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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] The second topic concerning the liability of directors of a company in pre-insolvency is addressed in A/CN.9/WG.V/WP.104.

4. This note 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, A/CN.9/WG.V/WP.99 and the reports of the Working Group of its thirty-ninth and fortieth session (A/CN.9/715 and 738 respectively).

5. Pursuant to a decision taken by the Working Group at its fortieth session that, as a working assumption, the Guide to Enactment of the Model Law should be revised and enriched (A/CN.9/738, para. 13), this note sets forth draft revisions and additions to the Guide to Enactment as follows:

(a) The introductory paragraphs have been reordered and a new, shorter section IV on main features added;

(b) The paragraphs of the former section on main features have been moved to the article-by-article section or deleted on the basis that much of the material included was repeated under specific articles and was better placed in the article-by-article analysis;

(c) The article-by-article analysis has been expanded and given greater emphasis, reflecting the conclusions of the Working Group.

6. Paragraphs that have not been revised or that do not include revised text are not included in this note, except as strictly necessary. The text of new footnotes has been included; footnotes to be retained from the published version are not repeated,

[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.

but their location is indicated by a note in square brackets. References to the discussion in the Working Group have also been omitted, but will be updated to reflect current deliberations.

7. For ease of reference, the paragraph numbers from the published version of the Guide to Enactment are retained to indicate the reordering of the text and the additions that have been made. The numbering of the paragraphs in this note is therefore not necessarily sequential. Where a new paragraph has been added, it takes the number of the immediately preceding paragraph with the addition of an alpha character. All headings from the published text have been included and relevant paragraph numbers included in square brackets in the heading to indicate content and facilitate comparison with the published text.

GUIDE TO ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY *[based on the revised version in annex III of the Legislative Guide on Insolvency Law]*

I. Purpose and origin of the Model Law

A. Purpose of the Model Law *[paras. 1-3, 3A]*

1. The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.

Note to the Working Group

The Working Group may wish to note that the phrase "severe financial distress" is used in the published version of the Guide in paragraph 71 dealing with the definitions in article 2, and in particular paragraph (a). Elsewhere the Guide refers to the "insolvent debtor". The Working Group may wish to consider whether "severe financial distress" should be retained, or whether "financial distress" would be sufficient.

2. The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Thus, the States enacting the Model Law ("enacting States") would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. By enacting the Model Law, States acknowledge that certain insolvency laws may have to be modified in order to meet internationally recognized standards.

3. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides an [interface] [framework for cooperation] between jurisdictions, offering solutions that help in several modest but significant ways and facilitate a certain level of harmonization. Those solutions include the following:

(a)-(f) [...]

(g) Establishing rules for coordination of relief granted in the enacting State to assist two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

3A. Jurisdictions that currently have to deal with numerous cases of cross-border insolvency as well as jurisdictions that wish to be well prepared for the increasing likelihood of cases of cross-border insolvency will find the Model Law useful.

B. Origin of the Model Law *[paras. 13, 18, 19]*

13. The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment.

18. The Model Law takes into account the results of other international efforts, including the negotiations leading to the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the "EC Regulation"), the European Convention on Certain International Aspects of Bankruptcy (1990)[2], the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International Law (Bustamante Code) (1928).[3] Proposals from non-governmental organizations that have been taken into account include the Model International Insolvency Cooperation Act and the Cross-Border Insolvency Concordat, both developed by Committee J of the Section on Business Law of the International Bar Association.[4]

19. [...]

C. Preparatory work and adoption *[paras. 4-8]*

4. The project was initiated by the United Nations Commission on International Trade Law (UNCITRAL), in close cooperation with INSOL International. The project benefited from the expert advice of INSOL during all stages of the preparatory work. In addition, during the formulation of the Law, consultative assistance was provided by the former Committee J (Insolvency) of the Section on Business Law of the International Bar Association.

5. Prior to the decision by UNCITRAL to undertake work on cross-border insolvency, the Commission and INSOL held two international colloquiums for insolvency practitioners, judges, government officials and representatives of other interested sectors.[5] The suggestion arising from those colloquiums was that work by

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[2] *[footnote 9]*.
[3] *[footnote 10]*.
[4] Available from www.iiiglobal.org/component/jdownloads/finish/396/1522.html (last visited 15 February 2012).
[5] *[footnote 3]*.

UNCITRAL should have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency representatives and recognition of foreign insolvency proceedings.

6. When UNCITRAL decided in 1995 to develop a legal instrument relating to cross-border insolvency, it entrusted the work to the Working Group on Insolvency Law, one of the subsidiary bodies of UNCITRAL.[6] The Working Group devoted four two-week sessions to the work on the project.[7]

7. [...]

8. [...]

II. Purpose of the Guide to Enactment and Interpretation *[paras. 9-10]*

9. UNCITRAL considered that the Model Law would be a more effective tool if it were accompanied by background and explanatory information. While such information would primarily be directed to executive branches of Governments and legislators preparing the necessary legislative revisions, it would also provide useful insight to those charged with interpretation and application of the Model Law, such as judges,[8] and other users of the text such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions should be varied in order to be adapted to the particular national circumstances.

10. The present Guide has been prepared by the Secretariat pursuant to the request of UNCITRAL made at the close of its thirtieth session, in 1997 [and revised in accordance with the request of UNCITRAL made at its ... session]. It is based on the deliberations and decisions of the Commission at that thirtieth session,[9] when the Model Law was adopted, as well as on considerations of the Working Group on Insolvency Law, which conducted the preparatory work. The revisions are based on the deliberations of the Working Group at its thirty-ninth (2010), fortieth (2011) and forty-first (2012) sessions, as well as of the Commission at its [...] session [20...].

III. The model law as a vehicle for the harmonization of laws *[paras 11-12]*

11. [...]

A. Flexibility of a model law

12. In incorporating the text of a model law into its system, a State may modify or leave out some of its provisions. In the case of a convention, the possibility of

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[6] *[footnote 4]*.

[7] *[footnote 5]*.

[8] Where "judges" would include a judicial officer or other person appointed to exercise the powers of the court or other competent authority having jurisdiction under domestic insolvency laws [enacting the Model Law].

[9] *[footnote 8]*.

changes being made to the uniform text by the States parties (normally referred to as "reservations") is much more restricted; in particular trade law conventions usually either totally prohibit reservations or allow only specified ones. The flexibility inherent in a model law is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system (which is the case with the UNCITRAL Model Law on Cross-Border Insolvency). This, however, also means that the degree of, and certainty about, harmonization achieved through a model law is likely to be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the Model Law into their legal systems.

B. Fitting the Model Law into existing national law *[paras. 20-21, 49]*

20. With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State. This is manifested in several ways:

(a) [...]

(b) The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding under the national law (article 20);

(c) Recognition of foreign proceedings does not prevent local creditors from initiating or continuing collective insolvency proceedings in the enacting State (article 28);

(d)-(f) [...].

21. The flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see paras. 91-92) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency matters. Thus it is advisable to limit deviations from the uniform text to a minimum. This will assist in making the national law as transparent as possible for foreign users (see also paras. 11 and 12 above). The advantage of uniformity and transparency is that it will make it easier for the enacting States to demonstrate the basis of national law on cross-border insolvency and obtain cooperation from other States in insolvency matters.

49. [...]

IV. Main features of the Model Law *[paras. 49A-D, 37, 37A-H, 32-33, 33A-G]*

49A. The text of the Model Law focuses on four key elements identified, through the studies and consultations conducted in the early 1990s prior to the negotiation of

the Model Law, as being the areas upon which international agreement might be possible:

(a) Access to local courts for representatives of foreign insolvency proceedings and for creditors and authorisation for representatives of local proceedings to seek assistance elsewhere;

(b) Recognition of certain orders issued by foreign courts;

(c) Relief to assist foreign proceedings;

(d) Cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings.

A. Access

49B. The provisions on access address inbound and outbound aspects of cross-border insolvency. An insolvency representative from the enacting State is authorised to act in a foreign State (article 5) on behalf of local proceedings. A foreign representative has a right of direct access to courts in the enacting State (article 9); a right to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (article 11), for which recognition is not required; and, upon recognition, a right to participate in insolvency-related proceedings conducted in the enacting State under the law of that State (article 12).

49C. The fact that a foreign representative has the right to apply to the courts of the enacting State does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the enacting State for any purpose other than that application (article 10).

49D. Importantly, foreign creditors have the same right as local creditors to commence and participate in proceedings in the enacting State (article 13).

37. [...]

B. Recognition

37A. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Article 17 provides that, subject to article 6, where the specified requirements of article 2 concerning the nature of the foreign proceeding and the foreign representative are met and the evidence required by 15 has been provided, the court should recognize the foreign proceeding as a matter of course. The process of application and recognition is aided by the presumptions provided in article 16 that enable the court in the enacting State to presume the authenticity and validity of the certificates and documents, originating in the foreign State, that required by article 15.

37B. Article 6 allows recognition to be refused where it would be "manifestly contrary to the public policy" of the recognizing State. This may be a preliminary

question to be considered on an application for recognition. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that it be interpreted restrictively and that article 6 be used only in exceptional circumstances (see paras. 86-89).

37C. A foreign proceeding should be recognized as a main proceeding or a non-main proceeding (article 17, paragraph 2). A main proceeding is one taking place where the debtor had its centre of main interests (COMI) [at the date of commencement of the foreign proceeding]. In principle, such a proceeding is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs. Centre of main interests is not defined in the Model Law, but is based on a presumption of the registered office or habitual residence of the debtor (article 16, paragraph 3).

37D. A non-main proceeding is one taking place where the debtor has an establishment. This is defined as "any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services" (article 2, subparagraph (f)). Proceedings commenced on a different basis, such as presence of assets, without a centre of main interests or establishment, would not qualify for recognition under the Model Law scheme. Main and non-main proceedings are discussed in more detail below at paras. [...].

37E. Acknowledging that it might subsequently be discovered that the grounds for granting recognition were lacking at the time of recognition, have changed or ceased to exist, the Model Law (article 17, paragraph 4) provides for modification or termination of the order for recognition.

37F. Recognition of foreign proceedings under the Model Law has several effects. Principal amongst them is the relief accorded to assist the foreign proceeding (articles 20 and 21), but additionally the foreign representative is entitled to participate in any local insolvency proceeding regarding the debtor (article 13), has standing to initiate an action for avoidance of antecedent transactions (article 23) and may intervene in any proceeding in which the debtor is a party (article 24).

C. Relief

37G. A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. Accordingly, the Model Law specifies the relief that is available in both of those instances. As such, it neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the foreign proceeding the relief that would be available under the law of the enacting State. However, it is possible, as noted above, to align the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding commenced under the law of the enacting State (article 20).

37H. Interim relief is available at the discretion of the court between the making of an application for recognition and the decision on that application (article 19); specified forms of relief are available on recognition of main proceedings

(article 20); and relief at the discretion of the court is available for both main and non-main proceedings following recognition (article 21). In the case of main proceedings, that discretionary relief would be in addition to the relief available on recognition.

32. Key elements of the relief accorded upon recognition of a foreign "main" proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor, and a suspension of the debtor's right to transfer or encumber its assets (article 20, para. 1). Such stay and suspension are "mandatory" (or "automatic") in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide "breathing space" until appropriate measures are taken for reorganization or fair liquidation of the assets of the debtor. The suspension of transfers is necessary because in a modern, globalized economic system it is possible for a multinational debtor to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a rapid "freeze" essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

33. [...]

33A. With respect to interim and discretionary relief, the court can impose conditions and modify or terminate the relief to protect the interests of creditors and other interested persons affected by the relief ordered (article 22).

D. Cooperation and coordination

Cooperation

33B. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between foreign representatives is also authorized. Cooperation is discussed in detail in paragraphs 173-183.

Note to the Working Group

Paragraph 173A, addressing the articles in chapter IV dealing with cooperation and coordination, notes that cooperation under the Model Law is not dependent on recognition and may thus occur at an early stage before an application for recognition and in respect of proceedings that are not a foreign proceeding within article 2. The Working Group may wish to consider whether this clarification should also be included in the introduction.

33C. Recognizing that the idea of cooperation might be unfamiliar to many judges and insolvency representatives, article 27 sets out some of the possible means of cooperation. These are further discussed and amplified in the UNCITRAL Practice

Guide on Cross-Border Insolvency Cooperation,[10] which also compiles practice and experience with respect to the use and negotiation of cross-border insolvency agreements.

Concurrent proceedings

33D. Several provisions of the Model Law address coordination of concurrent proceedings and aim to foster decisions that would best achieve the objectives of both proceedings.

33E. The recognition of foreign main proceedings does not prevent commencement of local proceedings (article 28), nor does the commencement of local proceedings terminate recognition already accorded to foreign proceedings or prevent recognition of foreign proceedings.

33F. Article 29 addresses adjustment of the relief available where there are concurrent proceedings. The basic principle is that relief granted to a recognized foreign proceeding should be consistent with local proceedings, irrespective of whether the foreign proceeding was recognized before or after the commencement of the local proceeding. For example, where local proceedings have already commenced at the time the application for recognition is made, relief granted to the foreign proceeding must be consistent with the local proceeding. If the foreign proceeding is recognized as a main proceeding, the automatic relief available on recognition under article 20 will not apply.

33G. Articles 31 and 32 contain additional means of facilitating coordination. Article 31 establishes a presumption to the effect that recognition of a foreign proceeding is sufficient proof of insolvency where insolvency is required for commencement of a local proceeding. Article 32 establishes the hotchpot rule to avoid situations in which a creditor might make claims and be paid in multiple insolvency proceedings in different jurisdictions, thereby potentially obtaining more favourable treatment than other creditors.

V. Article-by-article remarks

Preamble *[Paras. 54, 55, 51, 51A, 52, 53, 56]*

54. The Preamble gives a succinct statement of the basic policy objectives of the Model Law. It is not intended to create substantive rights, but rather to provide general orientation for users of the Model Law and to assist in its interpretation.

55. [...]

Use of the term "insolvency" [paras. 51-51A, 52-53, 56]

51. Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency"[11]. However, as used in the Model Law, the word "insolvency"

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[10] The text of the Practice Guide is available from www.uncitral.org/uncitral/en/uncitral_texts.html.

[11] The Legislative Guide explains insolvency as being "when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets" and insolvency

refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The reason is that the Model Law covers proceedings concerning different types of debtors and, among those proceedings, deals with proceedings aimed at liquidating or reorganizing the debtor. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2 paragraph (a) are not insolvency proceedings within the scope of the Model Law.

51A. Debtors covered by the Model Law would generally fall within the scope of the UNCITRAL Legislative Guide on Insolvency Law and would therefore be those eligible for commencement of insolvency proceedings in accordance with recommendations 15 and 16 of the Legislative Guide,[12] being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets.

52. It should be noted that in some jurisdictions the expression "insolvency proceedings" has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Law, since the Model Law is designed to be applicable to proceedings regardless of whether they involve a natural or a legal person as the debtor. If, in the enacting State, the word "insolvency" may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.

53. [...]

"State"

56. The word "State", as used in the preamble and throughout the Model Law, refers to the entity that enacts the Law (the "enacting State"). The term should not be understood as referring, for example, to a state in a country with a federal system. The national statute may use another expression that is customarily used for this purpose.

Note to the Working Group

Document A/CN.9/WG.V/WP.95, paragraphs 34-35, raised the issue of whether the particular entity administered by the foreign representative is a "debtor" as envisaged by the law of the recognizing State. "Debtor" is not a term defined by the Model Law. The Working Group may wish to consider

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proceedings as being "collective proceedings ,subject to court supervision, either for reorganization or liquidation".

[12] Recommendations 15 and 16 provide:

15. The insolvency law should specify that insolvency proceedings can be commenced on the application of a debtor if the debtor can show either that:

(a) It is or will be generally unable to pay its debts as they mature; or

(b) Its liabilities exceed the value of its assets.

16. The insolvency law should specify that insolvency proceedings can be commenced on the application of a creditor if it can be shown that either:

(a) The debtor is generally unable to pay its debts as they mature; or

(b) The debtor's liabilities exceed the value of its assets.

whether that issue should be addressed in the Guide to Enactment; the only material currently relating to the types of debtor covered by the Model Law is article 1 paragraph 2 (paragraphs 60-66 of the Guide to Enactment), which provides for the exclusion of certain debtors, such as specially regulated entities.

CHAPTER I. GENERAL PROVISIONS — ARTICLES 1-8

Article 1. Scope of application

Paragraph 1[paras. 57 and 59]

57. Article 1, paragraph 1, outlines the types of issue that may arise in cases of cross-border insolvency and for which the Model Law provides solutions: (a) inward-bound requests for recognition of a foreign proceeding; (b) outward-bound requests from a court or [insolvency] representative in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of proceedings taking place concurrently in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.

58. [deleted]

59. "Assistance" in paragraph 1, subparagraphs (a) and (b), is intended to cover various situations dealt with in the Model Law, in which a court or an insolvency representative in one State may make a request to a court or an insolvency representative in another State for assistance within the scope of the Model Law. The Law specifies some of those measures (e.g. article 19, subparas. 1 (a) and (b); article 21, subparas. 1 (a)-(f) and para. 2; and article 27, subparas. (a)-(e)), while other possible measures are covered by a broader formulation (such as the one in article 21, subpara. 1 (g)).

Paragraph 2 (Specially regulated insolvency proceedings) [paras. 60-65]

Non-traders or natural persons [para. 66]

Article 2. Definitions

Subparagraphs (a)-(d) [paras. 67-68A]

67. Since the Model Law will be embedded in the national law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Law contains definitions of the terms "foreign proceeding" (subparagraph (a)) and "foreign representative" (subparagraph (d)), but not of the person or body that may be entrusted with the administration of the assets of the debtor in an insolvency proceeding in the enacting State. To the extent that it would be useful to define in the national statute the term used for such a person or body (rather than just using the term commonly employed to refer to such persons), this may be added to the definitions in the law enacting the Model Law.[13]

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[13] The term "insolvency representative" is used in the Legislative Guide to describe such a person and is explained as being "a person or body, including one appointed on an interim basis,

68. By specifying the required characteristics of a "foreign proceeding" and a "foreign representative", the definitions limit the scope of application of the Model Law. For a proceeding to be susceptible to recognition or cooperation under the Model Law and for a foreign representative to be accorded access to local courts under the Model Law, the foreign proceeding and the foreign representative must have the attributes of subparagraphs (a) and (d).

68A. Proceedings that do not have those attributes would not be eligible for recognition under the Model Law.

Subparagraph (a) — Foreign proceeding [paras. 71, 23-23B, 24-24G, 69, 70]

71. The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in different legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State. As noted in paragraph 52 above, the expression "insolvency proceedings" may have a technical meaning in some legal systems, but is intended in subparagraph (a) to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent.

72. *[deleted]*

23. The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. Whether a foreign proceeding possesses those elements would be determined at the time of consideration of the application for recognition.

23A. As noted in paragraph (e) of the preamble, the focus of the Model Law is upon severely financially troubled and insolvent debtors and the laws that prevent or address the financial distress of those debtors. As noted above (para. 51A), these are debtors that would generally fall within the commencement criteria discussed in the Legislative Guide, being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets (recommendations 15 and 16).

(i) Collective proceeding

23B. As a general principle, a collective proceeding is one that addresses all assets and liabilities of the debtor and the rights and claims of all creditors, as opposed to a proceeding designed to assist a particular creditor to obtain payment or a process designed for some purpose other than to address the insolvency or severe financial distress of the debtor. A proceeding should not be excluded purely because a class of creditors' rights is unaffected by it nor should those insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets

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authorised in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate".

unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law (see Legislative Guide, part two, chap. II, paras. 7-9).

24. Within the parameters of the definition of a foreign proceeding, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. This would also include proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, "debtor in possession").

24A. The Model Law recognizes that, for certain purposes, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent. Paragraph 194 below notes that those circumstances might include cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment. Paragraph 195 below notes that for use in jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of foreign main proceedings, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding.

(ii) Pursuant to a law relating to insolvency

24B. This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained[14] and irrespective of whether the law that contained the rules related exclusively to insolvency. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress.

(iii) Control or supervision by a foreign court

24C. The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 24, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.

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

24D. Expedited proceedings of the type referred to in the Legislative Guide (see part two, chap IV, paras. 76-94 and recommendations 160-168) should not be excluded. These are proceedings in which the court exercises control or supervision at a late stage of the insolvency process. Proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so should also not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open [or pending] and the court retains jurisdiction until implementation is completed.

24E. Subparagraph (a) makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding.

(iv) For the purpose of reorganization or liquidation

24F. Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding in article 2, subparagraph (a) may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets.

24G. Types of procedures that might not be eligible for recognition could include financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt where the negotiations do not lead to the commencement of an insolvency proceeding, including those referred to in the Legislative Guide as expedited proceedings (see para 24D), conducted under the insolvency law. Such measures would generally not satisfy the requirement for collectivity nor for control or supervision by the court (see paras. 24C-E). Because they could take a potentially large number of forms, those measures would be difficult to address in a general rule on recognition.[15] Other procedures that do not require supervision or control by the court might also be ineligible.

Interim proceeding

69. The definitions in subparagraphs (a) and (d) cover also an “interim proceeding” and a representative “appointed on an interim basis”. In a State where interim proceedings are either not known or do not meet the requisites of the definition, the question may arise whether recognition of a foreign “interim proceeding” creates a risk of allowing potentially disruptive consequences under the Model Law that the situation does not warrant. It is advisable that, irrespective of the way interim proceedings are treated in the enacting State, the reference to

[15] A/CN.9/419, paras. 19 and 29.

"interim proceeding" in subparagraph (a) and to a foreign representative appointed "on an interim basis" in subparagraph (d), be maintained. The reason is that in the practice of many countries insolvency proceedings are often, or even usually, commenced on an "interim" or "provisional" basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition in article 2, subparagraph (a). Such proceedings are often conducted for weeks or months as "interim" proceedings under the administration of persons appointed on an "interim" basis, and only some time later would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The objectives of the Model Law apply fully to such "interim proceedings" (provided the requisites of subparagraphs (a) and (d) are met); therefore, these proceedings should not be distinguished from other insolvency proceedings merely because they are described as being of an interim nature. The point that an interim proceeding and the foreign representative must meet all the requirements of article 2 is emphasized in article 17, paragraph 1, according to which a foreign proceeding may be recognized only if it is "a proceeding within the meaning of subparagraph (a) of article 2" and "the foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2".

70. Article 18 addresses a case where, after the application for recognition or after recognition, the foreign proceeding or foreign representative, whether interim or not, ceases to meet the requirements of article 2, subparagraphs (a) and (d) (see paras. 133-134 below).

Subparagraph (b) — foreign main proceeding [paras. 31-31C]

31. A foreign proceeding is deemed to be the "main" proceeding if it has been commenced in the State where "the debtor has the centre of its main interests". This corresponds to the formulation in article 3 of the EC Regulation (based upon the formulation previously adopted in the European Union Convention on Insolvency Proceedings), thus building on the emerging harmonization as regards the notion of a "main" proceeding. The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21, coordination of the foreign proceeding with proceedings that may be commenced in the recognizing jurisdiction under chapter IV and with other concurrent proceedings under chapter V.

31A. The Model Law does not define the concept "centre of main interests". However, an explanatory report (the Virgos-Schmit Report),[16] prepared with respect to the European Convention, provided guidance on the concept of "main insolvency proceedings" and notwithstanding the subsequent demise of the convention, the Report has been accepted generally as an aid to interpretation of the term "centre of main interests" in the EC Regulation. Since the formulation "centre of main interests" in the EC Regulation corresponds to that of the Model Law, albeit for different purposes (see para. 123A), jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law.

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[16] M.Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels 3 May 1996. The report was published in July 1996 and is available from http://aei.pitt.edu/952.

31B. Recitals (12) and (13) of the EC Regulation state:

"(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings[17] to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

"(13) The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

31C. The Virgos-Schmit Report explained the concept of "main insolvency proceedings" as follows:

"73. Main insolvency proceedings

"Article 3 (1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at encompassing all the debtor's assets on a world-wide basis and at affecting all creditors, wherever located.

"Only one set of main proceedings may be opened in the territory covered by the Convention.

...

"75. The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

"The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

"By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

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[17] The EC Regulation refers to "secondary proceedings", while the Model Law uses "non-main proceedings".

> "In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.
>
> "Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office."

Centre of main interests is discussed further in the remarks on article 16.

Subparagraph (c) — foreign non-main proceeding [para. 73]

73. Subparagraph (c) requires that a "foreign non-main proceeding" take place in the State where the debtor has an "establishment" (see below, para. 75-75A). Thus, a foreign non-main proceeding susceptible to recognition under article 17, paragraph 2 may be only a proceeding commenced in a State where the debtor has an establishment in the meaning of article 2, subparagraph (f). This rule does not affect the provision in article 28, namely, that an insolvency proceeding may be commenced in the enacting State if the debtor has assets there. It should be noted, however, that the effects of an insolvency proceeding commenced on the basis of the presence of assets only are normally restricted to the assets located in that State; if other assets of the debtor located abroad should, under the law of the enacting State, be administered in that insolvency proceeding (as envisaged in article 28), that cross-border issue is to be dealt with as a matter of international cooperation and coordination under articles 25-27 of the Model Law.

Subparagraph (e) [para. 74]

74. A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of "foreign court" in subparagraph (e) includes also non-judicial authorities. Subparagraph (e) follows a similar definition contained in article 2, subparagraph (d), of the EC Regulation, as well as the Legislative Guide (Introd., para. 12(i)); the UNCITRAL Practice Guide (Introd., paras. 7-8) and the Judicial Perspective.

Subparagraph (f) [para. 75-75B]

75. The definition of the term "establishment" was inspired by article 2, subparagraph (h), of the European Union Convention on Insolvency Proceedings. The term is used in the Model Law in the definition of "foreign non-main proceeding" (article 2, subparagraph (c)) and in the context of article 17, paragraph 2, according to which, for a foreign non-main proceeding to be recognized, the debtor must have an establishment in the foreign State (see also para. 73 above).

75A. The Virgos-Schmit Report on that Convention provides some further explanation of "establishment":

> "Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.
>
> "The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an 'establishment'. A certain stability is required. The negative formula ('non-transitory') aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor."[18]

75B. Since "establishment" is a defined term, the inquiry to be made by the court as to whether the debtor has an establishment is purely factual in nature. Unlike "foreign main proceeding" there is no presumption with respect to the determination of establishment. There is a legal issue as to whether the term "non-transitory" refers to the duration of a relevant economic activity or to the specific location at which the activity is carried on. The commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts or of property would not in principle satisfy the definition of establishment. [However, the presence of an asset together with minimal management of that asset might be sufficient to constitute an "establishment".]

> *Note to the Working Group*
>
> The Working Group may wish to consider the inclusion of the last sentence of paragraph 75B in order to provide flexibility in determining what might constitute an establishment and avoid a narrow interpretation.

Article 3. International obligations of this State [paras. 76-78]

Article 4. [Competent court or authority][1] *[paras. 79-83]*

Article 5. Authorization of [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] *to act in a foreign State [paras. 84-85]*

Article 6. Public policy exception [paras. 86-89]

Article 7. Additional assistance under other laws [para. 90]

Article 8. Interpretation [paras. 91-92]

91. [...]

92. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL. For further information about the system, see paragraph 202 below.

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[18] Virgos-Schmit Report, para. 7.1.

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE — ARTICLES 9-14

Article 9. Right of direct access [para. 93]

93. An important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State. Article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular action. Article 4 deals with court competence in the enacting State for providing relief to the foreign representative.

Article 10. Limited jurisdiction [paras. 94-96]

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency] *[paras. 97-99]*

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency] *[paras. 100-102]*

100. The purpose of article 12 is to ensure that, when an insolvency proceeding concerning a debtor is taking place in the enacting State, the foreign representative of a proceeding concerning that debtor will be given, as an effect of recognition of the foreign proceeding, standing [(or "procedural legitimation")] to make petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding.

Note to the Working Group

The Working Group may wish to consider whether it is necessary to retain the reference to "procedural legitimation" (see also para. 166 below).

101. [...]

102. [...]

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency] *[paras. 103-105]*

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency] *[paras. 106-111]*

[Continued in A/CN.9/WG.V/WP.103/Add.1]