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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 of America, 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 obligations of directors in the period approaching insolvency is addressed in A/CN.9/WG.V/WP.113.

4. 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), proposals to revise the Guide to Enactment are set forth in documents A/CN.9/WG.V/WP.95 and Add.1, A/CN.9/WG.V/WP.99, A/CN.9/WG.V/WP.103 and Add.1, A/CN.9/WG.V/WP.105 and A/CN.9/WG.V/WP.107, as well as the reports of the Working Group of its thirty-ninth, fortieth, forty-first and forty-second sessions (A/CN.9/715, 738, 742 and 763, respectively).

5. This note builds upon those documents and sets forth further draft revisions based upon the deliberations and decisions of the Working Group at its forty-second session. The reader will be assisted in understanding the changes proposed for the Guide to Enactment by consulting both the published version of that document (available at www.uncitral.org/uncitral/uncitral_texts/insolvency.html) and document A/CN.9/WG.V/WP.107.

6. Paragraphs of the published version of the Guide to Enactment that have not been revised or that do not include revised text are not set out in this note; this is indicated by "[…]". Where only minor editorial changes are suggested, the paragraph is not set out in full, but a reference to the relevant paragraph of the document containing those changes is included (i.e. A/CN.9/WG.V/WP.107). For ease of reference, the paragraph numbers from the published version of the Guide to

[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.

Enactment have been retained to indicate the reordering of the text and the additional paragraphs proposed. 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 to indicate content and facilitate comparison with the published text.

7. Footnotes to be retained from the published version of the Guide without revision are not repeated (although the footnote markers remain in the text), but since the placement of some of the original footnotes has been changed, their location is indicated by a note in square brackets. The text of new or revised footnotes has been included. The sections of the Guide entitled "Discussion in UNCITRAL and in the Working Group", which list relevant document references, have also been omitted, but will be included in the final version, updated to reflect both the original and current deliberations, together with the text of each article.

8. The Working Group may wish to note several issues outstanding from the discussion at its forty-second session:

(a) Footnote 22 to paragraph 123K was placed in square brackets at the request of the Working Group (A/CN.9/763, para. 47);

(b) Since paragraph 123F now refers to only two principal factors, the words "considered as a whole" appear inappropriate and might be revised to "considered together";

(c) Paragraphs 128D and 128L are new text. Paragraph 128D concerns the date for determining the existence of an establishment and was prepared by the Secretariat at the request of the Working Group (A/CN.9/763, para. 52). Material from the previous draft of paragraph 128L, which concerned abuse of process, has been moved to follow 123J (A/CN.9/763, para. 54).

9. The Working Group may also wish to note the conclusion from its fortieth session (A/CN.9/738, paras. 36-37) with respect to adding material on enterprise groups to the Guide to Enactment, that while some reservations were expressed as to the appropriateness of that course of action, it was agreed that reference should be made, in the Guide to Enactment, to part three of the Legislative Guide and the solutions adopted with respect to the treatment of groups in insolvency, particularly in the international context. The Working Group may wish to consider that conclusion and indicate its views on whether material should be added and if so, what that material should be.

Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

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.

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 a 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) The following footnote has been inserted after "enacting State": "The "enacting State" refers to a State that has enacted legislation based on the Model Law. Unless otherwise provided, that term is used in the Guide to Enactment and Interpretation to refer to the State receiving an application under the Model Law.";

(b)-(f) […];

(g) The words "in favour of" have been replaced with the words "to assist".

3A. For 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, the Model Law is an essential reference for developing an effective cross-border cooperation framework.

B. Origin of the Model Law

13. […]

18 For minor revisions, see A/CN.9/WG.V/WP.103, para. 18.[2]

19. […]

C. Preparatory work and adoption

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.

5-7. The footnotes have been updated, see A/CN.9/WG.V/WP.107, paras. 5-7.

8. […]

II. Purpose of the Guide to Enactment and Interpretation

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,[3] 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 adapted to address particular national circumstances.

10. The present Guide was prepared by the Secretariat pursuant to the request of UNCITRAL made at the close of its thirtieth session, in 1997. It is based on the deliberations and decisions of the Commission at that thirtieth session,[4] when the Model Law was adopted, as well as on considerations of the Working Group on Insolvency Law, which conducted the preparatory work. The Guide has been revised in accordance with the request of UNCITRAL at its forty-third session (2010)[5] in order to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to "centre of main interests". The revisions are based on the deliberations of the Working Group at its thirty-ninth (2010), fortieth (2011), forty-first (2012), forty-second (2012) and forty-third (2013) sessions, as well as of the Commission at its forty-sixth session

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[2] *For information only*: paragraphs 18, 19, 31, 72, 74 and 75 of the original Guide to Enactment were updated in 2004 to take account of the entry into force of European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (see A/59/17, para. 51) and are included in the version of the text published as annex III of the Legislative Guide on Insolvency Law (United Nations Publication No. E.05.V.10).

[3] 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].

[4] [*footnote 8*] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), para. 220.

[5] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259.

(2013) and were adopted as the Guide to Enactment and Interpretation of the Model Law on … July 2013.

III. The Model Law as a vehicle for the harmonization of laws

11. […]

A. Flexibility of a model law

12. […]

B. Fitting the Model Law into existing national law

20. […]

(a), (d)-(f) […];

(b) Add the reference "(article 20)" at the end of the paragraph;

(c) The word "maintaining" has been replaced with "continuing".

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 enacting States to demonstrate the basis of their national law on cross-border insolvency and obtain cooperation from other States in insolvency matters.

49. […]

IV. Main features of the Model Law

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 authorization 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 both inbound and outbound aspects of cross-border insolvency. In terms of outbound aspects, article 5 authorises the person or body administering a reorganization or liquidation under the law of the enacting State (referred to as the insolvency representative)[6] to act in a foreign State (article 5) on behalf of local proceedings. In terms of inbound requests, a foreign representative applying in the enacting State has the following rights: of direct access to courts in the enacting State (article 9); to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (article 11); and to apply for recognition of the foreign proceedings in which they have been appointed (article 15). Upon recognition, a foreign representative is entitled to participate in insolvency-related proceedings conducted in the enacting State under the law of that State (article 12); to initiate in the enacting State an action to avoid or otherwise render ineffective acts detrimental to creditors (article 23); and to intervene in any local proceedings in which the debtor is a party (article 24).

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, when the specified requirements of article 2 concerning the nature of the foreign proceeding (i.e. that the foreign proceeding is, as a matter of course, a collective proceeding[7] for the purposes of liquidation or reorganization under the control or supervision of the court) and the foreign representative are met and the evidence required by article 15 has been provided, the court should recognize the foreign proceeding without further requirement. 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 are required by article 15.

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[6] This terminology reflects the language used in article 5 of the Model Law and is used for consistency with the Legislative Guide on Insolvency Law, which explains that an "insolvency representative" is "a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate": Introduction, para. 12 (v).

[7] On what constitutes a collective proceeding see paras. […] below.

37B. Article 6 allows recognition to be refused where it would be "manifestly contrary to the public policy" of the State in which recognition is sought. 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 the exception be interpreted restrictively and that article 6 be used only in exceptional and limited circumstances (see paras. 86-89). Differences in insolvency schemes do not themselves justify a finding that enforcing one State's laws would violate the public policy of another State.

37C. A foreign proceeding should be recognized as either 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 (see paras. …. on timing). In principle, a main 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 that it is 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 in 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 provides for modification or termination of the order for recognition (article 17, paragraph 4).

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, as noted above, 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. Additional assistance might be available under other laws of the enacting State (see article 7).

32. The words “the representative of a” in the first sentence and the word “fair” in the third sentence have been deleted.

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 not dependent upon recognition and may thus occur at an early stage and before an application for recognition is made. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Moreover, cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets. Cooperation is discussed in detail in paragraphs 173-183.

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,[8] which also compiles practice and experience with respect to the use and negotiation of cross-border insolvency agreements.

[8] The Practice Guide is available from www.uncitral.org/uncitral/en/uncitral_texts.html.

Coordination of 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 in the enacting State (article 28), nor does the commencement of local proceedings in that State 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 the relief granted in 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 proof that the debtor is insolvent 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

54. The final words of the second sentence have been replaced with the words "and to assist in its interpretation."

55. […]

Use of the term "insolvency"

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".[9] However, as used in the Model Law, the word "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

[9] The UNCITRAL Legislative Guide on Insolvency Law 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 proceedings as being "collective proceedings, subject to court supervision, either for reorganization or liquidation".

to dissolve the entity and other foreign proceedings not falling within article 2, subparagraph (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 eligible for commencement of insolvency proceedings in accordance with recommendations 15 and 16 of the Legislative Guide,[10] 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.

52-53. […]

"State"

56. The sentence "The national statute may use another expression that is customarily used for this purpose." has been added at the end of the paragraph.

Chapter I. General provisions

Article 1. Scope of application

Paragraph 1

57. […]

58. [*Incorporated into paragraph 56*]

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, subparagraphs 1 (a) and (b); article 21, subparagraphs 1 (a)-(f) and paragraph 2; and article 27, subparagraphs (a)-(e)), while other possible measures are covered by a broader formulation (such as the one in article 21, subparagraph 1 (g)).

Paragraph 2 (Specially regulated insolvency proceedings)

60-64. […]

65. The words "the law" in the parentheses have been replaced with the words "a law".

Non-traders or natural persons

66. […]

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[10] 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.

Article 2. Definitions

Subparagraphs (a)-(d)

67. […]

68. The word "of" in the last line of the paragraph has been replaced with the words "specified in".

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

Subparagraph (a) — Foreign proceeding

71. The words "or insolvent" have been added at the end of the paragraph.

72. This paragraph has been deleted and the issue discussed in detail in paragraphs 31 and following.

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 (article 2, subparagraph (a)). Whether a foreign proceeding possesses those elements would be determined at the time the application for recognition is considered.

23A. As noted in subparagraph (e) of the preamble, the focus of the Model Law is upon severely financially distressed 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).

23A bis. The following paragraphs discuss the various characteristics required of a "foreign proceeding" under article 2. Although discussed separately, these characteristics are cumulative and article 2, subparagraph (a) should be considered as a whole.

(i) Collective proceeding

23B. For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all 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 State. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up[11] or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance

[11] "Winding up" is a procedure in which the existence of a corporation and its business are brought to an end.

companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purposes of liquidation or reorganization (see below, paras. 24F and G).

23C. In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is 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. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it. An example would be insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law (see Legislative Guide on Insolvency Law, part two, chap. II, paras. 7-9). Examples of the manner in which a collective proceeding for the purposes of article 2 might deal with creditors include providing creditors that are adversely affected by the proceeding with a right (though not necessarily the obligation): to submit claims for determination and to receive an equitable distribution or satisfaction of their claims, to participate in the proceedings, and to receive notice of the proceedings in order to facilitate their participation. The Legislative Guide deals extensively with the rights of creditors, including the right to participate in proceedings (part two, chapter III, paras. 75-112).

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. The definition would also include those 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[12] and irrespective of

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

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.

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) of article 2 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,

conducted under the insolvency law.[13] 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.[14] Other procedures that do not require supervision or control by the court might also be ineligible.

Interim proceeding

69. […]

70. The reference "(see paras. 133-134 below)" has been added at the end of the first sentence; the second sentence has been relocated to the remarks on article 18.

Subparagraph (b) — foreign main proceeding

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 (the European Convention)), 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 and coordination of the foreign proceeding with proceedings that may be commenced in the enacting State 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),[15] 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.

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[16] to be opened to run in parallel with the main

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[13] Such contractual arrangements would clearly remain enforceable outside the Model Law without the need for recognition; nothing in the Model Law or Guide to Enactment is intended to restrict such enforceability.

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

[15] 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.

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

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.

"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

73. A cross-reference to paragraphs 75-75A has been added at the end of the first sentence.

Subparagraph (d) — foreign representative

73A. Subparagraph (d) recognizes that the foreign representative may be a person authorized in the foreign proceedings to administer those proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorized specifically for the purposes of representing those proceedings. The Model Law does not specify that the foreign representative must be authorized by the court (as defined in article 2, subparagraph (e)) and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointment made on an interim basis (see above paras. 69-70). The fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the Model Law; article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court. The definition in subparagraph (d) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph (e)

74. The words: "as well as the Legislative Guide (Introd., para. 12(i)) and the UNCITRAL Practice Guide (Introd., paras. 7-8)" have been added at the end of the paragraph after the words "subparagraph (d)".

Subparagraph (f)

75. The definition of the term "establishment" was inspired by article 2, subparagraph (h), of the EC Regulation. 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."[17]

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

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.

Article 3. International obligations of this State

76-77. […]

78. The words "for them" in the first sentence have been replaced with the words "in order".

Article 4. [Competent court or authority][18]

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*

84. The last sentence has been revised to read: "An enacting State in which insolvency representatives are already equipped to act as foreign representatives may decide to forgo inclusion of article 5, although retaining that article would provide clear statutory evidence of that authority and assist foreign courts and other users of the law."

85. […]

Article 6. Public policy exception

86-89. […]

Article 7. Additional assistance under other laws

90. […]

Article 8. Interpretation

91. The second sentence has been revised as follows: "More recently, it has been recognized that such a provision would also be useful in a non-treaty text such as a model law on the basis that a State enacting a model law would have an interest in its harmonized interpretation."

92. […]

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[18] [*footnote 1*] A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:
Nothing in this Law affects the provisions in force in this State governing the authority of [*insert the title of the government-appointed person or body*].

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 9. Right of direct access

93. The following introductory sentence has been added: “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 10. Limited jurisdiction

94-95. […]

96. The words “as it should” in the second sentence have been replaced with the word “to”.

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

97. […]

98. The first sentence has been revised as follows: “Article 11 is designed to ensure that the foreign representative (of a foreign main or non-main proceeding) has standing[19] to request the commencement of an insolvency proceeding” and the footnote has been added.

99. […]

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

100. The paragraph has been aligned with paragraph 98 and footnote 26.

101. The last words have been revised to read “any such motions”.

102. The words “(see below, paras. 169 and 172)” have been added at the end of the paragraph.

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

103-105. […]

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

106-111. […]

Chapter III. Recognition of a foreign proceeding and relief

Article 15. Application for recognition of a foreign proceeding

112. The following two introductory sentences have been added: “The Model Law avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications that might otherwise have to be

[19] Also known as “procedural legitimation”, “active legitimation” or “legitimation”.

used. This facilitates a coordinated, cooperative approach to cross-border insolvency and makes fast action possible."

113-118. […]

119. Paragraph 4 entitles, but does not compel, the court to require a translation of some or all documents accompanying the application for recognition. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time, as contemplated by article 17, paragraph 3, if the court is in a position to consider the application without the need for translation of the documents.

Notice

120. Different solutions exist as to whether the court is required to issue notice of an application for recognition. In a number of jurisdictions, fundamental principles of due process, in some cases enshrined in the constitution, may be understood as requiring that a decision on the importance of the recognition of a foreign insolvency proceeding could only be made after hearing the affected parties. In other States, however, it is considered that applications for recognition of foreign proceedings require expeditious treatment (as they are often submitted in circumstances of imminent danger of dissipation or concealment of the assets) and that, accordingly, the issuance of notice prior to any court decision on recognition is not required. In these circumstances, imposing the requirement could cause undue delay and would be inconsistent with article 17, paragraph 3, which provides that an application for recognition of a foreign proceeding should be decided upon at the earliest possible time.

121. […]

Article 16. Presumptions concerning recognition

Paragraph 1

122. Article 16 establishes presumptions that permit and encourage fast action in cases where speed may be essential. These presumptions allow the court to expedite the evidentiary process. At the same time, they do not prevent the court, in accordance with the applicable procedural law, from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question.

122A. Article 16, paragraph 1 creates a presumption with respect to the definitions of "foreign proceeding" and "foreign representative" in article 2. If the decision commencing the foreign proceeding and appointing the foreign representative indicates that the foreign proceeding is a proceeding within the meaning of article 2, subparagraph (a) and that the foreign representative is a person or body within the meaning of article 2, subparagraph (d), the receiving court is entitled to so presume. That presumption has been relied upon in practice by various receiving courts when the court commencing the proceedings has included that information in its orders.[20]

122B. Inclusion of information regarding the nature of the foreign proceeding and the foreign representative as defined in article 2 in the orders made by the court commencing the foreign proceeding can facilitate the task of recognition in relevant

[20] For examples, see A/CN.9/WG.V/WP.95, paras. 15-16.

cases. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the requirements of article 2 are met (discussed further in paras. 124B-C below).

Paragraph 2

123. […]

Paragraph 3

123A. Although the presumption contained in article 16, paragraph 3 corresponds to the presumption in the EC Regulation, it serves a different purpose. In the Model Law, the presumption is designed to facilitate the recognition of foreign insolvency proceedings and the provision of assistance to those proceedings. Under the EC Regulation, the presumption relates to the proper place for commencement of insolvency proceedings, thus determining the applicable law, and to the automatic recognition of those proceedings by other EU member States. Under the Regulation, the decision on centre of main interests is made by the court receiving an application for commencement of insolvency proceedings at the time of consideration of that application. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding; in some cases it has been made several years later. Accordingly, the court considering an application for recognition under the Model Law must determine whether the foreign proceeding for which recognition is sought is taking place in a forum that was the debtor's centre of main interests when the proceeding commenced (the issue of timing with respect to the determination of centre of main interests is discussed in paras. 128A-E below). Notwithstanding the different purpose of centre of main interests under the two instruments, the jurisprudence with respect to interpretation of that concept in the EC Regulation may be relevant to its interpretation in the Model Law.

123B. The presumption in article 16, paragraph 3 has given rise to considerable discussion, most commonly in the context of corporate rather than individual debtors, with the focus upon the proof required for the presumption to be rebutted. The debtor's centre of main interests is likely to be the same location as its place of registration and in that situation no issue concerning rebuttal of the presumption will arise.

123C. However, when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor's registered office and its alleged centre of main interests, the party alleging the centre of main interests is not at the place of registration will be required to satisfy the court as to the location of the centre of main interests. The court of the enacting State will be required to consider independently where the debtor's centre of main interests is located.

Centre of main interests

123D. The concept of a debtor's centre of main interests is fundamental to the operation of the Model Law.[21] The Model Law accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The essential attributes of the debtor's centre of main interests correspond to those attributes that will enable those who deal with the debtor (especially creditors) to ascertain the place where an insolvency proceeding concerning the debtor is likely to commence. As has been noted, the Model Law establishes a presumption that the debtor's place of registration is the place that corresponds to those attributes. However, in reality, the debtor's centre of main interests may not always coincide with the place of its registration and the Model Law provides for the rebuttal of the presumption where the centre of main interests is in a different location to the place of registration. Where it is uncertain that the debtor's place of registration is its centre of main interests, the centre of main interests will be identified by other factors which indicate to those who deal with the debtor (especially creditors) where the centre of main interests is. It is thus important to consider the factors that may independently indicate that a given State is the debtor's centre of main interests.

Factors relevant to the determination of centre of main interests

123F. In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests. The factors are: (a) the location is readily ascertainable by creditors, and (b) the location is where the central administration of the debtor takes place.

123G. When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered. 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 an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests.

123I. The order in which the additional factors are set out below is not intended to indicate the priority or weight to be accorded to them, nor is it intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case. The additional factors may include the following: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision

[21] As noted in paragraph 31A, the concept of centre of main interests also underlies the scheme set out in the EC Regulation.

or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

Movement of centre of main interests

123K. A debtor's centre of main interests may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and even between the time of the application for commencement and the actual commencement of those proceedings.[22] Whenever there is evidence of such a move in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the factors identified in paragraphs 123F and I above more carefully and to take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable by third parties may be harder to meet if the move of the centre of main interests occurs in close proximity to the opening of proceedings.

123M. It is unlikely that a debtor could move its place of registration (or habitual residence) after the commencement of insolvency proceedings, since many insolvency laws contain specific provisions preventing such a move. In any event, if this were to occur, it should not affect the decision as to centre of main interests for the purposes of the Model Law, since the time relevant to that determination is the date of commencement of the foreign proceeding (see paras. 128A-C below).

Article 17. Decision to recognize a foreign proceeding

Paragraph 1

124. A cross-reference "(see article 6)" has been added after the words "enacting State".

124A. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition. This requires a determination that the proceedings are foreign proceedings within article 2, subparagraph (a). The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15 and article 6 is not relevant, recognition should follow in accordance with article 17.

124B. In reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any information that may have been presented to the originating court. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the foreign proceeding meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumptions in article 16, paragraphs 1 and 2 (see para. ...), on the information in

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22 [In some examples, the move was intended to give the debtor access to an insolvency process, such as reorganization, that more closely met its needs than what was available under the law of its former centre of main interests. In other examples, the move of the centre of main interests may have been designed to thwart the legitimate expectations of creditors and third parties or undertaken as the result of insider exploitation or biased motivation.]

the certificates and documents provided in support of an application for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

124C. Accordingly, recognition of a foreign proceeding would be assisted if the originating court mentioned in its orders any information that would facilitate a finding by a receiving court that the proceeding is a foreign proceeding within the meaning of article 2. This would be particularly helpful when the originating court was aware of the international character either of the debtor or its business and of the likelihood that recognition of the proceeding would be sought under the Model Law. The same considerations would apply to the appointment and recognition of the foreign representative.

Paragraph 2

126-128. […]

Date at which to determine centre of main interests and establishment

128A. The Model Law does not expressly indicate the relevant date for determining the centre of main interests of the debtor.

128B. Article 17, subparagraph 2 (a) provides that the foreign proceeding is to be recognized as a main proceeding "if it is taking place in the State where the debtor has the centre of its main interests" [*emphasis added*]. The use of the present tense in article 17 does not address the question of the relevant date, but rather requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (i.e. it is no longer "taking place" having been terminated or closed), there is no proceeding that would be eligible for recognition under the Model Law.

128C. With respect to the date at which the centre of main interests of the debtor should to be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.[23] Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the centre of the debtor's main interests by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 (a) is clearly satisfied

[23] Under some insolvency laws, the effects of commencement are backdated to the date of the application for commencement or the date of application becomes the date of commencement by virtue of automatic commencement. In both cases, it is appropriate to refer to the date of commencement for the purposes of the COMI determination, since the Model Law is concerned only with existing foreign proceedings and when they commenced.

and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings.

128D. The same considerations apply to the time at which any determination with respect to the existence of an establishment of the debtor should be made. Accordingly, the date of commencement of the foreign proceeding is the relevant date to be considered in making that determination.

Abuse of process

123J. One issue that has arisen is whether, on a recognition application, the court should be able to take account of abuse of its processes as a ground to decline recognition. There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of "foreign proceeding", "foreign main proceeding" and "foreign non-main proceeding". Since what constitutes abuse of process depends on domestic law or procedural rules, the Model Law does not explicitly prevent receiving courts from applying domestic law or procedural rules to respond to a perceived abuse of process. However, the broader purpose of the Model Law, namely to foster international cooperation as a means of maximizing outcomes for all stakeholders, as set out in article 1, as well as the international origins of the Model Law, and the need to promote uniformity in its application, as set out in article 8, should be borne in mind. Courts considering the application of domestic laws and procedural rules might also recall that the public policy exception in article 6 (see paras. 86-89 above) is intended to be narrowly construed and invoked only when the taking of action under the Model Law would be manifestly contrary to a State's public policy. As a general rule, article 6 should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.

123L. If the applicant falsely claims the centre of main interests to be in a particular State, the receiving court may determine that there has been a deliberate abuse of the process. The Model Law does not prevent receiving courts from applying domestic law or procedural rules in response to such an abuse of process.

Paragraph 3

125. The foreign representative's ability to obtain early recognition (and the consequential ability to invoke in particular articles 20, 21, 23 and 24) is often essential for the effective protection of the assets of the debtor from dissipation and concealment. For that reason, paragraph 3 obligates the court to decide on the application "at the earliest possible time". The phrase "at the earliest possible time" has a degree of elasticity. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, "the earliest possible time" might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.

Paragraph 4

129. A decision to recognize a foreign proceeding would normally be subject to review or rescission, as any other court decision. Paragraph 4 clarifies that the decision on recognition may be revisited if grounds for granting it were fully or partially lacking or have ceased to exist.

130. Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign proceeding has been terminated or its nature has changed (e.g. a reorganization proceeding might be converted into a liquidation proceeding) or if the status of the foreign representative's appointment has changed or the appointment has been terminated. Also, new facts might arise that require or justify a change of the court's decision, for example, if the foreign representative disregarded the conditions under which the court granted relief. The court's ability to review the recognition decision is assisted by the obligation article 18 imposes on the foreign representative to inform the court of such changed circumstances.

131. The words "under national laws" in the second sentence have been deleted.

Notice of decision to recognize foreign proceedings

132. […]

Article 18. Subsequent information

Subparagraph (a)

133. Article 18 obligates the foreign representative to inform the court promptly, after the time of filing the application for recognition of the foreign proceeding, of "any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment". The purpose of the obligation is to allow the court to modify or terminate the consequences of recognition. As noted above, it is possible that, after the application for recognition or after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition, such as termination of the foreign proceeding or conversion from one type of proceeding to another. Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the foreign representative's appointment are frequent, but that only some of those modifications would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of "substantial" changes. It is of particular importance that the court be informed of such modifications when its decision on recognition concerns a foreign "interim proceeding" or a foreign representative has been "appointed on an interim basis" (see article 2, subparagraphs (a) and (d)).

Subparagraph (b)

134. The words "existence of the" and "have been" in the third sentence have been deleted and the words "and to facilitate cooperation under chapter IV" added at the end of the paragraph.

Paragraphs 1-4

135-140. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 135-140.

Article 20. Effects of recognition of a foreign main proceeding

141. The following sentence has been added at the end of the paragraph: "Additional effects of recognition are contained in articles 14, 23 and 24."

142. [...]

143. The beginning of the second sentence should read: "In order to achieve those benefits, the imposition on the insolvent debtor of the consequences of article 20 in the enacting State (i.e. the country where it maintains a limited business presence) is justified…". The last sentence should read: "If, in a given case, recognition should produce results that would be contrary to the legitimate interests of a party in interest, including the debtor, the law of the enacting State should include appropriate protections, as indicated in article 20, paragraph 2 (and discussed in paragraph 149 below)."

144-146. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 144-146.

147-148. […]

149. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 149.

150. […]

151-153. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 151-153.

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

154. In addition to the mandatory stay and suspension under article 20, the Model Law authorizes the court, following recognition of a foreign proceeding, to grant relief for the benefit of that proceeding. This post-recognition relief under article 21 is discretionary, as is pre-recognition relief under article 19. The types of relief listed in article 21, paragraph 1, are typical of the relief most frequently granted in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case.

155. [...]

156. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 156.

157. [...]

158. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 158.

159. [...]

160. For minor editorial revisions see A/CN.9/WG.V/WP.107 para.160.

Article 22. Protection of creditors and other interested persons

161. [...]

162-164. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 162-164.

Article 23. Actions to avoid acts detrimental to creditors

165. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 165-166.

166. The Model Law expressly provides that, as an effect of recognition of the foreign proceeding under article 17, a foreign representative has standing[19] to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it neither creates any substantive right regarding such actions nor provides any solution involving conflict of laws; the Model Law does not address the right of a foreign representative to bring such an action in the enacting State under the law of the State in which the foreign proceeding is taking place. The effect of article 17 is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency representative appointed in the enacting State.

166A. When the foreign proceeding has been recognized as a "non-main proceeding", it is necessary for the court to consider specifically whether any action to be taken under the article 23 authority relates to assets that "should be administered in the foreign non-main proceeding" (article 23, paragraph (2)). Again, this distinguishes the nature of a "main" proceeding from that of a "non-main" proceeding and emphasizes that the relief in a "non-main" proceeding is likely to be more restrictive than for a "main" proceeding.

167. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 167.

Article 24. Intervention by a foreign representative in proceedings in this State

168-169. [...]

170. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 170.

171-172. [...]

Chapter IV. Cooperation with foreign courts and foreign representatives

38-39. [...]

173. […]

173A. Cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets. Such a provision may be useful when that proceeding is commenced in the enacting State and assistance is sought elsewhere. That provision may also be relevant when the enacting State, in addition to the Model Law, has other laws facilitating coordination and cooperation with foreign proceedings (see article 7).

174-178. [...]

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

179-180. [...]

181. Article 27 is suggested for use by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by articles 25 and 26. Such an indicative listing may be particularly helpful in States with a limited tradition of direct cross-border judicial cooperation and in States where judicial discretion has traditionally been limited and, as an indicative list, leaves the legislator an opportunity to include other forms of cooperation. Any listing of forms of possible cooperation should be illustrative rather than exhaustive, to avoid inadvertently precluding certain forms of appropriate cooperation and limiting the ability of courts to fashion remedies in keeping with specific circumstances.

182. [...]

183. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 183.

183A. The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation expands upon the forms of cooperation mentioned in article 27 and, in particular, compiles practice and experience with the use of cross-border insolvency agreements.[24]

Chapter V. Concurrent proceedings

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

184. The following introductory sentence has been added: "The Model Law imposes virtually no limitations on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings."

185. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 185.

186. The following has been added as a new second sentence: "The adoption of such a restriction would not be contrary to the policy underlying the Model Law."

187. [...]

187A. Where under the law of the enacting State the debtor must be insolvent to commence an insolvency proceeding, the Model Law establishes a rebuttable presumption that recognition of a foreign main proceeding constitutes the requisite proof of insolvency of the debtor for that purpose (article 31) (see paras. 194-197).

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

188. The following has been added as a new second sentence: "The objective of this article and article 30 is to foster coordinated decisions that would best achieve the objectives of both proceedings (e.g. maximization of the value of the debtor's assets or the most advantageous reorganization of the enterprise)."

189-191. [...]

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[24] See footnote 8.

Article 30. Coordination of more than one foreign proceeding

192-193. [...]

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

194-196. [...]

197. The following introductory sentence has been added: “This rule, however, would be helpful in those legal systems in which commencement of an insolvency proceeding requires proof that the debtor is in fact insolvent.”

Article 32. Rule of payment in concurrent proceedings

198-200. [...]

VI. Assistance from the UNCITRAL Secretariat

201-202. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 201-202.