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Revised Guide to Enactment of the Model Law and draft Part four of the Legislative Guide on Insolvency Law

Compilation of comments by Governments

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I. Introduction

1. In preparation for the forty-sixth session of the Commission (Vienna, 8-26 July 2013), the text of the draft revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (contained in document A/CN.9/WG.V/WP.112) and the draft commentary and legislative recommendations on directors' obligations in the period approaching insolvency (contained in document A/CN.9/WG.V/WP.113) were circulated at the request of Working Group V (Insolvency Law) to all Governments and international organizations for information and comment (see A/CN.9/766, para. 101).

2. The present document reproduces the comments received by the Secretariat relating to those two draft texts. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Governments

Qatar

[Original: Arabic]
[Date: 19 June 2013]

1. The Guide that was revised by the Working Group in relation to the concept of the "debtor's centre of main interests"

Having examined the Commission's document A/CN.9/WG.V/WP.112, we would like to state that the importance of determining the debtor's centre of main interests lies in assisting the creditor to define the place where the insolvency proceedings concerning the debtor would be commenced. It is most often the State where the debtor is registered. It has been determined in the light of several factors, including, for example, that a State might be the place where the centre of administration of the debtor's affairs is located. The Model Law, however, did not explicitly indicate the date on which the determination of the debtor's centre of main interests would be effected. It should be noted that if a recognition applicant falsely claims the centre of main interests to be in a particular State, the receiving court may consider such a claim to be a deliberate abuse of the process. The Model Law does not prevent the receiving court from applying domestic law or procedural rules to such an abuse of process.

2. Directors' obligations in the period approaching insolvency

The State of Qatar suggests that discussions by the Working Group should only be focused on responsibilities and liabilities arising in the context of insolvency, and should not address criminal liabilities that might arise therefrom or issues covered by company laws.

Russian Federation

[Original: Russian]

[Date: 24 June 2013]

1. The Russian Federation notes that the draft texts of the revised Guide to Enactment of the Model Law on Cross-Border Insolvency and draft Part four of the Legislative Guide on Insolvency Law on directors' obligations in the period approaching insolvency have, as a whole, been approved by Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law (UNCITRAL).

However, the Russian Federation would like to draw attention to the need for additional consideration of the following provisions of the draft texts.

2. Revised Guide to Enactment of the Model Law on Cross-Border Insolvency
 - In paragraph 33F of the revised text, the procedure for granting relief to a foreign proceeding should be specified or clarified. In Russian procedural legislation, there is no such term as "adjustment of relief", which may lead to difficulties in applying the provisions of the Model Law.
 - The above considerations apply also to the provisions of paragraph 123F of the draft text, in that the factor that "the location is readily ascertainable by creditors" should also be clarified.
3. Draft Part four of the Legislative Guide on Insolvency Law on directors' obligations in the period approaching insolvency
 - In paragraph 4 of recommendation 4 [3] under section C, the term "factual control" should be clarified, given that, for example, under Russian legislation, the broad definition of "director" proposed in the draft Guide will include not only directors of enterprises but also persons in a position to exert influence (including control) over the entrepreneurial or commercial activities of the debtor.
 - In paragraph 10[8] of recommendations 7-11 under section E, it would be useful to clarify what is meant by "administrative expenses".
4. The Russian Federation may submit additional comments on the draft texts at the Commission's forthcoming session.

Singapore

[Reference to the Revised Guide to Enactment of the Model Law]

[Original: English]

[Date: 25 June 2013]

1. **Paragraph 123A** — We note that the wording of the presumption in article 16, paragraph 3, of the Model Law corresponds to that in the EC Regulation on Insolvency Proceedings ("EC Regulation"), although the purposes/uses of the presumptions are different. The presumption in the EC Regulation is used in the context of determining the proper place of commencement of formal insolvency

proceedings. The presumption in the Model Law arises where there are recognition proceedings in a country (other than the country where the formal insolvency proceedings were commenced) where the court, in the course of hearing the recognition application, needs to determine if the insolvency proceedings for which recognition is being sought were commenced in the debtor's "centre of main interests" ("COMI"). The insertion of this paragraph with the statement highlighting the possible relevance of EC jurisprudence in the interpretation of COMI in the context of Article 16 leads us to ask to what extent/how the case law is relevant, and what the experience of courts in non-European Union jurisdictions is in interpreting COMI in the context of the Model Law.

2. We further highlight that where the party alleging that the COMI is not the place of registration i.e. seeking to displace the presumption of COMI, will be required to satisfy the court as to the location of the COMI, according to the requirements set out in paragraphs 123D, F, G and I. It must be noted that the party attempting to displace the presumption may not have access to the information pertaining to the factors relevant to determining COMI, as such information would most likely be wholly within the debtor's knowledge, e.g. location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank etc. (see paragraph 123I).

3. **Paragraph 123M** — We wish to highlight that it is not clear at which point in time one determines the COMI, if the debtor has moved the COMI before the commencement of foreign insolvency proceedings.