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Insolvency Law

Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)

Note by the Secretariat

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics, both of which were of current importance, where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the first of those two topics, concerning a proposal by the United States, as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.[1] A proposal[2] concerning a possible definition of "COMI" is contained in A/CN.9/WG.V/WP.101. The second topic concerning the liability of directors and officers of a company in insolvency and pre-insolvency is addressed in A/CN.9/WG.V/WP.100.

4. As a preliminary matter, the Working Group may wish to consider the need to resolve the form and manner in which the first part of the proposal, i.e. guidance on issues related to COMI, might be presented. The proposal (A/CN.9/WG.V/WP.93/Add.2, paras. 68-70) suggests that, in considering the questions raised below, the Working Group should set out the policy rationale for any conclusions it may reach that could form the basis of guidance to be provided on interpretation of the Model Law. Explaining that policy rationale could also provide a helpful "legislative history" for a jurist or insolvency authority to understand the scope and meaning of the various provisions of the Model Law. The Working Group might wish to consider how that might be achieved. Various types of document could be developed, depending upon the level of guidance the Working Group sought to provide, such as information and commentary on the one hand or recommendations on the other. An information document that could accompany the existing text of the Model Law and Guide to Enactment of the Model Law (the Guide to Enactment) might be one solution, while another might be to incorporate the text promulgated by the Working Group in the Guide to Enactment itself. The Working Group may wish to note that the text entitled "The UNCITRAL Model

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[1] See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

[2] Proposal for a definition of "centre of main interests" (articles 2 (b) and 16 (3) of the UNCITRAL Model Law on Cross-Border Insolvency) by the delegations of Mexico, Spain and the Union Internationale des Avocats (UIA).

Law on Cross-Border Insolvency: the judicial perspective" (the Judicial Perspective), which provides information for judges on the use and interpretation of the Model Law, was finalized and adopted by the Commission at its forty-fourth session in 2011.[3]

5. In considering the question of the form of its work, the Working Group might bear in mind that providing commentary or guidance additional to the existing Guide to Enactment could prove confusing for the reader or user, especially where the commentary or guidance departs from, or provides further elaboration of, points already addressed in the Guide to Enactment. For that reason, revising the Guide to Enactment might be the most effective and efficient approach in order to provide a single source of information and guidance. In that regard, it might be suggested that since some of the issues discussed below are pertinent to use and implementation of the Model Law as enacted, rather than to its enactment per se, they are therefore not appropriate for inclusion in any revision of the Guide to Enactment. The status of the Guide to Enactment, however, and its use by courts as a guide to the meaning of the Model Law (in addition to its use by legislators and policymakers in enacting the Model Law, as noted in paragraph 9 of the Guide to Enactment) suggests that the inclusion of additional commentary and guidance in the Guide to Enactment could be appropriate.

6. Since no decision has been taken by the Working Group on this issue and the form of the final work product is thus unclear, this working paper makes reference only to the issues that might be included or further elaborated in "additional commentary". It does, however, identify some of the paragraphs of the Guide to Enactment that might require reconsideration and amendment if the Working Group were to decide that additional commentary or guidance on the issues discussed should be included in the Guide to Enactment.

7. This paper draws from and builds upon the previous working papers discussing the issue of COMI, specifically A/CN.9/WG.V/WP.95 and Add.1. The Working Group may wish to recall the issues upon which it did not reach a conclusion at its previous session at which those papers were discussed:[4]

(a) The various elements of the definition of "foreign proceedings" in article 2 of the Model Law (see A/CN.9/715, para. 22);

(b) Application of the public policy exception in article 6 (A/CN.9/715, para. 30). The Working Group agreed that the exception should be narrowly construed, but did not further discuss how to ensure that could be achieved;

(c) Prioritization of a list of factors to be used in determining COMI and rebutting the presumption in article 16 (3) (A/CN.9/715, para. 41); and

(d) Impact of fraud on the determination of COMI (A/CN.9/715, para. 43).

8. In addition to the materials previously provided, the following discussion offers further information on some of the points previously discussed, with further questions for consideration by the Working Group.

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[3] A pre-release version of the text is available at www.uncitral.org/pdf/english/texts/insolven/pre-judicial-perspective.pdf.

[4] The report of the work of the thirty-ninth session of Working Group V is set forth in A/CN.9/715.

I. Interpretation and application of concepts relating to centre of main interests

A. Proceedings qualifying for recognition under the Model Law: article 2

1. Requirement for insolvency of the debtor (see A/CN.9/WG.V/WP.95, paras. 8-12)

9. At its thirty-ninth session, the Working Group did not reach a conclusion on the need to further discuss whether the Model Law included a requirement for the financial distress or insolvency of the debtor, other than to take the view (A/CN.9/715, paras. 18) that it was premature to decide whether the definition of "foreign proceeding" in article 2 required clarification additional to that already provided by the Guide to Enactment of the Model Law.

10. A number of points, as noted in the working paper prepared for the thirty-ninth session (A/CN.9/WG.V/WP.95, paras. 8-12), were previously considered by the Working Group when developing the Model Law and various decisions were taken. For example, it was acknowledged that since different jurisdictions have different notions of what constitutes "insolvency proceedings" the term cannot easily be defined; rather the work should concentrate on the characteristics that foreign insolvency proceedings should possess in order to qualify for recognition (A/CN.9/WG.V/WP.95, para. 8). Other points are already included in the Guide to Enactment with respect to the requirement of insolvency. It is noted, for example, that the debtor should be experiencing severe financial distress or be insolvent (Guide to Enactment, paras. 1, 13, 14, 51 and 71).

11. To further assist users of the Model Law, the Working Group may wish to consider the following proposals for additional commentary on this preliminary point:

(a) To give greater emphasis to the Preamble to the Model Law, in particular paragraph (e) and the reference to "financially troubled businesses". Paragraphs 1, 13, 23-24, 51-53 and 71 of the Guide to Enactment could be reconsidered in that regard;

(b) To include references to, or elaboration upon, various elements from the Legislative Guide, including the definition of insolvency (glossary, para. 12(s); the key objectives of an effective insolvency law (part one, chap. I, paras. 1-14 and recommendations 1-6), as well as to the general features of an insolvency law (part one, chap. I, paras. 20-27 and recommendation 7) and to recommendations 15 and 16, which contemplate insolvency or imminent insolvency, as defined, as conditions for commencement of insolvency proceedings. Paragraphs 13-19 and 51-53 of the Guide to Enactment could be relevant to that issue; and

(c) To discuss some of the general characteristics of proceedings that are eligible for recognition under the Model Law, given some of the issues that have arisen in the cases considering this question (A/CN.9/WG.V/WP.95, paras. 18-23). For example, the labelling of a law as an insolvency law may not be determinative; rather what is intended is a law relating to insolvency or the prevention of insolvency or addressing financial distress, including laws that may not require insolvency as a condition for commencement of formal insolvency proceedings,

but which nevertheless address financial distress, as opposed to laws that focus on getting rid of a legal entity (especially where that entity is solvent). Paragraphs 23-24 and 51-53 of the Guide to Enactment could be relevant to that issue.

2. Elements of the definition of "foreign proceeding" (A/CN.9/WG.V/WP.95, paras. 13-38)

12. To be recognized under the Model Law, a foreign proceeding must fall within the definition in article 2 (a), which contains several elements. The proceedings should be (*emphasis added*):

(i) *Collective* judicial or administrative proceeding in a foreign State, including an interim proceeding,

(ii) Pursuant to *a law relating to insolvency*,

(iii) In which proceeding the assets and affairs of the debtor are *subject to control or supervision by a foreign court*,

(iv) *For the purpose of reorganization or liquidation*.

13. It will be recalled that article 16 (1) creates a presumption with respect to the definitions of "foreign proceeding" and "foreign representative" in article 2. If the decision commencing the foreign proceeding and appointing the foreign representative indicates that the foreign proceeding is a proceeding within the meaning of article 2 (a) and that the foreign representative is a person or body within the meaning of article 2 (d), the court is entitled to so presume.

14. It will also be recalled that recognizing courts have relied upon that presumption in several cases (see A/CN.9/WG.V/WP.95, paras. 15-16) where the court commencing the foreign insolvency proceeding (the originating court) noted that for the purposes of seeking recognition, the insolvency representative was a foreign representative and that the proceedings were foreign proceedings. The Working Group may wish to consider whether originating courts should be encouraged to state, without more, that the proceedings would fall within the definition in article 2 (a) and were thus "foreign proceedings" for the purposes of the Model Law or whether in addition they should be encouraged to set out, in the orders made, the essence of the evidence presented to them that would facilitate recognition of the proceedings as foreign proceedings under article 2 (a). The same consideration could apply to appointment of the insolvency representative and recognition of that person as the foreign representative under article 2 (d). The commentary to articles 15 and 17 of the Model Law (paras. 30-31, 67-68 and 125 of the Guide to Enactment) could note that the decisions and orders of the originating court are not determinative or binding on the receiving court, which is required to satisfy itself that the proceedings meet the requirements of article 2 (a), but that in appropriate circumstances those decisions and orders might be given weight by the receiving court in considering and reaching its own conclusions on that question.

15. A related matter concerns the status of the proceedings as either main or non-main (A/CN.9/WG.V/WP.95/Add.1, paras. 1-3). At its previous session, the Working Group agreed that it would be useful if the originating court were to include information concerning the status of the proceedings in any orders it made and, accordingly, that that point could be included in additional commentary

(A/CN.9/715, para. 37). Paragraphs 73 and 126-127 of the Guide to Enactment may be relevant to that issue.

(a) Collective proceeding (A/CN.9/WG.V/WP.95, paras. 18-23)

16. It will be recalled that the Guide to Enactment notes the requirement that creditors be involved collectively in the foreign proceeding,[5] rather than that the proceeding is one designed to assist a particular creditor to obtain payment. It is also noted that a variety of collective proceedings would be eligible for recognition "be they compulsory or voluntary, corporate or individual, winding-up or reorganization", and would include those where the debtor retained some degree of control over its assets, albeit under court supervision (e.g. debtor-in-possession, suspension of payments).[6] When discussed in the Working Group in the context of developing the Model Law, it was noted that "a collective character involved representation of the mass of creditors".[7]

17. In the cases discussed in the previous working paper (A/CN.9/WG.V/WP.95, paras. 19-23), the courts identified various elements regarded as necessary to satisfy the "collective" requirement, including that the proceeding should: consider the rights and obligations of all creditors and realize assets for the benefit of all creditors; contemplate both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action; or be concerned with collecting and distributing the debtor's assets. Notwithstanding these elements, there continues to be some lack of specificity as to the types of proceeding that might or might not satisfy the "collective" requirement. In this regard, the Working Group might note a concern that proceedings that are not truly collective could attempt to use the provisions of the Model Law to gain control over assets in the receiving jurisdiction or to stop actions in that jurisdiction and in so doing, frustrate other proceedings that are truly "collective". To achieve greater specificity, it might be relevant to consider not only what constitutes a "collective" proceeding, but also the types of proceeding that do not.

18. At its previous session, the Working Group suggested (A/CN.9/715, para. 21) that the Secretariat could identify some types of proceeding that did not clearly fall within the definition of article 2 (a) or whose inclusion could give, or had already given, rise to various concerns.

19. Proceedings giving rise to concern have included, for example, those that represent only one class of creditor, such as policyholders, in proceedings concerning an insurance company debtor, or prioritized creditors, such as banks, in proceedings that involve reorganization of some, but not necessarily all, debt. The latter may involve various, differently labelled types of proceeding, including expedited proceedings of the kind described in the Legislative Guide (part two, chap. IV).

20. It will be recalled that in discussing expedited proceedings, the Legislative Guide notes (part two, chap. IV, paras. 81-82) that it is not always possible or even

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[5] Guide to Enactment, para. 23.

[6] Id., para. 24.

[7] A/CN.9/422, para. 48.

necessary to involve all creditors in the voluntary restructuring negotiations that precede expedited proceedings. Typically, these negotiations involve the debtor and one or more classes of creditor, such as lenders and bond and equity holders, and it is usual for certain types of non-institutional and other creditors, such as trade creditors, to continue to be paid in the ordinary course of business. Accordingly, they do not need to participate in the proceedings. Where, however, it is proposed that the rights of those creditors be modified, they would need to participate in the proceedings and agree to the proposed modifications. The Legislative Guide also notes, with respect to the commencement of an expedited proceeding, that it should be available to any debtor that is not yet eligible to commence proceedings under the general provisions of the insolvency law, but it is likely the debtor will be generally unable to pay its debts in the future as they mature (para. 84 and recommendation 160).

21. While such expedited proceedings would satisfy certain requirements of the definition of a "foreign proceeding", it may not be clear that in all cases they satisfy the "collective" requirement. Several questions arise. The first is whether the "collective" element requires the consideration, participation or representation of ***all*** creditors in the proceedings, irrespective of whether or how they are to be affected, or only those creditors whose rights are affected, for example, by postponement or other modification. A second question concerns the manner of their involvement in the proceedings and whether "collective" requires the rights and interest of all creditors to be considered (by the court or the insolvency representative) in the course of the proceedings or refers to their participation or representation in the proceedings. Creditors might participate in different ways, either directly or indirectly, depending on the nature of the proceedings. Where reorganization requires a statutory or contractual percentage of creditors to approve a plan, a requirement for direct participation would be satisfied. In liquidation, however, creditors may have no clear opportunity for such direct participation. In terms of representation, there are again different approaches, such as creditor committees or representatives appointed by the court (creditor participation is discussed in the Legislative Guide, part two, chap. III, paras. 75-114).

22. A different approach to the question of what constitutes a "collective proceeding" might be to suggest that the proceedings must be for the collective good of all creditors (in the sense that all will benefit when the debtor trades out of its financial difficulties), rather than focussing on a requirement that the rights of all creditors be considered or that all creditors participate or be represented in the proceedings.

23. Some laws have approached the issue of definition by reference to the label given to each type of proceeding in different jurisdictions. In the European Union, for example, the EC Regulation includes an annex listing the names of different types of proceeding to be covered by the Regulation. While that approach might be possible for a limited number of jurisdictions in a regional context, it might not prove to be helpful in a global context, since not all jurisdictions share a common understanding of what those labels mean and it might prove cumbersome and difficult to achieve in a comprehensive manner.

24. The Working Group may wish to consider which of these approaches might be desirable or whether there are alternatives that would be preferable.

(b) Pursuant to a law relating to insolvency (A/CN.9/WG.V/WP.95, paras. 24-29)

25. It will be recalled that the preparatory documents to the Model Law indicate this formulation was used to allude to the fact that liquidation and reorganization might be conducted under law other than, strictly speaking, insolvency law (e.g. company law).[8] It was approved by the Working Group as being "sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute in which they might be contained."[9]

26. The previous working paper (A/CN.9/WG.V/WP.95, paras 26-29) noted that the question of what constitutes "a law relating to insolvency" had been considered by several courts, particularly in the context of determining whether a receivership proceeding was a foreign proceeding that would qualify for recognition. The cases had identified various elements of that requirement: that the law in question did not have to be statutory (i.e. it could include the common law) or that it did not have to be a law relating exclusively to insolvency. One case also decided that having identified the law pursuant to which the proceedings were brought, the court was to consider whether that law related to insolvency and whether the other factors to which the definition [in article 2] referred could be regarded as being brought about "pursuant" to that law.[10]

27. Some cases also indicated the characteristics of the proceedings in question that did not satisfy the requirement of the Model Law. For example, where the recited purpose of the proceedings was to prevent dissipation and waste, rather than to liquidate or reorganize the debtors' estates; where the detriment that the court was concerned to prevent was detriment to investors rather to all creditors; where the powers conferred and duties imposed on the insolvency representative were to gather in and preserve assets, not to liquidate or distribute them; and where the insolvency representative had no power to distribute the assets of the debtor.

28. The proposal in paragraph 11 above also relates to what is intended by "law relating to insolvency". To provide further guidance on this point, the Working Group may wish to consider whether the additional commentary should discuss the purpose of insolvency laws, i.e. to prevent or address financial distress, and other purposes that would not satisfy the definition.

(c) Control or supervision of assets and affairs of the debtor by a foreign court (A/CN.9/WG.V/WP.95, paras. 30-35)

29. It will be recalled that other than noting that a foreign proceeding would include proceedings in which the debtor retained some measure of control over its assets, albeit under court supervision,[11] the Guide to Enactment does not define the level of control or supervision required to satisfy the definition or the time at which that supervision or control should arise. Preparatory documents suggest that this formulation was adopted to clarify the formal nature of the control or supervision requirement and make it clear that "private financial adjustment arrangements that might be entered into by parties outside of judicial or administrative proceedings

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[8] A/CN.9/WG.V/WP.44, Notes to article 2 (c), para. 2.

[9] A/CN.9/422, para. 49.

[10] *Stanford International Bank* (on appeal), A/CN.9/WG.V/WP.95, para. 27, footnote 32.

[11] Guide to Enactment, para. 24.

[and which] could take a potentially large number of forms"[12] were not suitable for inclusion in a general rule on recognition.

30. Some cases that have considered this requirement have concluded: that both assets and affairs of the debtor must be under the control or supervision of the courts; that involvement of the court at a later stage of the proceedings, for example after approval of a reorganization plan by creditors, was sufficient to establish the degree of oversight required for recognition; and that the mere possibility under the relevant law of oversight by a court was sufficient, even if, in fact, there was no oversight in the particular case.

31. The Working Group may wish to consider whether this issue should be further elaborated to highlight some of the ways in which and times at which the court might supervise or control the assets and affairs of the debtor sufficient to satisfy the definition in article 2 (a). That discussion, which might be added to paragraphs 67-68 of the Guide to Enactment, could address the following issues:

(a) The different types of proceeding, such as an expedited proceeding, where the court involvement comes at a later stage;

(b) The degree of supervision or control required and whether it should be actual or potential. For example, should the requirement be for actual control or supervision of the assets and affairs of the debtor by the court or would it be sufficient for the court to have the possibility of supervising the insolvency representative, who in turn was responsible for supervising the debtors assets and affairs?;

(c) Whether that control or supervision must be actual at the time of the application for recognition, noting for example, cases where the application for recognition is made at a late stage in the proceedings, such as after approval of a reorganization plan, and the court no longer has any involvement.

B. Recognition

1. Main and non-main proceedings (A/CN.9/WG.V/WP.95/Add.1, paras. 1-3)

32. Article 17 of the Model Law provides that a foreign proceeding within the meaning of article 2 (a) shall be recognized as either a foreign main proceeding or a foreign non-main proceeding.

33. At its previous session, the Working Group agreed that the Model Law clearly provided for recognition of only two types of proceeding — main and non-main. Proceedings not falling into either category could not be recognized, as noted in the Guide to Enactment. Paragraph 128, for example, confirms that the Model Law does not envisage recognition of a proceeding commenced in a State in which the debtor has assets but no establishment as defined in article 2 (c).

34. Given that there has been some lack of clarity in interpreting this aspect of the Model Law, the Working Group may wish to consider whether the explanation provided at paragraphs 73 and 128 of the Guide to Enactment is sufficient or whether the issue should be clarified by additional commentary.

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[12] A/CN.9/419, para. 29.

2. Location of COMI — article 16 presumption (A/CN.9/WG.V/WP.95/Add.1, paras. 4-18)

35. It will be recalled that article 16 of the Model Law establishes a presumption upon which the court is entitled to rely in determining COMI. Article 16 (3) provides that, in the absence of proof to the contrary, the debtor's registered office (or habitual residence in the case of an individual) is presumed to be the centre of its main interests (COMI). Paragraph 122 of the Guide to Enactment makes it clear that article 16 establishes presumptions that allow the court to expedite the evidentiary process. At the same time, those presumptions do not prevent a court, in accordance with the applicable procedural law, from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party. It might also be noted that reliance on the presumption can, in the absence of independent review by the receiving court, facilitate improper forum shopping.

36. A number of cases have raised issues concerning the location of the COMI of the debtor and the interpretation of the presumption in article 16. Particular concerns relate to rebuttal of the presumption and the factors that would be relevant in that regard, especially in the case of a company debtor. Those decisions, including cases under both the EC Regulation and the Model Law, were set forth in A/CN.9/WG.V/WP.95/Add.1, paragraphs 6-18.

37. In relation to the question of COMI, the Working Group may wish to consider whether it would be appropriate to refer, in additional commentary, to the UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective, in particular section II.C, which details the steps to be taken in the process of recognition. Although directed to judges rather than to legislators, that information might nevertheless prove useful to the latter.

3. Factors relevant to determining COMI and rebutting the presumption (A/CN.9/WG.V/WP.95/Add.1, paras. 19-21)

38. At its previous session, the Working Group considered the factors set out in A/CN.9/WG.V/WP.95/Add.1, paragraph 20 and agreed that a list of indicative factors would assist judges in their COMI analysis (A/CN.9/715, para. 41). Different views were expressed as to the relative importance of the various factors included in that list. Although it was suggested that the final list should be short and that the factors could be prioritized, it was felt that such an approach might prove to be unduly restrictive for judges.

39. The Working Group may wish to note that paragraph 127 of the Guide to Enactment provides:

> "It is not advisable to include more than one criterion for qualifying a foreign proceeding as a main proceeding and provide that on the basis of any of those criteria a proceeding could be deemed a main proceeding. An approach involving such 'multiple criteria' would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding."

In considering the approach of listing factors relevant to determining COMI, the Working Group may consider how it should be made clear that the intention is not

to provide multiple criteria, but rather to provide guidance on how the single criteria, i.e. centre of main interests, is to be interpreted.

40. An initial issue for consideration by the Working Group concerns the purpose of providing a list of factors and whether it is, for example:

(a) To inform judges and other users of the Model Law about the types of factor that might be (or have been) taken into account in determining COMI; or

(b) To be determinative and limit the factors that should be considered, i.e. in the nature of a recommendation.

41. If the former is intended, the list could be included in additional commentary, with some drafting refinements, as set forth in A/CN.9/WG.V/WP.95/Add.1, paragraph 20. The commentary could indicate that some of those factors might be considered to be more important than others, but that nevertheless all of them could be considered, depending on the facts of the specific case. That commentary might suggest, for example, that (f) the location from which financing was organized or authorized or the location of the debtor's primary bank, would only be important where the bank controlled the debtor; that (k) the location of employees, might be important where employees could be future creditors, or less important on the basis that protection of employees is more an issue of protecting the rights of interested parties, is not relevant to the COMI analysis and is, in any event addressed by article 22 of the Model Law; that (e) the jurisdiction whose law would apply to most disputes, was not sufficiently important to be a determining factor and could, in any event, be a jurisdiction unrelated to the place from which the debtor was managed or conducted its business, factors that were both considered to be more important than (e). Such an explanation might be inserted, for example, after paragraph 126 of the Guide to Enactment.

42. If the second approach were to be followed, a preliminary question relates to the form of the final work product to be adopted by the Working Group and whether the inclusion of recommendations would be appropriate. A second question relates to the style of any recommendation. It will be recalled that the Legislative Guide uses various styles of recommendation. These vary from recommending that an insolvency law should adopt a specific, sometimes quite detailed, approach to recommending, without more detail, that a particular issue should be addressed by insolvency law. With respect to the factors listed in A/CN.9/WG.V/WP.95/Add.1, paragraph 20, it could be recommended, for example, that the key factors to be considered are (a) the location of the debtor's headquarters or head office functions or nerve centre; (b) the location of the debtor's management; and (m) the location which creditors recognize as being the centre of the company's operations. The recommendation could also state that while other factors may be relevant in specific cases, they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors.

43. Irrespective of the approach to be adopted on this issue, it might be useful for users of the Model Law if the factors to be listed were further elaborated to provide, for example, information on the types of circumstance in which each might be important or in which they have been found to be important, without reference to any specific case or jurisdiction.

44. Recalling that the presumption in article 16 (3) with respect to an individual debtor relates to habitual residence, the Working Group may wish to consider whether specific factors should be identified in order to rebut that part of the presumption. Those factors would relate only to habitual residence for individuals and not affect the COMI analysis for legal entities. In that regard, it might be noted that while individuals can move easily from place to place, it is more complicated in the case of a legal entity and might suggest, in some circumstances, opportunistic behaviour. In others, it might reflect a desire to gain access to a more favourable insolvency regime, such as one inclined to reorganization, rather than to liquidation.

4. Effect of recognition of the COMI

45. The Guide to Enactment to the Model Law provides that the effects of recognition of proceedings as main or non-main proceedings relate to the granting of relief. It does not deal with other implications of that recognition, such as that the law of the location of the COMI might be the law applicable to many aspects of the proceedings, as provided in recommendation 31 of the Legislative Guide. Examples of those other effects encountered in practice, such as in the Lehman Brothers cases, might provide a useful illustration of the issues.

46. The Working Group may wish to consider whether the effects of recognition should be discussed in more detail in any additional commentary or guidance.

5. Impact of fraud (A/CN.9/WG.V/WP.95/Add.1, paras. 22-25)

47. As noted in the previous working paper, there have been a number of cases in which the impact of fraud was discussed. The courts in those cases looked at the extent to which fraud might have an impact on the determination of COMI where the place of registration was merely a pretext and no actual business was carried out there. One solution suggested was to look instead at the place from which the fraud was being conducted.

48. At its previous session, the Working Group considered the impact of fraud, concluding that the issue would need further consideration (A/CN.9/715, para. 43). It may wish to take up that discussion again on the basis of the material previously provided.

6. Time relevant to determining COMI (A/CN.9/WG.V/WP.95/Add.1, paras. 26-36)

49. It will be recalled that a number of cases arising under both the Model Law and the EC Regulation have involved a debtor moving from one jurisdiction to another in close proximity to the commencement of insolvency proceedings. The Model Law does not address that possibility or make any mention of timing with respect to the determination of COMI, other than the tense of the language of article 17 (a), which provides that the foreign proceeding is to be recognized as a main proceeding "if it *is taking place* in the State where the debtor *has* the centre of its main interests" (*emphasis added*).

(a) Cases under the Model Law

50. In the cases under the Model Law dealing with this issue, various courts concluded:

(a) The proceedings had to be current at the time of the application for recognition;

(b) In order to be recognized as a foreign main proceeding, the COMI had to be in the State seeking recognition at the time recognition was sought: an operational approach that looked at the history of the debtor's connection with a particular State could not be accepted;

(c) The determination of COMI must rely on the facts in existence at the time of the application for recognition;

(d) A "totality of circumstances" approach should not be precluded in appropriate cases where, for example, there may have been an opportunistic change of location of the registered office of a company in order to establish COMI (as a result of e.g. insider exploitation, untoward manipulation, overt thwarting of third-party expectations, biased activity or motivation).

(b) Cases under the EC Regulation

51. In several the cases under the EC Regulation, the courts concluded:

(a) The location of the debtor's COMI should be decided by reference to the time of the application for commencement of insolvency proceedings;

(b) If the debtor moved after the application, but before commencement, that was not sufficient to move the COMI;

(c) Moving the jurisdiction of incorporation may not be sufficient to transfer a company's COMI, unless sufficient evidence can be advanced to rebut the presumption as to registered office;

(d) The relevant time to consider COMI was the date of the hearing for commencement or earlier if there was an application for interim relief;

(e) The consideration of COMI should be based on objective and ascertainable facts.

52. In comparing the approaches under the Model Law and the EC Regulation, the Working Group will recall that COMI is relevant under the Model Law for recognition of existing foreign proceedings, while under the EC Regulation it relates to the proper place for commencement of proceedings. At its previous session, the Working Group agreed that the relevant time for determining COMI under the Model Law should be the date of the initial application for commencement of insolvency proceedings and that that conclusion should be reflected in its final work (A/CN.9/715, para. 45).

53. The Working Group may wish to consider whether and how the issue of opportunistic moving of COMI in close proximity to the application for commencement of insolvency proceedings might be addressed. As noted above, there may be cases where the movement might be the result of legitimate forum shopping to find, for example, a jurisdiction which offers an insolvency proceeding,

such as reorganization, that meets the needs of the debtor more closely than the law of its home jurisdiction or it might be the result of manipulation. A distinction might need to be drawn between manipulation that suggests fraud and underlying fraud of the kind discussed above, where the debtor has no legitimate business purpose.

54. The commentary might indicate, for example, that it is desirable for the court to consider that issue more carefully where there is evidence of the movement of COMI in such circumstances. Such a consideration might require the court to look broadly at the list of factors outlined above and not confine its consideration to three or four factors that might be indicated as more important. The commentary might also note that although the decision of the receiving court might be based on the findings of the originating court, the decision is nevertheless that of the receiving court and might be subject to review.

C. Enterprise groups

55. At its previous session, the Working Group noted (A/CN.9/715, paras. 47-48), that many cases under the Model Law involved members of enterprise groups and that it might be beneficial to also provide additional guidance on the interpretation of COMI as it relates to enterprise groups. After discussion, the Working Group agreed to request the Secretariat, resources permitting, to prepare a study on COMI as it relates to enterprise groups for its consideration at a future session, including (i) discussion during its previous work on part three of the Legislative Guide, (ii) existing practice with enterprise groups, and, so far as possible, (iii) suggestions on how far future work might go.

56. With respect to issue (i), the Working Group may wish to recall the working papers prepared for previous sessions that discuss aspects of enterprise groups and COMI — A/CN.9/WG.V/WP.74/Add.2; A/CN.9/WG.V/WP.76/Add.2; A/CN.9/WG.V/WP.82/Add.4; and A/CN.9/WG.V/WP.85/Add.1.

57. While it is not possible to repeat the material provided in those papers, the Working Group may wish to recall the conclusions it reached as a result of discussing those materials at its thirty-first to thirty-sixth sessions.

58. At its thirty-first session, the Working Group concluded (A/CN.9/618, para. 54) that the difficulties of achieving an agreed definition of the COMI of an enterprise group suggested the need to focus on facilitating coordination and cooperation between the various courts in which insolvency proceedings against different members of an enterprise group might be commenced, whilst acknowledging the desirability of avoiding a multiplicity of proceedings in the corporate group context.

59. At its thirty-second, thirty-third and thirty-fourth sessions, the Working Group had limited discussion of international issues, much of which was confined to attempting to identify a way forward and the manner in which the relevant issues might be discussed.

60. At its thirty-fifth session, the Working Group generally agreed (A/CN.9/666, paras. 26-27) that it would be difficult to reach a definition of the COMI of an enterprise group that could be used, for example, to limit the commencement of parallel proceedings or simplify the number of laws that might apply to insolvency

proceedings commenced in different States with respect to members of the same group. It also agreed that it would also be difficult to use the COMI of a group to apply the recognition regime of the Model Law to the enterprise group. The Working Group concluded (A/CN.9/666 para. 32): that the presumption contained in article 16 (3) of the Model Law was not directly applicable in the context of enterprise groups; that providing a rule on the COMI of an enterprise group could be useful to facilitate coordination of multiple insolvency proceedings with respect to group members; and that that rule might establish a rebuttable presumption along the lines of article 16 (3) for determining the seat of the controlling group member, with the factors relevant to rebutting that presumption being based upon the factors set forth in paragraphs 6 and 13 of A/CN.9/WG.V/WP.82/Add.4.

61. At its thirty-sixth session, after further consideration of the idea of a coordination centre, the view was expressed (A/CN.9/671, para. 18) that identifying a coordination centre in an enterprise group brought with it a number of the difficulties associated with identifying the COMI of an individual debtor. Those included, in particular, whether the decision identifying a particular coordination centre in one State could be enforced or at least recognized in other States and which State should make the identification decision. It was widely agreed (A/CN.9/671, para. 20) that a decision by one court identifying a coordination centre should not be binding in other States.

62. Although there was some support for retaining a recommendation on the coordination centre, the Working Group was unable to identify a clear role for such a centre that would add to the more general recommendations on coordination and cooperation between the courts and insolvency representatives. Having considered the other draft recommendations, the Working Group returned to the topic of a coordination centre and agreed (A/CN.9/671, para. 23) to delete draft recommendations 1 and 2 (which provided a presumption for identifying the coordination centre), on the basis that the determination of a coordination centre did not imply any legal consequences because it was non-binding. The Working Group nevertheless recognized the value of one entity having the leading role in the cooperation and agreed to address the importance of having one entity acting as the coordinating member in the commentary. That issue was subsequently addressed in the final version of recommendation 250, which provides that the means of cooperation between insolvency representatives may include one of them taking a coordinating role.

63. With respect to issue (ii), no further study as requested could be prepared for this session due to a lack of available resources. However, the Working Group may wish to note that it is uncertain whether existing practice with respect to enterprise groups has developed in any new direction that indicates a solution to the issues already identified by the Working Group in connection with COMI and enterprise groups. Recent practice does suggest, however, the increasing use of coordination and cooperation in ways largely consistent with the recommendations contained in part three of the Legislative Guide to address multiple cross-border proceedings involving members of enterprise groups.

64. In view of the above, it is difficult to provide suggestions in response to issue (iii) above. Noting, in particular, that it is generally agreed the Model Law does not apply to enterprise groups per se, the Working Group may wish to consider further whether it would nevertheless be appropriate to include material in

additional commentary on the manner in which the Model Law has been applied in the case of multiple proceedings involving members of enterprise groups or whether that material might more appropriately be included in the Judicial Perspective[13] when it is revised. The Working Group may also wish to consider how, in light of the above information, the issue of enterprise groups and COMI might be further developed.

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[13] The decision of the Commission adopting the Judicial Perspective (A/66/17, para. 200) makes provision for the Judicial Perspective to be updated as required to reflect developments with respect to application and interpretation of the Model Law.