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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 liability of directors of a company in pre-insolvency is addressed in A/CN.9/WG.V/WP.104.

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 and A/CN.9/WG.V/WP.105, as well as the reports of the Working Group of its thirty-ninth, fortieth and forty-first sessions (A/CN.9/715, 738 and 742 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-first session. The reader will be assisted in understanding the changes made to the Guide to Enactment by consulting both the published version of that document and documents A/CN.9/WP.103 and Add.1.

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 included in this note, except as strictly necessary. For ease of reference, the paragraph numbers from that published version have been retained to indicate the reordering of the text and the additions that have been made. The numbering of the paragraphs in this note is therefore not necessarily sequential. Where a new paragraph has been added, it takes the number of the immediately preceding paragraph with the addition of an alpha character. All headings from the published text have been included and relevant

[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.

paragraph numbers added in square brackets in the heading 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 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 lists relevant document references, have also been omitted, but will be included in the final version, updated to reflect both the original and current deliberations.

Enterprise groups

8. At the forty-fifth session of the Commission (2012), a question was raised as to whether the mandate of the Working Group included the issue of COMI in the context of enterprise groups. It was noted that while the report of the fortieth session of the Working Group (A/CN.9/738, para. 37) included the following with respect to that issue: "… and particularly with respect to the concept of COMI of an enterprise group, it was suggested that once the Working Group had reached agreement on the factors relevant to identifying the COMI of an individual debtor, it might be possible to consider the group issue further and, in particular, the relevance of those factors in the group context," no indication was given in that report as to whether the Working Group had agreed with that suggestion.

9. The Working Group may wish to note that the report of its forty-first session (A/CN.9/742, para. 46), includes the following: "It was recalled that the Working Group had agreed that revision of the Guide to Enactment should focus on the individual debtors covered by the Model Law and that the question of treatment of enterprise groups in cross-border insolvency proceedings could be further considered once that work was completed." No reference to that report was made at the Commission.

10. A further concern expressed at the forty-fifth session of the Commission was whether the current mandate of Working Group V covered issues of COMI as it might relate to enterprise groups. The Working Group will recall that the current mandate is based upon a proposal of the United States, as described in paragraph 3 above; the mandate specifically includes the phrase "as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8". The references included in that proposal to the cross-border insolvency issues affecting enterprise groups are encapsulated in the second part of the mandate adopted by the Commission, namely "and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition".

11. To address any ambiguity that may exist concerning these two issues, the Working Group may wish to clarify its views and make a recommendation to the Commission on (a) whether the current mandate of Working Group V covers enterprise groups in a manner that includes issues of COMI; and (b) the order in which it proposes to address the various elements of the current mandate.

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 [paras. 1-3A]

3. Delete the word “interface” in square brackets and retain the words “framework for cooperation”. In subparagraph (a), insert the following footnote with respect to the term “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 to refer to the State receiving an application under the Model Law”.

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 [paras. 13, 18, 19]

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

5. Revise the footnote to read: [footnote 3] The first was the UNCITRAL-INSOL Colloquium on Cross-Border Insolvency (Vienna, 17 to 19 April 1994) (for the report on the Colloquium, see document A/CN.9/398 and www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html; for the proceedings of the Colloquium, see International Insolvency Review, Special Conference Issue, vol. 4, 1995; and for the considerations of UNCITRAL relating to the Colloquium, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* (A/49/17), paras. 215-222). The second colloquium, organized to elicit the views of judges, was the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22 to 23 March 1995) (for the report on the Judicial Colloquium, see document A/CN.9/413 and www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html; and for the considerations of UNCITRAL relating to the Judicial Colloquium, see *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 382-393).

6. Revise the footnote to read: [*footnote 5*] For the reports of the Working Group see: eighteenth session (Vienna, 30 October to 10 November 1995), document A/CN.9/419 and Corr.1; nineteenth session (New York, 1 to 12 April 1996), document A/CN.9/422; twentieth session (Vienna, 7 to 18 October 1996), document A/CN.9/433; and twenty-first session (New York, 20 to 31 January 1997), document A/CN.9/435; all documents are available from www.uncitral.org/uncitral/en/commission/sessions.html.

7. Revise the footnote to read: [*footnote 6*] The Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held at New Orleans from 22 to 23 March 1997. A brief account of the Colloquium appears in the report of UNCITRAL on the work of its thirtieth session (Vienna, 12 to 30 May 1997) (*Official Records of the General Assembly, Fifty-second Session,*

Supplement No. 17 (A/52/17), paras. 17-22) and the report on the Colloquium is available from www.uncitral.org/pdf/english/news/SecondJC.pdf.

II. PURPOSE OF THE GUIDE TO ENACTMENT AND INTERPRETATION *[paras. 9-10]*

9. Revise the third sentence to read: "Such information might also assist States in considering which, if any, of the provisions should be adapted to address particular national circumstances."

III. THE MODEL LAW AS A VEHICLE FOR THE HARMONIZATION OF LAWS *[Introd., para. 11]*

A. Flexibility of a model law [para. 12]

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

IV. MAIN FEATURES OF THE MODEL LAW *[Introd., para. 49A]*

A. Access [paras. 49B-D, 37]

49B. In the second sentence, replace the words "An insolvency representative from the enacting State" with the words "The person or body administering a reorganization or liquidation under the law of the enacting State (referred to as the insolvency representative)" and insert the following footnote after "(referred to as the insolvency representative)": "This terminology 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)."

Revise the third sentence to read: "A foreign representative 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)."

B. Recognition [paras. 37A-F]

37A. In the second sentence, after the words "concerning the nature of the foreign proceeding", add the words "(i.e. that the foreign proceeding is, inter alia, a collective proceeding[2] for the purposes of liquidation or reorganization under the control or supervision of the court)".

37B. In the first sentence, delete the word "recognizing" and add the words "in which recognition is sought" after the word "State". In the fourth sentence, replace the word "it" with the words "the exception".

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

37C. In the first sentence, insert the word “either” before “a main proceeding”. At the end of the second sentence insert the words “(see paras. …. on timing)”. In the third sentence, delete the word “such” and insert the word “main” before the word “proceeding”.

37E. Add the words “(article 17, paragraph 4)” at the end of the paragraph.

37F. In the second sentence, add “as noted above” after the word “additionally”.

C. Relief [paras. 37G-H, 32-33A]

32. Delete the word “fair” in the third sentence.

D. Cooperation and coordination [paras. 33B-G]

Cooperation

33B. After the first sentence, insert the following sentences: “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.”

Coordination of concurrent proceedings

33E. Insert the words “in the enacting State” before the words “(article 28)” and the words “in that State” before the word “terminate”.

V. ARTICLE-BY-ARTICLE REMARKS

Preamble [paras. 54, 55]

Use of the term “insolvency” [paras. 51-53, 56]

CHAPTER I. GENERAL PROVISIONS – ARTICLES 1-8

Article 1. Scope of application

Paragraph 1 [paras. 57, 59]

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

60-64. […]

65. Revise the words in parentheses by replacing “the law” with “a law”.

Non-traders or natural persons [para. 66]

Article 2. Definitions

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

68. In the last line of the paragraph, replace the word "of" with the words "specified in".

68A. […]

Subparagraph (a) – Foreign proceeding [paras. 71, 23-23Abis]

23A. In the first sentence, replace the word "troubled" with the word "distressed".

23Abis. 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[3] *[paras. 23B-C, 24-24A]*

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[4] 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 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 those 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

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[3] **Note to the Working Group**: Paragraphs 23B and C have been revised on the basis of the text proposed at the forty-first session of the Working Group (A/CN.9/742, para. 28) and the discussion and conclusions reached at that session (A/CN.9/742, paras. 30-31).

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

with creditors includes 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 those 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).

(ii) Pursuant to a law relating to insolvency [para. 24B]

(iii) Control or supervision by a foreign court [paras. 24C-E]

(iv) For the purpose of reorganization or liquidation [paras. 24F-G]

24G. In the first sentence, delete the words "including those referred to in the Legislative Guide as expedited proceedings (see para. 24D)" and insert at the end of that sentence the following footnote: "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."

Interim proceeding [paras. 69-70]

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

31. In the second sentence, insert the words "(the European Convention)" after the reference to the European Union Convention on Insolvency Proceedings.

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

73. In the second sentence, replace the word "in" with "within".

Subparagraph (d) – foreign representative [para. 73A]

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 acceptable evidence of that appointment. The definition in subparagraph (d) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph (e) [para. 74]

74. Delete the words "and the Judicial Perspective" at the end of the paragraph.

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

75B. Delete the sentence in square brackets at the end of the paragraph.

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

78. In the first sentence, replace the words "for them" with the words "in order".

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

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

84. Revise the last part of the paragraph to read: "although retaining article 5 would provide clear statutory evidence of that authority and assist foreign courts and other users of the law."

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

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

Article 8. Interpretation [paras. 91-92]

91. Revise the second sentence to read: "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."

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

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

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

96. In the second sentence, replace the words "as it would" 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] *[paras. 97-99]*

98. In the first sentence, delete the words "(or procedural legitimation)" and add the following footnote after the word "standing": "Also known as "procedural legitimation", "active legitimation" or "legitimation"."

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

100. Delete the word "procedural" before the word "standing" and the words "(or "procedural legitimation")" and insert after the word "standing" a reference to the footnote to paragraph 98.

101. Revise the last words to read: "any such motions".

102. At the end of the paragraph, add the words "(see below, paras. 169 and 172)."

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

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

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

Article 15 as a whole [paras. 112-118]

Paragraph 4 [para. 119]

119. Revise the second sentence to read: "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.[5]"

Notice [paras. 120-121]

120. In the first line, delete the word "also". In the third sentence, replace the words "because of this need for expeditiousness" with "accordingly". In the fourth sentence, replace the words "According to that way of thinking" with the words "In these circumstances" and the word "would" with the word "could".

Article 16. Presumptions concerning recognition [para. 122]

Paragraph 1 [paras. 122A-122B]

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, although as noted below 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 at paras. 124B-C below). It is desirable that originating courts confine themselves to making findings with respect to the debtor's centre of main interests only when required to do so in order to determine their own competence. Making such findings with a view to influencing the decisions of a receiving court should be avoided.

Paragraph 2 [para. 123]

Paragraph 3 [paras. 123A-G, 123I, 123K-M]

123A. In the penultimate sentence, replace the words "is the debtor's centre of main interests" with the words "was the debtor's centre of main interests".

123B. At the beginning of the second sentence, replace the words "In the majority of cases" with the word "Frequently".

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[5] **Note to the Working Group**. The issue in paragraph 119 is whether the court requires a translation of the documents or can proceed without that translation because the documents are comprehendible to the court, rather than whether the court "understands" the documents; the documents may be written in the language of the court but not understandable as such.

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 prove [satisfy the court as to][6] 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[7] *[paras. 123D-E]*

Version 1[8]

123D. The predictability and transparency of a debtor's centre of main interests may have significant economic importance to creditors. Creditors doing business with the debtor may evaluate the jurisdiction in which they would likely have to demonstrate their claims in the event of an insolvency proceeding, and calculate the risk of credit extension in light of the insolvency law likely to apply. In making that evaluation, 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.

123E. The concept of centre of main interests underlies the scheme set out in the EC Regulation. The Model Law also 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 the debtor is likely to commence insolvency proceedings. As has been noted, the Model Law establishes a presumption that place of registration is the place that corresponds to those attributes. However, in reality, the debtor's centre of main interests may not coincide with the place of its registration. It is thus important to consider the factors that independently indicate a given place is the debtor's centre of main interests and which should be consulted where there is proof contrary to the presumption in article 16, paragraph (3).

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[6] **Note to the Working Group**. Article 16(3) specifically refers to proof to the contrary in order to satisfy the presumption. It has been suggested, however, that the word "proof" in paragraph 123C is too strong and the alternative "satisfy the court" would be preferable. The Working Group may wish to consider that issue.

[7] **Note to the Working Group**. The previous versions of paragraphs 123D and E have been deleted and substituted with text approved at the forty-first session of the Working Group as indicated in A/CN.9/742, para. 52, with some editing and revision by the Secretariat. A second version of those paragraphs is proposed for further consideration.

[8] **Note to the Working Group**. The text supported by Working Group V at its forty-first session (A/CN.9/742, para. 52) refers to the expectations of creditors and the place that creditors might expect proceedings to commence. However, since the first factor to be considered in determining COMI refers to the "ascertainability" of that place by creditors, the draft text has been aligned with that concept. In reviewing the drafting of these paragraphs, the Working Group may wish to consider the relationship between "expectations" on the one hand and "ascertainability" on the other.

Version 2

123D. The concept of a debtor's centre of main interests is fundamental to the operation of the Model Law. The Model Law accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The concept of centre of main interests also underlies the scheme set out in the EC Regulation. The Model Law establishes a presumption that the centre of main interests is the place of registration. 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 the place of registration is not the debtor's 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[9] *[paras. 123F-G, I]*

123F. In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been commenced is the debtor's centre of main interests. The factors are: (a) the location is readily ascertainable by [creditors] [third parties], (b) the location is where the [management] [central administration or operations] of the debtor takes place, [and (c) the location is one in which the debtor's principal assets or operations are found].[10]

123G. Frequently, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, however, there may be conflicts among the factors, requiring a more careful review of the facts. While no one factor is consistently determinative and 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, the court may nevertheless need to give greater or lesser weight to a given factor, depending on the circumstances of the particular case. The inquiry is thus one of fact and the court will analyse the factors to discern, objectively, where a particular debtor has its centre of main interests. In all cases, the endeavour is a

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[9] **Note to the Working Group**. The previous version of paragraphs 123F and 123G has been deleted and a new draft prepared on the basis of the text proposed at the forty-first session of the Working Group (A/CN.9/742, para. 52) and the discussion in the Working Group (A/CN.9/742, para. 53). Paragraph 123G is based on the second half of the text of 123F proposed in A/CN.9/742, para. 52.

[10] **Note to the Working Group**. Various suggestions were made as to the three key factors for determining COMI (A/CN.9/742, paras. 52 and 53). The suggestions with respect to ideas expressed by factors (a) and (b) (however formulated) were generally supported. However, two opposing views were expressed with respect to location of principal assets. The view opposing inclusion of that factor noted that it could potentially point to a number of different locations and might create uncertainty as to what constituted "principal" assets (para. 53). The view in favour of its inclusion was that in liquidation there may no longer be a place of central administration of the debtor and the location of its principal assets might be a helpful indicator. The Working Group did not generally support deletion of that factor and it is included in square brackets for further consideration.

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.[11] When the factors noted above do not yield a ready answer regarding the debtor's centre of main interests, a number of other elements concerning the debtor's business may be considered. These may include: 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 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 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[12] *[paras. 123K-M]*

123K. Cases have occurred in which the debtor has moved its place of registration (or habitual residence in the case of an individual debtor) in close proximity to the commencement of insolvency proceedings, in some instances even between the time of the application for commencement and the actual commencement of those proceedings. 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 home jurisdiction and might be described as a legitimate reason for changing the country of registration. Determining the centre of main interests based on the place of registration in such cases is unlikely to raise issues of concern for the receiving court.

123L. In other examples, the move of the place of registration (or habitual residence) may be considered to be purely opportunistic, designed to thwart the legitimate expectations of creditors and third parties or undertaken as the result of insider exploitation or biased motivation. As a general rule, whenever there is evidence of a move of the place of registration in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving

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[11] **Note to the Working Group**. The Working Group requested the Secretariat to consider paragraphs 123E-I with a view to seeing what material might usefully be retained. Paragraph 123I has been revised to include a new introductory sentence. The Working Group may wish to consider whether all of these factors should be retained or whether the list might be reduced by deleting, for example, the site of the controlling law or the law governing the main contracts of the company; the location from which reorganization of the debtor was being conducted; and the jurisdiction whose law would apply to most disputes. What was previously paragraph 123H has been added to the end of paragraph 123D.

[12] **Note to the Working Group**. Paragraph 123J dealing with abuse of process has been moved to article 17 on the basis that it deals generally with abuse of process as a grounds for declining recognition, not only with abuse of process as it relates to COMI, specifically to the movement of COMI in close proximity to the commencement of insolvency proceedings. The previous version of 123K has been deleted and new paragraphs 123K-L prepared on the basis of the Working Group's request at its forty-first session (A/CN.9/742, para. 56).

court, in determining whether to recognize those proceedings, to consider the factors identified in para. […] above more carefully and take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable to 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. 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 process. The Model Law does not prevent receiving courts from applying domestic law or procedural rules in response to any such abuse of process.

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 [paras. 124-124C, 126-128C, 123J, 125, 129-132]

Paragraph 1 [paras. 124-124C]

124B. Revise the first sentence to read: "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 [evidence] [information][13] that may have been presented to the originating court."

124C. Revise the first sentence to read: "Accordingly, recognition of a foreign proceeding would be assisted if the originating court mentioned in its orders any [evidence] [information] that would facilitate a finding by a receiving court that the proceeding is a foreign proceeding within the meaning of article 2."

Paragraph 2 [paras. 126-128]

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

128A. In the first line, replace the words "the date that is relevant" with the words "the relevant date".

128C. Revise the first sentence to read: "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.[14]" Delete the existing second sentence and insert the

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[13] **Note to the Working Group**. With respect to paragraph 122B, the Working group agreed to refer only to the inclusion of "information" in orders of the originating court. It may wish to consider whether paragraphs 124B and C should also refer only to "information".

[14] 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.

following: “That approach is consistent with the date at which the determination as to centre of main interests is made under the EC Regulation in order to commence insolvency proceedings.”

Abuse of process [para. 123J][15]

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.

Paragraph 3 [para. 125]

125. In the middle of the second sentence, delete the words “and the court should in practice be able to conclude the recognition process within such a short period of time”.

Paragraph 4 [paras. 129-131]

130. At the end of the first sentence, add the words “or if the status of the foreign representative’s appointment has changed or the appointment has been terminated”.

131. In the first sentence, delete the words “under national laws”.

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

Article 18. Subsequent information

Subparagraph (a) [para. 133]

133. Revise the fourth and fifth sentences to read: “Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the

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[15] **Note to the Working Group**. Paragraph 123J, which was previously located in the remarks pertaining to article 16 has been relocated to article 17, on the basis that abuse of process is not restricted to the question of determining the centre of main interests and may be related to the decision to recognize more generally.

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 kept 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) [para. 134]

134. In the third sentence, delete the words "existence of the" and the words "have been".

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

Paragraph 1 [paras. 135-137]

135. Delete the words "which is" before the words "available only upon recognition".

136. At the end of the paragraph, replace the words "more narrow" with "narrower".

137. In the first sentence, delete the word "already".

Paragraph 2 [para. 138]

138. Revise the second sentence to read: "Paragraph 2 is the appropriate place for the enacting State to make provision for such notice."

Paragraph 3 [para. 139]

139. In the first sentence, replace the words "the relief" before "terminates" with the word "it".

Paragraph 4 [para. 140]

140. Revise the middle of the first sentence to read: "if a foreign main proceeding is pending".

Article 20. Effects of recognition of a foreign main proceeding [Introd., paras. 141-147]

144. In the first sentence, delete the word "also".

145. Revise the penultimate sentence to read: "For example, if the arbitration does not take place in either the enacting State or the State of the main proceeding, it may be difficult to enforce the stay of the arbitral proceedings." In the last sentence delete the words "provisions of".

146. In the first sentence, delete the word "also" before "enforcement measures".

Paragraph 2 [paras. 148-150]

149. Revise the fourth sentence to read: “If courts are to be given such a power, some legal systems would normally require the grounds on which the court could modify or terminate the mandatory effects of recognition under article 20, paragraph 1 to be specified.”

Paragraph 3 [paras. 151-152]

151. In the first sentence, add the words “the application of” before the words “article 20”.

152. Revise the second sentence to read: “However, paragraph 3 may still be useful in such States because the question of the cessation of the running of the limitation period might be governed, pursuant to rules concerning conflict of laws, by the law of a State other than the enacting State; furthermore, the paragraph would be useful as an assurance to foreign claimants that their claims would not be prejudiced in the enacting State.”

Paragraph 4 [para. 153]

153. In the first sentence, delete the word “merely”.

Article 21. Relief that may be granted upon recognition of a foreign proceeding [Introd., paras. 154-156]

154. Revise the middle of the third sentence to read: “are typical of the relief most frequently granted in insolvency proceedings”.

156. Revise the closing phrase to read: “subject the relief granted to any conditions it considers appropriate.”

Paragraph 2 [para. 157]

Paragraph 3 [paras. 158-160]

158. In the penultimate sentence, add the words “non-main” before “proceedings” and in the last sentence, replace the word “admonish” with the word “advise”.

160. Revise the opening words to read “The idea underlying article 21, paragraph 3, is also reflected in article 19.”.

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

162. Revise the final words of the first sentence to read: “articles 19 and 21”. In the second sentence, replace the word “better” with “appropriately”.

163. In the last sentence, replace the words “such a definition” with “an appropriate text” and insert the word “against” after the word “discriminating”.

164. In the first sentence, replace the word “apprise” with the word “notify”.

Article 23. Actions to avoid acts detrimental to creditors [paras. 165-166, 166A, 167]

165. In the last sentence, delete the word "procedural" and add a cross-reference to the footnote to paragraph 98.

166. In the first sentence, add a reference to the footnote to paragraph 98 after the word "standing". Revise the second sentence to read: "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." In the third sentence, replace the words "the provisions" with "article 17".

167. In the first sentence, delete the word "procedural" and add a cross-reference to the footnote to paragraph 98.

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

170. In the first sentence, delete the word "procedural" and add a cross-reference to the footnote to paragraph 98.

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

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]

183. In the first sentence, replace the word "possibility" with the word "opportunity".

183A. At the end of the paragraph, insert a cross-reference to the Practice Guide on Cross-Border Insolvency Cooperation.

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. 184-187]*

185. In the fourth sentence, replace the words "opted for" with the word "chosen".

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 [paras. 188-191]*

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]

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

201. Revise the e-mail and Internet home page addresses as follows: e-mail: uncitral@uncitral.org; Internet home page: www.uncitral.org.

202. Revise the first and second sentences to read: The Model Law is included in the Case Law on UNCITRAL Texts (CLOUT) information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application.