United Nations A/CN.9/WG.V/WP.103/Add.1

General Assembly

Distr.: Limited
28 February 2012

Original: English

United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Forty-first session
New York, 30 April-4 May 2012

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

Contents

V.12-51242 (E)

Please recycle

V. Article-by-article remarks (*continued*)

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding [paras. 112-121]

Article 15 as a whole

112. 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 used. This facilitates a coordinated, cooperative approach to cross-border insolvency and makes fast action possible. Article 15 defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, it is desirable not to encumber the process with additional procedural requirements beyond those referred to. With article 15, in conjunction with article 16, the Model Law provides a simple, expeditious structure to be used by a foreign representative to obtain recognition.

113-121. [...]

Article 16. Presumptions concerning recognition [paras. 122-122B, 123-123K]

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.

Paragraph 1 [paras. 122A-122B]

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 court is entitled to so presume. That presumption has been relied upon in practice by various recognizing courts when the court commencing the proceedings has included that information in its orders.[1]

122B. Inclusion of that information in the orders made by the court commencing the foreign proceeding should be encouraged in order to facilitate the task of recognition in relevant cases (discussed further at paras. 124B-C below). Such information would include the [essence] [gist] of evidence presented to the originating court.

Paragraph 2 [para. 123]

123. [...]

---

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

Paragraph 3 [paras. 123A-123K]

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 ex-post whether the foreign proceeding for which recognition is sought is taking place in a forum that is the debtor's centre of main interests [or 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 at 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. In the majority of cases, the debtor's centre of main interest is likely to be the same location as its place of registration and no issue concerning rebuttal of the presumption will arise.

123C. 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 [seat of operations] [operational centre], the [foreign representative] [party alleging that the centre of main interests is not at the place of registration] will be required to prove the location of the centre of main interests. The court of the enacting State will be required to consider independently where the centre of main interests is located.

Note to the Working Group

The Working Group may wish to consider whether the court is required to make this evaluation and satisfy itself as to the location of COMI in all cases or only where there is a dispute.

Paragraphs 123C and 124D (dealing with paragraph 1 of article 17) refer to the court independently satisfying itself as to the location of the debtor's COMI. Paragraph 124D also notes that the orders or decisions of the originating court are not binding on the receiving court.

The Working Group may wish to consider whether decisions made under laws, such as the EC Regulation, that require the originating court to determine whether the debtor's COMI is in that jurisdiction before a main proceeding can

be commenced might be distinguished from decisions made in jurisdictions where the question of whether the local proceeding might be classified as main or non-main will not be relevant to the commencement of local proceedings and the court will not need to consider the issue (although there may be examples where, although not required to consider the question for commencement purposes, the court might nevertheless decide on the location of the COMI). The Working Group may also wish to consider the situation in which a party that failed to persuade the originating court that the debtor's COMI was located somewhere other than the location determined by the originating court then raises the same issue in the context of recognition.

Factors relevant to rebutting the presumption

123D. In determining the location that might constitute a debtor's centre of main interests when it is alleged to be somewhere other than the place of registration, courts have focussed upon what is variously described as the location of the debtor's headquarters; the debtor's nerve centre; the place of the debtor's central administration; or the place from which the debtor's head office functions are performed and upon the factors considered relevant to that determination. Centre of main interests has also been likened to the debtor's principal place of business, although since large, corporate debtors may have several principal places of business, but in principle only one place where head office functions are carried out, the latter standard is likely to provide more certainty as to the debtor's real centre of main interests.

123E. Under the EC Regulation, "centre of main interests" has been authoritatively interpreted as meaning that where the place in which the bodies responsible for the management and supervision of the debtor are located and in which the management decisions of the debtor are actually taken are the same as its registered office, the presumption cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a State other than that in which the registered office is located cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all relevant factors make it possible for third parties to establish that the company's actual centre of management and supervision and of the management of its interests is located in that other State. However, the presumption may be rebutted in the case of a "letterbox company" that does not carry out any business in the territory of the State in which its registered office is located.

123F. Various factors have been found by different courts to be relevant to rebuttal of the presumption. No rigid formula is applied and no one factor is consistently determinative. Each factor may be more or less relevant or important to building up a picture of the real location of a debtor's centre of main interest by reference to the circumstances of each specific case. The inquiry is thus one of fact and the court will analyse a variety of factors to discern, objectively, where a particular debtor has its centre of main interests. This analysis will examine the location from which the debtor is managed and its physical operations are conducted, together with whether reasonable or ordinary third parties can discern or perceive where the debtor is conducting these various functions.

123G. It has been said that one of the important features of centre of main interests is the perception of the objective observer. One important purpose of centre of main interests is that it provides certainty and foreseeability for creditors of the company at the time they enter into a transaction. While there are differences in approach to determination of the centre of main interests of a debtor, the general trend of the decided cases seems to support objective ascertainment by third parties dealing with the debtor at relevant times. The issue lies more in the focus in some jurisdictions on specific factors, such as the "nerve centre" or "head office" of the particular entity that is the subject of the recognition application.

123H. Third parties may be influenced by information in the public domain and what could be learned in the ordinary course of dealing with the debtor. That may include reference to, for example, details reported in public disclosures made by the debtor, statements made in marketing materials and facts disclosed in contracts and agreements.

123I. [In addition to consideration of the main factors noted above in paragraph 123F, examples of factors that courts have found to be relevant include: the location of the debtor's main assets and/or creditors [the majority of creditors who would be affected by the case]; the location of the debtor's books and records; the location where financing was organized or authorized, or the cash management system was run; 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 of the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computers 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 or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.]

Abuse of process

123J. One issue that has arisen in determining centre of main interests is whether 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, such as abuse of process, 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 prevent receiving courts from applying domestic law, particularly procedural rules, to respond to any abuse of process.

123K. An alternative way of dealing with the abuse of process concern may be to consider whether recognition could be refused on the grounds of public policy.[2] A case could be made to support the proposition that an application for recognition as a main proceeding is an abuse of process if those responsible for pursuing the application know that the centre of main interests is elsewhere and yet deliberately

[2] See the discussion of the public policy exception at paras. [...].

decide to argue otherwise and/or to suppress relevant information when applying for recognition. An approach based on the "public policy" exception has the advantage of separating the recognition inquiry from any abuse-of-process issues in a manner reflecting the terms and spirit of the UNCITRAL Model Law.

Article 17. Decision to recognize a foreign proceeding [paras. 124-124C, 126-128E, 125, 129-132]

Paragraph 1 [paras. 124-124C]

124. The purpose of article 17 is to establish that, if recognition is not contrary to the public policy of the enacting State (see article 6) and if the application meets the requirements set out in the article, recognition will be granted as a matter of course.

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, paragraph (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 regard to any decisions and orders made by the originating court and to the [essence] [gist] of any evidence that may have been presented to the originating court, particularly as it relates to the nature of the foreign proceeding and whether it might be considered a main or non-main proceeding. 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 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, originating courts might be encouraged to include in their orders the [essence] [gist] of any evidence presented to them 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 the likelihood that recognition of the proceedings would be sought under the Model Law. The same considerations would apply to the appointment and recognition of the foreign representative.

Paragraph 2 [paras. 126-128]

126. Article 17 paragraph 2 draws the basic distinction between foreign proceedings categorized as the "main" proceedings and those foreign proceedings that are not so characterized, depending upon the jurisdictional basis of the foreign proceeding (see paragraph ... above). The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a "main" proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor

(article 20, subparagraphs 1 *(a)* and *(b)*) and an automatic "freeze" of those assets (article 20, subparagraph 1 *(c)*), subject to certain exceptions referred to in article 20, paragraph 2.

127-128. [...]

Timing of the determination with respect to COMI [paras. 128A-128E]

128A. The Model Law does not expressly indicate the date that is relevant for determining the centre of main interests of the debtor, other than article 17, subparagraph 2 (a) which provides that the foreign proceeding is to be recognized as a main proceeding "if it is taking place in the State where the debtor has the centre of its main interests" [*emphasis added*].

128B. The use of the present tense in article 17 requires that the foreign proceeding 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.

Note to the Working Group

Paragraph 128B refers to the closure of insolvency proceedings. This issue is discussed in the Legislative Guide (part two, chapter VI, paras, 16-19), where it is noted that different approaches are adopted. On that basis and to avoid any confusion that such a paragraph may create, particularly with respect to applicable law, the Working Group may wish to consider whether paragraph 128C might be sufficient.

128C. 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 an appropriate date at which to consider the debtor's centre of main interests. A slightly different, although related, alternative is the date of the application for commencement of the foreign proceeding, which under some insolvency laws might effectively be the same as the date of commencement. Where the debtor ceased trading 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 issue 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 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 use of present tense in the Model Law may be interpreted as suggesting that the relevant date for determining COMI should be the date of the application for recognition of the foreign proceeding. However, that date causes difficulties,

particularly if the foreign proceeding is a liquidation proceeding. In such a proceeding, the debtor is unlikely to continue having an active centre of main interests beyond the date of commencement of insolvency proceedings as the business would generally cease operating at the time of commencement, except in those cases where it is to be sold as a going concern or is trading out extant contracts to maximize creditor returns. A consideration of the location of the debtor's centre of main interests as at the date of the application for recognition might conclude that there was no current centre of main interests, only the centre of the activities of the liquidator. Moreover, using the date of the application for recognition overlooks the importance placed by article 15 on the decision commencing the foreign proceeding.

128E. The date at which the centre of main interests determination is made under the EC Regulation is the date of commencement of insolvency proceedings in one member State; other member States are required to automatically recognize those proceedings from that date.

Paragraph 3 [para. 125]

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 [paras. 129-131]

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). 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. [...]

Notice of decision to recognize foreign proceedings [para. 132]

Article 18. Subsequent information [paras. 133-134]

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. Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the terms of the appointment are frequent, but that only some of those modifications are such that they would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of "substantial" changes. The court should be kept so informed 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. Article 15, paragraph 3, requires that an application for recognition be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Article 18, subparagraph (b), extends that duty to the time after the application for recognition has been filed. That information will allow the court to consider whether relief already granted should be coordinated with the existence of the insolvency proceedings that have been commenced after the decision on recognition (see article 30) and facilitate cooperation under chapter IV.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding [paras. 135-140]

Article 20. Effects of recognition of a foreign main proceeding [paras. 141-153]

141. While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not, for they flow automatically from recognition of the foreign main proceeding. Another difference between discretionary relief under articles 19 and 21 and the effects under article 20 is that discretionary relief may be issued in favour of main and non-main proceedings, while the automatic effects apply only to main proceedings. Additional effects of recognition are contained in articles 14, 23 and 24.

142. [...]

143. The automatic consequences envisaged in article 20 are necessary to allow steps to be taken to organize an orderly and fair cross-border insolvency proceeding. 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, even if the State where the centre of the debtor's main interests is situated poses different (possibly less stringent) conditions

for the commencement of insolvency proceedings or even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State. This approach reflects a basic principle underlying the Model Law according to which recognition of foreign proceedings by the court of the enacting State produces effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State. If, in a given case, recognition should produce results that would be contrary to the legitimate interests of an interested party, 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).

144-153. [...]

Article 21. Relief that may be granted upon recognition of a foreign proceeding [paras. 154-160]

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 or most frequent 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.

155-160. [...]

Article 22. Protection of creditors and other interested persons [paras. 161-164]

Article 23. Actions to avoid acts detrimental to creditors [paras. 165-167]

165. Under many national laws both individual creditors and insolvency representatives have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such a right, insofar as it pertains to individual creditors, is often not governed by insolvency law but by general provisions of law (such as the civil code); the right is not necessarily tied to the existence of an insolvency proceeding against the debtor so that the action may be instituted prior to the commencement of such a proceeding. The person having such a right is typically only an affected creditor and not another person such as the insolvency representative. Furthermore, the conditions for these individual-creditor actions are different from the conditions applicable to similar actions that might be initiated by an insolvency representative. The standing conferred by article 23 extends only to actions that are available to the local insolvency representative in the context of an insolvency proceeding, and the article does not equate the foreign representative with individual creditors who may have similar rights under a different set of conditions. Such actions of individual creditors fall outside the scope of article 23.

166. The Model Law expressly provides that, as an effect of recognition of the foreign proceeding under article 17, a foreign representative has “standing” [(a concept in some systems referred to as “active procedural legitimation”, “active legitimation” or “legitimation”)] 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 does not create any substantive right regarding such actions and also does not provide any solution involving conflict of laws. The effect of the provision 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. 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.

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. Granting standing to the foreign representative to institute such actions is not without difficulty. In particular, such actions might not be looked upon favourably because of their potential for creating uncertainty about concluded or performed transactions. However, since the right to commence such actions is essential to protect the integrity of the assets of the debtor and is often the only realistic way to achieve such protection, it has been considered important to ensure that such right would not be denied to a foreign representative on the sole ground that he or she has not been locally appointed.

Article 24. Intervention by a foreign representative in proceedings in this State [paras. 168-172]

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES *[paras. 38-39, 173-178]*

38-39. [...]

173. Chapter IV (articles 25-27), on cross-border cooperation, is thus a core element of the Model Law. Its objective is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results. Cooperation as described in the chapter is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets (e.g. when items of production equipment located in two States are worth more if sold together than if sold separately) or to find the best solutions for the reorganization of the enterprise.

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 by 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. Articles 25 and 26 not only authorize cross-border cooperation, they also mandate it by providing that the court and the insolvency representative "shall cooperate to the maximum extent possible". The articles are designed to overcome the widespread problem of national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies. Enactment of such a legal basis would be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative framework for cooperation has proved to be useful.

175. To the extent that cross-border judicial cooperation in the enacting State is based on the principle of comity among nations, the enactment of articles 25-27 offers an opportunity for making that principle more concrete and adapting it to the particular circumstances of cross-border insolvencies.

176. [...]

177. The articles in chapter IV leave certain decisions, in particular when and how to cooperate, to the courts and, subject to the supervision of the courts, to the insolvency representatives. For a court (or a person or body referred to in articles 25 and 26) to cooperate with a foreign court or a foreign representative regarding a foreign proceeding, the Model Law does not require a previous formal decision to recognize that foreign proceeding.

178. [...]

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives [para. 179]

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] *and foreign courts or foreign representatives [para. 180]*

Article 27. Forms of cooperation [paras. 181-183A]

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 list 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. [...]

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.

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 [paras. 184-187A]*

184. The Model Law imposes virtually no limitations on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings. Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

185. [...]

186. Nevertheless, the enacting State may wish to adopt the more restrictive solution of allowing the initiation of the local proceeding only if the debtor has an establishment in the State. The adoption of such a restriction would not be contrary to the policy underlying the Model Law. The rationale may be that, when the assets in the enacting State are not part of an establishment, the commencement of a local proceeding would typically not be the most efficient way to protect the creditors, including local creditors. By tailoring the relief to be granted to the foreign main proceeding and cooperating with the foreign court and foreign representative, the court in the enacting State would have sufficient opportunity to ensure the assets in the State would be administered in such a way that local interests would be adequately protected. Therefore, the enacting State would act in line with the philosophy of the Model Law if it enacted the article by replacing the words “only if the debtor has assets in this State”, as they currently appear in article 28, with the words “only if the debtor has an establishment in this State”.

187. Those restrictions are useful in order to avoid creating an open-ended ability to extend the effects of a local proceeding to assets located abroad, a result that would generate uncertainty as to the application of the provision and that might lead to conflicts of jurisdiction.

187A. Where under the law of the enacting State the debtor must be insolvent to commence an insolvency proceeding, the Model Law deems the recognized foreign main proceeding to constitute the requisite proof of insolvency of the debtor for that purpose (article 31).

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] *and a foreign proceeding [paras. 188-191]*

188. Article 29 gives guidance to the court that deals with cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. 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). The opening words of article 29 direct the court that in all such cases it must seek cooperation and coordination pursuant to chapter IV (articles 25, 26 and 27) of the Model Law.

189-191. [...]

Article 30. Coordination of more than one foreign proceeding [paras. 192-193]

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding [paras. 194-197]

194-196. [...]

197. 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 31 would have particular significance when proving insolvency as the prerequisite for an insolvency proceeding would be a time-consuming exercise and of little additional benefit bearing in mind that the debtor is already in an insolvency proceeding in the State where it has the centre of its main interests and the commencement of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, the court of the enacting State is not bound by the decision of the foreign court, and local criteria for demonstrating insolvency remain operative, as is clarified by the words "in the absence of evidence to the contrary".

Article 32. Rule of payment in concurrent proceedings [paras. 198-200]

VI. Assistance from the UNCITRAL Secretariat *[paras. 201-202]*

B. Information on the interpretation of legislation based on the Model Law

202. The Model Law is included in the CLOUT information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to promote international awareness of the legislative texts formulated by UNCITRAL and to facilitate their uniform interpretation and application. The secretariat publishes, in the six official languages of the United Nations, abstracts of decisions and makes the full, original decisions available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.