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Report of Working Group V (Insolvency Law) on the work of its forty-first session*

(New York, 30 April-4 May 2012)

Contents

* This document was submitted for translation less than 10 weeks before the opening of the Commission session because of the holding of the Working Group session within that time frame from 30 April to 4 May.

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I. 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 three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. At its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The Working Group continued its discussion of topics (a) and (b) at its fortieth session in 2011 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.99, 100 and 101).

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its forty-first session in New York from 30 April to 4 May 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Benin, Cameroon, Canada, Chile, China, Colombia, France, Germany, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Nigeria, Norway, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Belgium, Croatia, Denmark, Indonesia, Iraq, Kuwait, Lithuania, Madagascar and Switzerland.

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

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank;

(b) *Invited intergovernmental organizations*: the Caribbean Community (CARICOM);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), American Bar Foundation (ABF), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), Inter-Pacific Bar Association (IPBA), International Women's Insolvency and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms Diana Lucia Talero Castro (Colombia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.102);

(b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.103 and Add.1);

(c) A note by the Secretariat on directors' obligations in the period approaching insolvency (A/CN.9/WG.V/WP.104); and

(d) A proposal from the delegation of the United States of America (A/CN.9/WG.V/WP.105).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of (a) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; and (b) directors' obligations in the period approaching insolvency.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency, on the basis of documents A/CN.9/WG.V/WP.103 and Add.1, A/CN.9/WG.V/WP.104 and A/CN.9/WG.V/WP.105. The deliberations and decisions of the Working Group on these topics are reflected below.

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

12. The Working Group commenced its session with a discussion of the draft revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency contained in documents A/CN.9/WG.V/WP.103 and Add.1, together with the proposals contained in document A/CN.9/WG.V/WP.105.

13. The Working Group approved the reordering of the draft text and noted the placement and substance of those paragraphs in respect of which no revisions were proposed.

A. Purpose and origin of the Model Law

14. The Working Group agreed to retain the reference to severe financial distress in paragraph 1 and throughout the Guide to Enactment. It was also agreed that the words "framework for cooperation" were preferable to "interface" in paragraph 3, and should be retained. It was further agreed that the Model Law was more than simply "useful" and that a stronger word should be used at the end of paragraph 3A.

15. The substance of paragraphs 1-3A, 13, 18 and 4-6 was otherwise adopted as drafted.

B. Purpose of the Guide to Enactment and Interpretation

16. The substance of paragraphs 9-10 was adopted as drafted.

C. The model law as a vehicle for the harmonization of laws

17. The substance of paragraphs 12, 20 and 21 was adopted as drafted.

D. Main features of the Model Law

1. Access

18. The Working Group agreed to delete the words "for which recognition is not required" in the third sentence of paragraph 49B. The substance of paragraphs 49A-D was otherwise adopted as drafted.

2. Recognition

19. A suggestion that a reference to the requirement under article 2 for the foreign proceeding to be a collective proceeding be included in the paragraphs on recognition, with a cross-reference to the remarks on article 2 (paragraphs 23B, 24 and 24A), received support. The substance of paragraphs 37A-F was otherwise adopted as drafted.

3. Relief

20. The substance of paragraphs 37G-H, 32 and 33A was adopted as drafted.

4. Cooperation and coordination

21. The Working Group approved the addition of the clarification from paragraph 173A to paragraph 33B, as proposed in the Note to the Working Group. The substance of paragraphs 33B and C was otherwise adopted as drafted.

22. The substance of paragraphs 33D-G was adopted as drafted.

E. Article-by-article remarks

1. Preamble

23. The substance of paragraphs 54, 51, 51A, 52 and 56 was approved as drafted. The Working Group agreed that, in order to avoid unnecessarily restricting the application of the Model Law, the types of debtor to be covered did not need to be addressed in the Guide to Enactment.

2. General provisions — articles 1-8

Article 1. Scope of application

24. The substance of paragraphs 57 and 59 was adopted as drafted.

Article 2. Definitions

25. The Working Group adopted the substance of paragraphs 67-68A, 71, 23 and 23A as drafted, with the replacement of the word "troubled" by "distressed" in paragraph 23A.

Subparagraph (a) — collective proceeding

26. The Working Group considered paragraphs 23B, 24 and 24A, together with the proposal contained in document A/CN.9/WG.V/WP.105, paragraph 8. There was

general agreement on the desirability of providing further guidance on what constituted a "collective proceeding" for the purposes of the Model Law and that the elements identified in paragraph 8 captured the essence of a collective proceeding. A number of concerns were expressed, however, with respect to the specific drafting proposed, on the basis that it might restrict the types of proceeding falling within the scope of the Model Law. It was observed that subparagraphs (a) and (c) could refer to "affected" rather than "all" creditors, that what constituted "sufficient notice" might be unclear and that not all claims would necessarily be subject to pro rata payment; that in referring only to participation with respect to the manner in which assets were administered, subparagraph (b) was too narrow, that it should perhaps refer to creditor participation to protect their legitimate interests and that what constituted "meaningful participation" might be unclear; and that subparagraph (d) should refer to "substantially all" of the assets and liabilities.

27. Support was expressed in favour of the approach of paragraph 23B, which stated the key principle but allowed flexibility. After discussion, it was suggested that paragraph 23B might be supplemented by additional elements drawn from paragraph 8.

28. The Working Group considered a proposal expanding upon the text included in paragraph 8 of document A/CN.9/WG.V/WP.105 as follows:

"Replace paragraph 23B with the following two paragraphs:

"23B. For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding. Such a proceeding should be collective because the Model Law is intended to provide a tool for achieving a coordinated, global solution for the stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another country. Nor is it intended that the Model Law serve as a tool for gathering up assets in an ordinary winding up proceeding, when such a proceeding does not also include provision for addressing the claims of creditors. There are also certain kinds of actions that might serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms. The Model Law may be an appropriate tool for such proceedings, provided the proceeding is collective as that term is used in the Model Law.

"23C. In evaluating whether a given proceeding is collective, as that term is intended in the Model Law, the following factors may be considered:

"(a) Whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors;

"(b) Whether creditors that are adversely affected by the proceeding have a right (though not necessarily the obligation) to submit claims for determination, and to receive an equitable distribution or satisfaction of their claims;

"(c) Whether such creditors have a right to meaningful participation in the proceeding;

"(d) Whether there are procedures in place for notice to such creditors, so that they can meaningfully participate in the proceedings."

29. The Working Group supported the proposed paragraph 23B with a few modifications namely: (a) amending the fourth sentence to read, "Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up or conservative proceeding that does not also include provision for addressing the claims of creditors"; and (b) inserting at an appropriate place in the new paragraph 23B the sentence from the existing paragraph 23B of document A/CN.9/WG.V/WP.103 commencing "A proceeding should not be excluded …". It was suggested that since some of the elements of what constituted a "foreign proceeding" addressed in paragraph 23B overlapped with those addressed under paragraphs 24F and G of document A/CN.9/WG.V/WP.103, a cross-reference could be included. It was also suggested that since all of the elements of what constituted a "foreign proceeding" should be considered as a whole, that point might be included in the paragraphs on article 2(a).

30. With respect to paragraph 23C of the proposal, concern was expressed that in order to ensure the speed and simplicity of the recognition process, unnecessary and burdensome requirements should not be imposed in order to qualify proceedings as collective proceedings. A simple approach would give the court flexibility to make a determination based on the circumstances of each case. It was proposed that subparagraph 23C (a) should be the key requirement for a collective proceeding and that since subparagraphs (b), (c) and (d) were procedural matters that might not always be present in proceedings otherwise regarded as collective, they should therefore not be considered substantive elements of a collective proceeding. A different view was that subparagraphs (c) and (d) should be retained as requirements of a collective proceeding, but be revised to ensure all parties involved (i) received proper notice; and (ii) were granted a right to participate in the proceedings. A suggestion was made to define the term "meaningful participation" in subparagraph 23C (c) to provide clarity, as it could be subject to various interpretations or to replace it with a different term such as "effective".

31. After discussion, the Working Group adopted a new paragraph 23C that would incorporate subparagraph 23C (a) as part of the chapeau to form a general principle. Subparagraphs 23C (b), (c) and (d) would be revised in a narrative form as examples of the ways in which a collective proceeding might deal with creditors. The Working Group agreed that since the Legislative Guide on Insolvency Law treated creditor participation extensively, a cross-reference to the relevant paragraphs of the Guide should be included. The Secretariat was requested to prepare a revised text for consideration at a future session.

Subparagraph (a) — pursuant to a law relating to insolvency

32. The substance of paragraph 24B was adopted as drafted.

Subparagraph (a) — control or supervision by a foreign court

33. The substance of paragraphs 24C-E was adopted as drafted.

Subparagraph (a) — for the purpose of reorganization or liquidation

34. The Working Group agreed to delete the words "including those referred to in the Legislative Guide as expedited proceedings (see para. 24D)" in paragraph 24G and to include clarification that the contractual arrangements referred to would be enforceable as such outside of the Model Law without the need for recognition; nothing in the Guide to Enactment was intended to restrict such enforceability. The substance of paragraphs 24F and G was otherwise adopted as drafted.

Interim proceeding

35. The substance of paragraphs 69-70 was adopted as drafted.

Subparagraph (b), (c), (e) and (f)

36. A proposal to delete the text in square brackets of paragraph 75B was supported. The substance of paragraphs 31, 31A-C and 73-75B was adopted with that revision.

Article 8. Interpretation

37. The substance of paragraph 92 was adopted as drafted.

38. The Working Group noted the proposal contained in A/CN.9/WG.V/WP.105, paragraphs 14-17 and agreed that the development of such material in the form of a digest of case law would not only provide greater access to court decisions on the Model Law and facilitate uniformity and predictability with respect to its interpretation, but also provide a useful supplement to the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. Chapter II. Access of foreign representatives and creditors to courts in this State — articles 9-14

39. It was noted that with respect to the reference to "standing" in paragraph 100, that a more detailed reference to other terminology was included in paragraph 166. The Secretariat was requested to align the paragraphs making reference to "standing" and the inclusion of the additional terminology. The substance of paragraphs 93 and 100 was otherwise adopted as drafted.

4. Chapter III. Recognition of a foreign proceeding and relief — articles 15-24

Article 15. Application for recognition of a foreign proceeding

40. The substance of paragraph 112 was adopted as drafted.

Article 16. Presumptions concerning recognition

41. The substance of paragraphs 122 and 122A was adopted as drafted. A proposal to replace the reference to "information" in paragraph 122B with a reference to "evidence" was not supported on the basis that it would not be possible in many legal systems to include evidence in a court decision. Information, however, could be provided and judges should be encouraged to give full and detailed reasons. Information included in court orders could be supplemented by declarations or

affidavits that would assist the receiving court. The Working Group agreed to retain the first sentence as drafted and to delete the second sentence of paragraph 122B.

42. Concern was expressed that examples were emerging in practice of originating courts making decisions with respect to COMI in situations where they were not required to do so under national law, but where the intention was to influence or attempt to bind the receiving court to follow that decision. It was observed that since the receiving court was required to independently satisfy itself as to the terms and requirements of the Model Law, it could not be bound by such decisions. It was acknowledged, however, that there might be situations, such as where the originating court was required by its national law to determine issues also addressed by the Model Law, such as with respect to COMI, where some regard might be accorded to such a decision and the reasoning behind it. There was strong support to add language to the effect that an originating court should only make findings with respect to COMI when required to determine its own competence and should not otherwise do so with the aim of influencing the determination of the receiving court.

43. A proposal to replace the words "in the majority of cases" in the second sentence of paragraph 123B with "frequently" was supported.

44. With respect to paragraph 123C, proposals were made to delete both options contained in square brackets and to replace them with the words "alleged centre of main interests", and to delete the text in square brackets referring to the foreign representative, retaining the alternative text without the square brackets. Both proposals received some support.

45. A proposal was also made that the use of the phrase "enacting State" should be clarified in the Guide to ensure that it was clear in each case whether the enacting State referred to was the receiving or originating State. It was suggested that an approach similar to that adopted in the Judicial Perspective, where a definition was adopted, might be appropriate. The Secretariat was requested to prepare appropriate revisions to the Guide to Enactment.

46. It was observed that where the debtor was a member of an enterprise group, that fact may add a further consideration to be taken into account by a court examining the issue of COMI. It was recalled the Working Group had agreed that revision of the Guide to Enactment should focus on the individual debtors covered by the Model Law and that the question of treatment of enterprise groups in cross-border insolvency proceedings could be further considered once that work was completed.

47. After discussion, the substance of paragraphs 123A, B and C was adopted with the revisions noted above.

Factors relevant to rebutting the presumption

48. It was observed that there were various situations in which the issue of COMI might arise for determination by the receiving court under the Model Law. The first situation involved cases originating in States where the originating court was not required under national law to make a determination as to the COMI of the debtor. In those cases, the receiving court was not required to inquire into the commencement of the foreign proceedings, but was required to determine whether they were main or non-main proceedings for the purposes of the Model Law on the

basis of the debtor's centre of main interests or establishment. In the majority of such cases, it was suggested, that determination would be made on the basis of the material placed before the receiving court by the applicant for recognition.

49. The second situation involved cases where the receiving court was on notice that there was some problem with the initial decision to commence the foreign proceeding or where a dispute arose at the time of the application. Such cases represented the only instance, it was suggested, where the receiving court should go beyond the material presented to it by the applicant for recognition.

50. The third situation involved cases commenced under the EU Insolvency Regulation, which required the commencing court to make a determination as to the COMI of the debtor in order to commence the proceedings. In those cases, it was suggested that, in the absence of a dispute, the court receiving an application for recognition of that proceeding under the Model Law should follow the same procedure as in the first situation. Another view was that the determination of the originating court would not be binding on the receiving court, but that the receiving court should give due regard to such a determination.

51. It was emphasized that the scheme of the Model Law was designed to ensure the simplicity and speed of recognition, and care should be taken to avoid any interpretation of the requirements of the Model Law that might lead courts to inquire into extraneous or irrelevant matters.

52. The Working Group discussed the proposal contained in A/CN.9/WG.V/WP.105, paragraph 12 and a further proposal to replace existing paragraph 123D, as follows:

> "*Centre of main interests*
>
> "123D. The predictability and transparency of a debtor's centre of main interests has great economic importance to creditors. It should, in most circumstances, be expected to correspond to the location creditors would expect the debtor to open insolvency proceedings in the event of severe financial distress. Creditors doing business with the debtor evaluate the jurisdiction in which they would likely have to demonstrate their claims in the event of an insolvency proceeding, and calculate the risk of credit extension in light of the insolvency law likely to apply. This concept underlies the scheme set out in the European Regulation on Insolvency. The Model Law reflects the significance of the concept, defining proceedings opened in the country that is the centre of main interests as the "main" proceeding. The Model Law also accords such proceedings greater deference, and more immediate, automatic relief.
>
> "123E. The essential attributes of the debtor's centre of main interests correspond to those attributes that tend to indicate to those who deal with the debtor (especially creditors) that this is the country where others would expect the debtor's insolvency proceeding to be opened. As has been noted, the Model Law indulges a presumption that country of registration is also the country that matches those expectations. That is not always the case however. It is thus important to consider those factors that independently indicate that a given country is the debtor's centre of main interests.

"*Factors relevant to the determination of centre of main interests*

"123F. In most cases, the following principle factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are (i) the location is readily ascertainable by creditors, (ii) the location is one in which the debtor's principal assets or operations are found, and (iii) the location is where the management of the debtor takes place. In most cases these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the endeavour is a holistic one, designed to determine that the location of the proceeding in fact corresponds to where the debtor's true seat or principle place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings. When the court determines that there is proof contrary to the presumption in Article 16(3), the court should consult these factors in determining the location of the debtor's centre of main interests."

53. Suggestions to revise that text included: (a) amending the penultimate sentence of new paragraph 123E as follows: "However, in reality, COMI may not coincide with the place of registration"; (b) deleting the words "the court determines that" in the final sentence of new paragraph 123F; (c) reversing the order of subparagraphs (ii)-(iii) of paragraph 123F on the basis that (ii) was less important than (iii); (d) omitting subparagraph (ii) or at least deleting the reference to location of principal assets on the basis that it was the factor most likely to point to a number of different locations and might lead to some uncertainty as to what might constitute the "principal" assets. In response, it was pointed out that in liquidation, the location of assets might be an important factor in determining COMI, since there may no longer be a place of operations; (e) adopting a formulation, such as centre of administration, rather than "the location where the management of the debtor takes place" in paragraph 123F; and (f) maintaining the heading from A/CN.9/WG.V/WP.103/Add.1 — "Factors relevant to rebuttal of the presumption" rather than the heading contained in the proposal. In that regard, it was observed that since the starting point for the determination of COMI was article 17 and the presumption in article 16(3) of the Model Law was only a procedural device designed to facilitate the speed of the determination in article 17, the heading in the proposal more accurately reflected the issue being addressed. With the exception of the proposal in subparagraph (d), those proposals were generally supported.

54. After discussion, the Working Group requested the Secretariat to prepare a revised text based on the proposal set forth in paragraph 8 above and the issues raised in the discussion in the Working Group.

55. Various views were expressed with respect to paragraphs 123E to I, including maintaining them on the basis that they added information and guidance to the above proposal, deleting them in favour of simplicity and considering them in the light of the above proposal to see what material might usefully be retained. Some support was expressed in favour of each of those proposals. After discussion, the Secretariat was requested revise this section of the Guide to Enactment in the light of the considerations raised.

Abuse of process

56. The Working Group recalled its previous discussion of the impact of fraud on the determination of COMI (A/CN.9/738, para. 32) and the issues that had been raised. After further discussion, the Working Group agreed to retain the substance of paragraph 123J as drafted. Concern was expressed with respect to the references in paragraph 123K to the use of public policy, noting the material included in paragraphs 86 to 89 of the Guide to Enactment and the intention that public policy be interpreted restrictively. The Working Group agreed that the issues referred to in paragraph 123K might better be addressed by a discussion of movements of COMI that could be considered an abuse of process or forum shopping and movements of COMI that might be characterized as choice of forum. The Secretariat was requested to prepare a revised text on those issues for consideration at a future session.

Article 17. Decision to recognize a foreign proceeding

57. The concern noted above in paragraph 42 was further raised. A proposal to add the word "due" to paragraph 124B before the word "regard" and to delete the remainder of the first sentence of that paragraph starting from the words "particularly as it relates" received support.

58. With respect to paragraph 124C, a proposal to reword the first sentence of the paragraph as follows was approved: "Accordingly, recognition of a foreign proceeding would be assisted if the originating court mentioned in its order any evidence that would facilitate a finding by the receiving court that the proceeding is a foreign proceeding within the meaning of article 2". The Working Group recalled the revisions it had made with respect to paragraph 122B and agreed that the two paragraphs should be aligned.

59. The substance of paragraphs 124-124C and 126 was adopted with those revisions.

Timing of the determination with respect to COMI

60. A proposal was made to provide a clear rule as follows: "The date of commencement of the foreign insolvency proceeding should be used as the date to determine the COMI of the debtor", where the date of commencement would be determined in accordance with applicable law. That proposal received wide support for the reasons cited in paragraph 128C. It was suggested that the proposed wording might be incorporated with the existing paragraph 128E. Some concern was expressed with respect to the possible movement of COMI between the date of commencement of the foreign proceeding and the date of the application for recognition. In response, it was observed that for the purposes of the Model Law, COMI could not change after the date of commencement of the foreign proceeding.

61. A further issue concerned the possibility, referred to in paragraph 128C, of the relevant date being the date of application for commencement of the foreign proceeding, on the basis that there might be a shift of COMI between that date and the date of commencement. It was suggested that, since the Model Law was concerned only with an existing foreign proceeding, the date of commencement was relevant, not the date of the application for commencement. Moreover, any attempt to shift COMI after the date of the application for commencement would be better addressed in the discussion on forum shopping or choice of forum. After discussion,

the Working Group agreed to delete paragraph 128D to avoid confusion and to review paragraph 128C to ensure there was sufficient explanation, particularly with respect to the reference to the date of application for commencement as being the relevant date for determination of the COMI of the debtor.

62. The substance of paragraphs 128A to E, 125 and 129-130 was adopted with those revisions.

Article 18. Subsequent information

63. The substance of paragraphs 133-134 was adopted as drafted.

Article 20. Effect of recognition of a foreign main proceeding

64. The substance of paragraphs 141 and 143 was adopted as drafted.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

65. The substance of paragraph 154 was adopted as drafted.

Article 23. Actions to avoid acts detrimental to creditors

66. The substance of paragraphs 165-167 was adopted as drafted.

5. Chapter IV. Cooperation with foreign courts and foreign representatives — articles 25-27

67. The substance of paragraphs 173-175 and 177 was adopted as drafted.

Article 27. Forms of cooperation

68. The substance of paragraphs 181 and 183A was adopted as drafted.

6. Chapter V. Concurrent proceedings — articles 28-31

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

69. The substance of paragraphs 184, 186-187A was adopted as drafted.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

70. The substance of paragraph 188 was adopted as drafted.

Article 31. Presumption of insolvency based upon recognition of a foreign main proceeding

71. The substance of paragraph 197 was adopted as drafted.

7. Assistance from the UNCITRAL Secretariat

72. The substance of paragraph 202 was adopted as drafted.

V. Directors' obligations in the period approaching insolvency

73. The Working Group commenced its consideration of the topic of directors' obligations in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.104.

A. Introduction

74. The Working Group agreed that, as a working assumption, it would proceed with its discussion of this topic on the basis that the text developed would form an additional part of the Legislative Guide on Insolvency Law.

B. Purpose of legislative provisions

75. The Working Group agreed to take up its consideration of the purpose clause when it had completed its discussion of the contents of the recommendations.

C. Contents of legislative provisions

Recommendation 1

76. It was proposed that the draft recommendations should be prefaced not by the words "the insolvency law", but rather by the words "the law relating to insolvency" or "insolvency or other law". It was noted that the majority of recommendations in the Legislative Guide referred to "the insolvency law" and it was decided, after further discussion, to include references to both the insolvency law and to the law relating to insolvency in square brackets.

77. Various proposals were made to revise the draft recommendation to provide greater clarity and identify more clearly the specific objective of these draft recommendations as follows: (a) to include a reference to the obligations under draft recommendation 4 by adding, after the word "harmed", the words "as a consequence of the breach of the obligations in recommendation 4" and deleting the words "improper acts or omissions of a director"; (b) to replace the notion of liability to the company with liability to the creditors or the insolvency estate, or to delete the final part of the draft recommendation after the comma and substitute "the director may be responsible for their conduct and remedies may be imposed in the course of insolvency proceedings"; and (c) to insert the words "committed in the period before the commencement of insolvency proceedings" after the words "acts or omissions of a director".

78. After discussion, the Working Group agreed to revise the draft recommendation along the lines proposed in paragraphs (a) and (c) and to refer to liability to the creditors.

Recommendation 2 — Parties that owe the obligation

79. Concerns were expressed with respect to the use of the word "director" and the scope of its meaning. It was proposed that it should be clear from the draft

recommendation that the obligations would apply to persons considered to be a director under national law and to any other person freely exercising management functions or making managerial decisions, including those who ought to be making such decisions, but did not necessarily do so. It was said that the latter should not be exempted simply because of inaction. A different view was that that formulation was too broad and that the words "or ought to make" in paragraph 22 of the commentary should be deleted. A further formulation proposed was to refer to both the duty and the power to manage a business enterprise. It was suggested that in order to accommodate those proposals, a term other than director was required and that "responsible person" might be appropriate. An alternative view was that, provided an explanation was included in the commentary, the term "director" should be used in preference to "responsible person", which was far too broad in meaning.

80. After discussion, the Working Group agreed to retain the word "director" and to include in the commentary appropriate clarification and explanation with respect to the issues raised in the discussion.

Recommendation 3 — When the obligation arises

81. Proposals to amend the draft recommendation included: (a) adding the words "in the absence of corrective action" before the words "insolvency was likely"; (b) deleting the subjective requirement that the director "knew or ought to have known" about the likelihood or unavoidability of insolvency. In response, it was suggested that that element was essential since it allowed the director's judgement to be assessed against the knowledge that a reasonable director should or ought to have had in the circumstances; and (c) replacing the words "likely or unavoidable" with the words "would occur". In response, it was suggested that the period of time covered by the recommendation was that in which the directors could still take remedial steps to avoid insolvency and that, if insolvency was completely unavoidable, the obligations in draft recommendation 4 would be deprived of meaning.

82. After discussion, the Working Group agreed to retain recommendation 3 as drafted.

Recommendation 4 — The obligations

83. General support was expressed in favour of subparagraph (a) of draft recommendation 4 on the basis that it formed a key element of the obligations directors should have in the period approaching insolvency. Additional key obligations, it was proposed, should include seeking professional advice (subparagraph (c)) and protecting the assets of the company (subparagraph (d)). Support was also expressed in favour of specifying in some detail the steps that might need to be taken by directors in pursuance of the obligation under subparagraph (a). Without that detail, it was suggested, the draft recommendation failed to provide relevant guidance for directors on what they might be expected to do.

84. Various concerns were expressed with respect to subparagraph (b) of draft recommendation 4. One view was that it was key to the obligations that should apply in the period approaching insolvency, since it established a link between the focus on the interests of shareholders when the debtor was solvent and the focus on the interests of creditors when insolvency proceedings commenced. Nevertheless, it

was clarified that the intention of the subparagraph was not to focus solely on creditors and ignore the interests of other stakeholders, but rather to increase the weighting given to creditor interests in that period relative to the interests of other stakeholders. Another view was that the drafting should be more specific, focusing on an obligation to refrain from any acts that might be prejudicial to the interests of creditors.

85. Although it was suggested that the obligation to ensure they were fully informed was a general obligation applicable to directors under company law, it was suggested that subparagraph (c) of draft recommendation 4 had a particular relevance in the pre-insolvency period, as directors needed to be aware that the company had actually entered that period in order to take reasonable steps under subparagraph (a).

86. Concerns were also expressed with respect to the impact on directors of the second part of subparagraph (d) of draft recommendation 4 and the relationship between that obligation and recommendation 87 of the Legislative Guide in the broader context of avoidable transactions under the Guide. It was suggested that the first part of subparagraph (d) could be added to the end of subparagraph (b), resulting in an obligation to give due regard to the interests of creditors by ensuring the protection of assets and that the references to recommendation 87 could then be deleted. A different view was that the reference to avoidable transactions should be retained in draft recommendation 4, but that that reference should be based more broadly on the section of the Legislative Guide addressing to avoidable transactions in order to incorporate both the recommendations relating to defences and other relevant explanatory material.

87. Although it received some support, a proposal to place the substance of subparagraphs (c) and (d) of draft recommendation 4 in the commentary was not adopted, on the basis to do so would deprive the draft recommendation of considerable substance.

88. After discussion, the Working Group agreed that draft recommendation 4 should be revised, with the Secretariat requested to provide optional texts for consideration at a future session. Those texts should include the following:

(a) A revision of subparagraph (a) to become part of the statement of principle;

(b) Inclusion of the substance of subparagraph (b) as part of that statement of principle and possible addition of other elements such as “other stakeholders”;

(c) Revision of subparagraphs (c) and (d) to form either distinct obligations or examples that might be taken pursuant to the obligation to take reasonable steps in existing subparagraph (a); and

(d) Revision of the substance of subparagraph (d) to clarify and expand the reference to recommendation 87 of the Legislative Guide in order to reflect the concerns expressed in the discussion.

Recommendation 5 — Liability

89. Concerns were expressed with respect to aspects of the draft recommendation, specifically the meaning of “directly or indirectly” and the manner in which the

connection between the failure to fulfil the obligations and the ensuing insolvency or the increase to losses would be assessed. In response to a proposal to insert a period after "in recommendation 4" and delete the balance of the recommendation, it was pointed out that those words modified the liability of the director and deleting them would remove any element of safeguard or protection they might provide.

90. It was observed that the revisions agreed with respect to draft recommendation 1 might effectively overtake draft recommendation 5 and it might thus be deleted. A different proposal was that the second half of draft recommendation 5 could be deleted and a cross-reference to draft recommendation 1 be added.

91. After discussion, the Working Group agreed that draft recommendation 5 should be considered together with draft recommendation 6 and in the light of revisions agreed to draft recommendation 1. The Secretariat was requested to prepare a revised text for consideration at a future session, taking into account the discussion in the Working Group.

Recommendation 6

92. Various concerns were expressed with respect to draft recommendation 6. In particular, it was suggested that the drafting established or implied a presumption of liability unless the directors could prove they had exercised due care and attention. In response, it was observed that the party seeking to allege a breach under draft recommendation 4 bore the burden of proving that breach, while under draft recommendation 6, the director bore the burden of proving, as a defence, that he or she had exercised the due care and attention required or had taken, for example, the reasonable steps required under draft recommendation 4. It was proposed that the draft recommendation should do no more than provide that breach of the obligations in draft recommendation 4 would lead to liability. A director that took the reasonable steps and otherwise satisfied the relevant obligations under draft recommendation 4 should not be found liable. Given that draft recommendation 4 already established certain obligations and that draft recommendation 1 established a connection between the actions of directors in the period approaching insolvency and liability, it was proposed there was no need for draft recommendation 6 and it could be deleted.

93. After discussion, the secretariat was requested to reconsider draft recommendations 5 and 6 in the light of the revisions agreed to draft recommendations 1 and 4 and to prepare a revised text for consideration by the Working Group at a future session.

Recommendation 7 — Remedies

94. The concept of proportionality as contained in the draft recommendation was found to be problematic and the formulation of the chapeau too complex. A proposal to simplify it to wording that limited the director's liability to the loss or damage caused by the breach of the obligations in draft recommendation 4 and to clarify that exemplary or punitive damages were not contemplated was supported. Subparagraph (b) raised concerns similar to those expressed with respect to draft recommendation 4 (d) and while it was acknowledged that a provision along the lines of subparagraph (b) might provide a disincentive for causing loss to the

insolvency estate, it was agreed further consideration needed to be given to the drafting and to clarifying the relationship of the draft recommendation to the section of the Legislative Guide on avoidance provisions.

95. After discussion, the Working Group agreed that the focus of the draft recommendation should be the damage caused by the actions of directors in the period approaching insolvency and the provision of compensation for that damage. It was further agreed that: subparagraph (a) be retained, with a clarification that the payment was for damage caused and would be made to the estate; subparagraph (b) caused a number of concerns that needed to be clarified; subparagraph (c) was not a remedy and might be addressed in the commentary; and that subparagraph (d) might be simplified. The Secretariat was requested to prepare a further draft for consideration at a future session.

Recommendation 8 — Conduct of proceedings against a director

96. Several proposals were made with respect to draft recommendation 8: (a) to vary the second sentence to permit "a creditor or any other interested party" to commence such a proceeding and to explain in the commentary that that might include shareholders; (b) to consider the treatment of creditors that became creditors only by virtue of the acts or omissions of directors in the period approaching insolvency and whether they might be able to pursue individual claims against directors; (c) to clarify to whom recoveries made by creditors would belong; (d) to include in the commentary a discussion parallel to that included in the commentary on avoidance proceedings in part two of the Legislative Guide dealing with issues relevant to the pursuit of such an action against a director. Those proposals were generally supported and the Secretariat was requested to take them into account in revising the draft recommendation and the accompanying commentary.

Recommendations 9 and 10 – Funding of proceedings against a director

97. The substance of draft recommendations 9 and 10 was adopted as drafted.

Recommendation 11 – Additional measures

98. Concern was expressed that since the draft recommendation might be of a criminal or punitive nature and that its focus was on future behaviour, it should not be included in these draft recommendations and could be deleted completely or retained, but only the first sentence. In response, it was suggested that disqualification might be an appropriate remedy in cases, for example, of egregious behaviour by directors, not only to prevent them from causing further harm to creditors generally, but also to serve as an incentive in the period approaching insolvency to take early advice and otherwise satisfy obligations of the kind referred to in recommendation 4. Support was expressed in favour of deleting the draft recommendation completely, deleting the second sentence and retaining the recommendation as drafted. After discussion the Working Group agreed that the first sentence of draft recommendation 11 should be retained and that the second sentence should be placed in square brackets for further discussion at a future session.

D. Purpose of legislative provisions

99. Having completed its deliberations on the draft recommendations, the Working Group returned to its consideration of the purpose clause. It was noted that the purpose clause might need to be aligned with the revisions adopted to the draft recommendations, particularly, for example, with respect to the reference to proportionality. It was also suggested that the purpose of serving as a tool to educate directors on their role and responsibilities in the period approaching insolvency could usefully be reflected in the purpose clause.

100. The Secretariat was requested to prepare a revision of the purpose clause for consideration at a future session.

E. Commentary

101. It was agreed that the word "shareholders" in paragraph 6 of the commentary should be replaced with "stakeholders". The Secretariat was requested to revise the commentary in the light of the revisions agreed to the draft recommendations.

VI. Technical assistance

102. The Working Group considered this topic in the light of paragraphs 16 and 17 of the provisional agenda A/CN.9/WG.V/WP.102. A number of States reported on recent activity to enact UNCITRAL insolvency texts into national law, specifically part three of the Legislative Guide on Insolvency Law and the Model Law on Cross-Border Insolvency, including both legislation that had entered into force and proposed legislation that was currently being drafted or considered. The Working Group also heard about a number of activities being conducted by States to assist, for example, with judicial education in other States and to develop tools for sharing information on UNCITRAL texts and supporting educational programmes.

103. Several international organizations reported on activities relating to the promotion of UNCITRAL texts and noted in particular the extensive use of the Legislative Guide as a basis for law reform and the dissemination of information on the work of UNCITRAL. The Working Group was advised of the forthcoming UNCITRAL/INSOL/World Bank multinational judicial colloquium in May 2013.

104. Recalling the observations of the Commission noted in paragraphs 16 and 17, a number of States emphasized the need for technical assistance and cooperation activities to enable them to adopt and use UNCITRAL texts to reform national laws. It was also emphasized that while work could be undertaken to assist States with law reform efforts, commitment was needed at the highest levels to ensure that those efforts led to enactment and implementation of the laws developed. It was also emphasized that there was a need for understanding of the importance of insolvency laws to trade and commerce. A call was made to revitalize the relevant trust fund to enable developing States to participate in sessions of UNCITRAL working groups.