than reorganization by the very nature of the proceedings and that the exercise of the right might relate to the design of the law. For example, where no automatic discharge was provided the debtor might have a greater interest in the conduct of the proceedings and in decisions affecting its interests.

67. In terms of defining where the debtor might be said to have an interest, it was suggested that the interest had to be legitimate, actual, current and substantive. It was noted that there would generally be procedural means to address those appeals that could not be justified.

2. The insolvency representative

68. A proposal that a section be added on the insolvency representative’s right of review and appeal received support. The omission of such a section, it was proposed, might be interpreted by readers of the guide to suggest that the insolvency representative did not have any such rights.

3. Creditors

69. As matters of drafting, it was proposed that references to collusion and conspiracy should be added to paragraph 7 of the commentary; that because

“administration of the estate” had different meanings in different languages and jurisdictions, another term should be found; and that the word “gain” in paragraph 9 should be changed to “obtain”. It was proposed, in addition, that the draft guide should address the balance between individual rights of review and appeal with the collective interests of creditors, as well as discussing the types of orders that might be appealed. It was noted in that regard that some jurisdictions permitted only final orders to be appealed, while others permitted a broader right of appeal. The substance of the material in the commentary was generally found to be acceptable.

70. The Working Group agreed that the draft guide should include recommendations to address the rights of appeal of the debtor.

71. As a general point, it was proposed that the guide should stress the need for such appeals to be determined in a timely manner to avoid delay to the proceedings and the incurring of unnecessary costs. As a matter of drafting, it was suggested that rights of appeal of the debtor, creditors and the insolvency representative could be more concisely addressed if included in one section under the heading of rights of appeal of interested parties, where interested parties would be a defined term. It was proposed that a definition along the following lines could be added to the glossary:

“Party in interest

The debtor, the insolvency representative, a creditor, an equity security holder, a creditor committee [a government authority] or any other person whose rights, property or duties under [or concerning] the insolvency law are affected.”

72. It was further proposed that recommendations along the following lines be added to chapter IV:

“Right to be heard

The insolvency law should provide that a party in interest has a right to be heard on any issue which affects its duties under the insolvency law, its rights or property in which it has an interest.

(a) A party in interest may object to any act that requires court approval;

(b) A party in interest may request review by the court of any act for which court approval was not required or not requested;

(c) A party in interest may request any relief available to it under the insolvency law.

“Right of appeal

A party in interest may appeal from any order of the court which affects its duties under the insolvency law, its rights or property in which it has an interest.”

73. A number of suggestions were made with respect to the drafting of the proposal. With respect to the definition of “party in interest”, it was queried whether the qualifying phrase commencing “whose rights ...” applied only to “other persons” or would also apply to the debtor, the insolvency representative and the other parties included in the definition. If that qualification did not apply to limit the

parties to whom notice must be given, it was pointed out that a requirement to give notice could result in notice being required to be given to a potentially large number of parties whose interests were not affected, for example, to all equity holders. In some cases that could impose a substantial obligation on the insolvency proceedings. A proposal to revise the drafting of the last phrase of the definition to more clearly identify the rights or interests to be affected along the lines of “whose rights, duties under the insolvency law or property in which it has an interest are affected” received some support. Support was also expressed in favour of retaining the reference to “government authority”, although the view was expressed that the term “public authority” might be more appropriate to cover the authorities intended to be included within the meaning of that phrase in the draft guide. A further proposal was to qualify the word “affected”, to require a substantial or direct effect or, alternatively, to include an explanation in the commentary limiting the scope of the word. In response, the view was expressed that because there was an increasing recognition of diffuse interests in different jurisdictions, it might be difficult to reach agreement on the level of qualification to be included in the guide. As a matter of drafting it was proposed that the words “The insolvency law should provide ...” be added at the beginning of the recommendation; that the words “in particular” be added at the end of the chapeau; that the words “any order” be revised to “an order”; that the use of the phrase “equity security holder” and the word “property” be aligned with the terminology used in the other chapters of the draft guide; and that the words “by insolvency proceedings” be added after “are affected”. The secretariat was requested to prepare a revision of the definition and recommendations for inclusion in the draft guide, and to make the necessary revisions to the commentary.

**G. Treatment of corporate groups in insolvency
(A/CN.9/WG.V/WP.63/Add.16, paras. 15-24)**

74. After discussion, the Working Group agreed not to formulate any recommendations for the section or to define “corporate groups” in the glossary, but that some redrafting of the commentary was necessary. A number of points to be stressed and elaborated on in that redrafting included the following. The law regarding the treatment of corporate groups was an area of great complexity and varied legal approaches, with national laws tending to reflect the specific legal frameworks of the relevant State, making it inappropriate for the Working Group to attempt to formulate specific recommendations in that area. It was also a topic of great importance and should be addressed by States in sufficient procedural detail to provide certainty to third parties. Alternatives to direct regulation of corporate groups in insolvency should be noted by reference to parts of the insolvency law or other law, such as avoidance or subordination provisions. It was suggested that the commentary’s primary focus should be on stating the issues raised by corporate groups in insolvency rather than what actions the insolvency law should provide for the resolution of such problems. As a further point, it was also suggested that a useful clarification to the commentary might be whether, and in what circumstances, a company in a group could commence insolvency proceedings for a related group company.

H. Part one. Designing the structure and key objectives of an effective and efficient insolvency regime (A/CN.9/WG.V/WP.63/Add.2)

75. It was noted that the Commission had reviewed part one of the draft guide at its thirty-sixth session⁶ and some minor changes to the text were suggested. It was also noted that the substance of part one as drafted was approved in principle by the Commission.

1. Introduction to insolvency procedures (chapeau, paras. 1-2)

76. The Working Group agreed with the substance of the paragraphs as currently drafted.

(a) Key objectives of an effective and efficient insolvency regime (paras. 3-13)

77. The Working Group agreed that a new objective, of a higher nature than the objectives currently contained in the text and relating to the insolvency law, might be added at the beginning of the section, outlining what an insolvency system should strive to achieve. The suggested purpose of such an objective was to encourage States to use potential indicators to assess the implementation of the key objectives, such as the availability of finance for start-up and reorganizing companies, domestic and international credit risk assessments and the economic performance of industry sectors. Suggested formulations included “to provide for certainty in the market” and “to promote economic stability and growth”.

78. It was suggested that an alternative positive expression of the objective discussed in paragraph 9 of the document could be to “preserve the estate to allow an equitable distribution to creditors”.

(b) Balancing the key objectives (paras. 14-18)

79. It was suggested a footnote might be added to the use of the example of security interests in the first sentence of paragraph 16, noting that steps had been taken in recent years towards harmonizing the law on security interests, such as the United Nations Convention on the Assignment of Receivables in International Trade and the International Institute for the Unification of Private Law (Unidroit) Convention on International Interests in Mobile Equipment.

80. The Working Group agreed with the substance of the section as currently drafted.

(c) General features of an insolvency regime (paras. 19-21)

81. Suggested drafting amendments included replacing the words “suspended by” in subparagraph 19 (f) with “enforced or protected notwithstanding”; and rewording subparagraph 19 (k) to refer to discharge more generally in liquidation. The Working Group agreed with the substance of the section as currently drafted.

2. Types of insolvency proceedings (chapeau, paras. 22-25)

82. It was agreed, consistent with the earlier discussions of the Working Group, to remove the references to informal processes from paragraph 22 and throughout the draft guide. The Working Group also agreed that some redrafting of paragraph 25

was necessary to reflect the Working Group's preference for reorganization, a point which generally should be reflected in the draft guide.

(a) Liquidation (paras. 26-29)

83. The Working Group agreed that the last sentence of paragraph 26 should be deleted. It was also agreed that a new paragraph should be added, addressing the fact that sale of a business as a going concern could be conducted in a liquidation proceeding in some jurisdictions, but only under reorganization proceedings in others. It was observed that, in many laws, liquidation did not exclude the possibility of transfer of the business to other companies. A proposal that received support was to make a clear distinction in discussing the various insolvency proceedings between liquidation, transfer of the business from the debtor company to another company (whether that occurred in liquidation or reorganization) and reorganization of the debtor company to preserve the business. Drafting suggestions were that a reference to secured creditors receiving the proceeds of the sale of encumbered assets should be added to the first sentence of paragraph 26 and that as a general matter, the guide should refer to sale or realization of assets, rather than just to their sale.

84. It was observed that the use of the word "universal" in paragraph 27 did not necessarily impart the meaning of wide acceptance in all languages and would warrant some attention in redrafting. It was also suggested that subparagraphs 27 (d) and (e) might be joined, with the addition of the following bridging phrase: "if the business of a debtor cannot be sold as a going concern".

(b) Reorganization (para. 30)

85. The Working Group agreed that a recommendation should be added to the draft guide to the effect that an insolvency law should include reorganization proceedings. It was also agreed that the discussion of reorganization proceedings in the commentary should reflect the Working Group's view that reorganization proceedings, in principle, were in the interest of all parties.

86. It was proposed that, given the Working Group's preference for reorganization, that section, containing paragraphs 30-55, should precede paragraphs 26-29 concerning liquidation proceedings. That proposal received support.

87. The Working Group agreed to remove the list of names of reorganization proceedings from paragraph 30 and to include it in the glossary. Drafting suggestions for the first sentence in paragraph 30 included inserting the words "company or failing that a" before the word "business" and deleting the rest of the sentence after the word "business".

(i) Formal reorganization proceedings (paras. 31-36)

88. A drafting suggestion was to delete the initial lines of paragraph 31 and begin the paragraph at the words, "not all debtors" in the second sentence.

(ii) Informal and expedited reorganization processes (paras. 37-55)

89. The Working Group agreed that, in general, the current text on informal processes should be retained, though with some specific redrafting. It was agreed that a statement should be made in the commentary that the viability and

effectiveness of informal processes as an alternative to formal insolvency proceedings was dependent on the existence of a strong institutional framework in a State, which would include an effective, efficient and certain legal and judicial structure. That statement could be supported by a cross reference to the discussion of the institutional framework in the draft guide. The commentary should also clearly state that informal processes were voluntary and contractual in nature and, if unsuccessful, must be followed by formal proceedings, which would include the possibility of expedited proceedings. It was also agreed to clarify in paragraphs 53-55 that a clear distinction could be made between out-of-court informal processes and court-based expedited proceedings. It was suggested that the substantive discussion of informal processes and expedited proceedings should be separated more clearly in the draft guide. Another suggestion was that the commentary should be informed by the fact that some proceedings worked well precisely because they were regulated, while other processes succeeded because they were not.

(c) Administrative processes (paras. 56-57)

90. The Working Group agreed that the substance of paragraphs 56 and 57 as drafted were acceptable.

(d) Structure of the insolvency regime (paras. 58-64)

91. With respect to paragraphs 58-64, it was suggested that it should be made clear that the section related only to formal insolvency regimes and, accordingly, should be relocated earlier in part one and on that basis could perhaps be shortened. It was further suggested that the section should make clear the preference for reorganization where the business was viable.

92. Suggestions of a drafting nature included changing the heading to reflect not the structure of the regime, but the organization of the insolvency law; deleting the words "Although ... proceedings" in the first sentence of paragraph 58; deleting the words "and with a view ... objectives" from paragraph 59; deleting the words "Where ... in the insolvency law" from the beginning of paragraph 60; and substituting the word "continued" for the word "granted" at the end of paragraph 61.

**I. Approval of a reorganization plan by classes of creditors
(A/CN.9/530, para. 84 and A/CN.9/WG.V/WP.63/Add.12,
recommendations 129 and 130)**

93. It was recalled that the Working Group, at its twenty-eighth session, had deferred its decision on whether all classes of creditors were required to approve a reorganization plan, or whether a more complicated formula that took into account the different priorities and interests of creditors should be adopted. It was also recalled that recommendations 129 and 130 of the draft guide, revised in accordance with discussions in the Working Group, provided firstly, that the insolvency law should specify, where voting on the plan was conducted in classes, how the vote achieved in each class would be treated for the purposes of approval and that different approaches could be taken, including that approval could require a specified majority of classes or approval by all classes, and secondly, where approval of all classes was not required, the law should address the treatment of

those classes that had not voted in support of a plan that was otherwise approved by the requisite number of classes.

94. After discussion, the Working Group agreed with the general substance of the recommendations, subject to some clarification in the commentary. It was suggested, specifically, that what was more important than approval by the requisite number of classes, was approval by the requisite classes, taking into consideration issues of priority and interests. It was suggested that although the commentary already provided a satisfactory discussion, further clarification could be included as to different options with respect to approval by classes and relevant protections required to make the plan binding on dissenting classes of creditors.

J. Glossary (A/CN.9/WG.V/WP.67)

95. As a general approach, it was agreed that the glossary should only make reference to the UNCITRAL Model Law on Cross-Border Insolvency and not cite other texts as source material, although it was noted that there might be some advantage in including those references in the footnotes to assist readers seeking further information in regard to defined terms. It was agreed that the definitions in the glossary should focus on the meaning in the text of the guide and not on the usage of terms in any particular jurisdiction.

1. Notes on terminology (paras. 1-5)

96. Some concern was expressed with regard to the possible extension of the definition of “court” in paragraphs 2 and 3 to include an administrative authority, on the basis that there might be some potential for confusion with the administrative processes described in paragraph 56 of the draft guide (see A/CN.9/WG.V/WP.63/Add.2). It was agreed that clarification was required.

97. Further suggestions for rules of interpretation to be added to paragraph 5 included an explanation of the use of “may” and “should” based on the difference between permission and instruction; and that the phrases “such as” and “for example”, might be treated in the same way as “include”.

2. Terms and definitions

Administrative claim or expense

98. Some support was expressed for deleting the words “that are generally accorded priority over unsecured claims and” from the definition on the basis that priority was not an essential part of the definition and should be dealt with in the chapter on priorities. An alternative formulation proposed was to refer to the expenses that had to be met, rather than to the priority they might be accorded. As a matter of drafting, it was suggested that the words “relate to” in the second line should be replaced with “include”. In response to a proposal to add to the definition a reference to costs incurred in the operation of a business where it was authorized to continue, a more generic description, such as “expenses for the continued operation of the debtor” was proposed. It was noted that in addition to the insolvency representative, that phrase might also refer to the debtor and the creditor committee.

Application for commencement of insolvency proceedings

99. Drafting suggestions included to insert the words “entities or persons such as” or, alternatively, “inter alia” after the words “made by”; adding the phrase “upon the filing of insolvency proceedings by a party other than the debtor” to the end of the first sentence; and deleting the second sentence.

Assetless estate

100. There was general agreement that the term, “assetless estate” did not accurately describe the concept discussed in the guide and should be replaced by terminology referring to debtors with insufficient assets. It was also agreed that discussion of the concept should be restricted to the commentary and removed from the glossary.

Avoidance action

101. It was agreed that the definition of “avoidance action” might be redrafted to focus on the essential legal effects of the term, leaving discussion of examples to the commentary. Drafting suggestions included deleting the references to application and commencement; adding “for reasons related to insolvency” to the end of the first sentence (with a cross-reference to the defined term, “insolvency”); adding as a reason for avoidance actions “in the collective interests of creditors or the estate”; and deleting the second sentence. It was also suggested that the definition might be assisted by the addition to the glossary of definitions of “undervalued transaction” and “creditor”. It was noted that recommendation 69 of the draft guide referred to most of the issues discussed by the Working Group and might assist in the redrafting. Some support was expressed for limiting the scope of the definition to transactions occurring before commencement.

Burdensome assets

102. The Working Group agreed to shorten the definition of “burdensome assets” by deleting the words “where the value of the secured claim ... the assets are not essential to a reorganization”. There was also support for replacing the idea of an asset with a negative value with a reference to an asset of no value and deleting the remaining text from “or where the asset is unsaleable”. It was suggested that the words “to the insolvency estate” might be added in the first line after the word “value”.

Centre of main interests

103. Regarding the term “centre of main interests”, drafting suggestions included retaining the reference to the European Community Regulation but moving it to a footnote.

Claim

104. A suggestion to delete the word “enforceable” and add the words “to claim from the debtor” after the word “right” was supported. It was also suggested that the word “judgement” be replaced by “debt” or be retained and followed by, “or contract”. It was also suggested that “judgement” should be a defined term.

Close-out netting

105. It was agreed the term should be deleted and that relevant material could be included in the definition of “netting” as appropriate.

Commencement of proceedings

106. With regard to the term “commencement of proceedings”, the Working Group agreed to retain the first line of the definition and the bracketed text without the brackets, and to delete the words “in some ... proceedings”. It was also suggested that the definition might be redrafted to emphasize that commencement was an event that defined the relevant date, rather than overemphasizing the importance of the date itself.

Court

107. Regarding the definition of “court”, it was questioned whether both the discussion in paragraphs 2 and 3 as well as a separate definition were required. A proposal to delete the reference to other competent authorities was not supported.

Cram-down

108. The Working Group agreed to delete the definition of “cram-down” from the glossary.

Creditor committee

109. Regarding the term “creditor committee”, it was agreed that the three bracketed phrases should be deleted from the definition. Further drafting suggestions were to add the phrase “in accordance with the insolvency regime of each country” after the words “representative body” and to delete the words “to act ... creditors and”.

Debtor

110. The Working Group agreed that the term should be amended by deleting both the words “including the management ... legal person” and the words in square brackets at the end of the sentence.

Discharge

111. It was noted that since discharge did not always require a court order and since not all liabilities were always discharged, those references should be deleted. It was further suggested that the words “including contracts ... reorganization” should be deleted. Those changes were supported.

Disposition

112. Some support was expressed in favour of redrafting the definition along the lines of “Every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part”. It was observed that some clarification was required to ensure that the draft guide did not refer to the disposal of an asset by way of encumbrance to avoid the circularity that would obtain if encumbrance was already defined as a means of disposal.

Encumbered asset

113. It was noted that the term “secured asset” had been replaced by “encumbered asset” in the draft guide to align the text with the draft legislative guide on secured transactions. It was agreed that the words “movable or immovable” and the second sentence should be deleted; and that the word “granted” should be replaced with the words “obtained by”.

Establishment

114. The Working Group agreed that the substance of the definition was acceptable.

Financial contract

115. It was recalled that the definition of the term “financial contract” had been discussed in the context of set-off and netting and it was agreed that, pending finalization of the discussion of that issue by the Working Group, the definition in the glossary should be placed in square brackets.

Going concern

116. It was agreed that the glossary should define the term “sale as a going concern” to cover the sale or transfer of a business in whole or in a substantial part, as opposed to sale of the separate assets of the business.

Insolvency

117. The Working Group agreed that the definition should take account of the commencement standard set forth in the recommendations on commencement of proceedings.

Insolvency estate

118. It was agreed that the words after the first sentence should be deleted and that the words “or supervised” should be added after “controlled”. Since the words relating to the time of constitution of the estate were not accurate, they should be deleted. A related suggestion was to include a definition of “asset” in the glossary to facilitate understanding of the terms using that word.

Insolvency proceedings

119. After discussion, a definition along the lines of “collective judicial or administrative proceeding for the purpose of either liquidation or reorganization of the debtor’s business, conducted according to the insolvency law” was widely supported.

Insolvency processes

120. The Working Group agreed that only the first sentence should be retained and, recalling the previous decision with respect to the use of the word “processes”, that the term to be defined should be amended to read “voluntary restructuring arrangement” or “informal reorganization procedure”.

Insolvency representative

121. After discussion, the Working Group agreed to a definition along the following lines: “A person or body responsible for administering the insolvency estate”.

Involuntary proceedings

122. Some support was expressed in favour of deleting the terms involuntary and voluntary proceedings on the basis that they only applied in some jurisdictions and could be replaced in the draft guide by references to the party making the application for commencement, such as a debtor or creditor application. It was noted that the terminology used would have to be wide enough to cover applications by government authorities that were not creditors or applications by other interested parties.

Liquidation

123. A proposal to adopt a definition along the lines of “proceedings to assemble and reduce the debtor’s assets to money for distribution in accordance with the insolvency law” was supported.

Margin, netting, netting agreement and set-off

124. With respect to “margin”, it was suggested that footnote 5 to A/CN.9/WG.V/WP.68 was sufficient explanation of the term and that it did not need to be also included in the glossary, especially in the terms drafted for the footnote. After discussion, it was agreed to defer the discussion of the terms, “margin”, “netting”, “netting agreement” and “set-off” until the Working Group completed its deliberations on the subject of financial contracts at its next session.

Ordinary course of business

125. A proposal to define the term along the lines “transfers or transactions consistent with operation of the business prior to insolvency proceedings” was supported.

Pari passu

126. Proposals to substitute “creditors of the same class” with “similarly situated creditors”, “paid” with “satisfied” and “equally” with either “rateably” or “proportionate to their claim” were supported.

Perfection, secured creditor, security interest

127. A proposal to reconsider these definitions in the light of the definitions included in the draft legislative guide on secured transactions was supported.

Post-commencement creditor

128. The Working Group agreed that the term to be defined should be “post-commencement claim” rather than “post-commencement creditor” and, that if a definition was required on the basis of usage of that term in the draft guide, a definition along the lines of “a claim arising from an act or omission occurring after commencement” should be included.

Preference

129. Reference was made to recommendation 70 (c) and preferential transactions in the context of avoidance proceedings and it was suggested that to the extent a definition was required, the terms of the recommendation should be used. It was suggested that the definition should indicate that it was an act by the debtor that would give rise to a preference.

130. The terms liquidity and illiquidity were suggested for inclusion in the glossary.

131. For lack of time, the Working Group did not complete its consideration of the glossary.

Notes

¹ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paras. 383-385.

² *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*.

³ *Ibid.*, *Fifty-sixth Session, Supplement No. 17 and Corrigendum (A/56/17 and Corr.3)*, paras. 296-308.

⁴ *Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 194.

⁵ For the complete text of the Commission's decision see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, paras. 172-197.

⁶ *Ibid.*, paras. 172-182.
