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# Insolvency Law

## Proposal for Consideration of the Working Group by the Delegation of the United States

1. Our delegation supports the continuing progress of Working Group V in further clarifying the concepts that form the basis for the Model Law on Cross-Border Insolvency. We appreciate the Secretariat's continued work and efforts in regard to updating the existing Guide to Enactment as that process advances our work.

2. This document is submitted to address specific details that we believe merit further consideration by Working Group V. These proposals include further defining the term collective proceeding, the factual basis to assist in the determination of what constitutes the centre of main interests, and the need for ongoing annotations to update and supplement the Guide to Enactment.

## I. Collective Proceedings

3. The Model Law provides for the recognition of a foreign representative in a foreign proceeding to be recognized in other jurisdictions with a minimum of difficulty provided the foreign representative can establish and meet the statutory predicates in order to obtain recognition. As a result the foreign representative upon recognition in a foreign main proceeding can obtain control over assets, halt litigation, obtain information, and obtain a variety of other remedies. In a foreign non-main proceeding, the foreign representative may obtain recognition and the relief granted will be discretionary by the court of the enacting State. Such powers should not be conferred on anyone other than the proper foreign representative of a foreign insolvency proceeding. This is designed to address legitimate proceedings and also designed to exclude proceedings that do not meet the qualification

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requirements under the Model Law. Careful elaboration of these elements is an important aid to those decision makers who must determine whether a given proceeding qualifies for recognition and relief.

4. One of the requisite elements is that the proceeding in question must be a "collective proceeding." The Model Law itself does not define what constitutes a collective proceeding. The courts that have attempted to interpret the phrase have had some difficulty in articulating a clear, predictable rule. Courts have also consulted the Guide to Enactment for insight with regard to how various phrases in the Model Law should be interpreted. Therefore, the addition to the Guide to Enactment of the definition of what constitutes a "collective proceeding" is necessary to provide clarity and transparency and to provide assistance to Courts addressing the issue.

5. Collective proceedings are to be distinguished from ordinary winding up proceedings of the sort often used to end the "life" of a legal entity outside the insolvency context. In such proceedings, creditors typically do not participate, though they may eventually receive distributions. Such proceeding may, under some laws, become collective as a result of insolvency, requiring that creditors be given the opportunity to meaningfully participate.

6. Collective proceedings are also distinguished from proceedings that are essentially remedial in nature, such as receiverships instituted primarily for the benefit (and payment) of a particular constituency. Some receiverships may be sufficiently collective in nature (permitting active participation by the entire creditor body in both the liquidation or reorganization of the debtor, and the presentation and satisfaction of their claims) to qualify.

7. **When creditors are permitted to present claims, when they can have input into the manner in which assets are administered, when they can receive payment on a pro rata basis out of the assets being administered, then the proceeding has the qualities of a collective proceeding. The word "collective" contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action.**

8. Based on the foregoing our delegation recommends that the Guide to Enactment set forth a definition of collective proceedings, as follows:

A collective proceeding, for purposes of the Model Law, is one in which:

*(a)* all creditors have the right (though not necessarily the obligation) to submit claims, with the expectation of pro rata payment of those claims, subject to statutory priorities;

*(b)* all creditors have a right to meaningful participation in the manner in which assets are administered;

*(c)* all creditors have sufficient notice in order to exercise these rights; and

*(d)* all the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities, and further subject to local exclusions relating to the rights of secured creditors.

## II. Factual Components in Order to Determine the Centre of Main Interests

9. The Model Law does not define the concept "centre of main interests." The concept is critical to the operation of the Model Law in order to determine the situs of the main insolvency proceeding. As set out in the Guide to Enactment, the main proceeding is the point of central coordination for all other proceedings pending in other States, subject to appropriate local protections. A proceeding that is not taking place in a country that is the debtor's centre of main interests should not enjoy the same level of deference, because the debtor's ties with that country (and its insolvency regime) are more limited.

10. The Model Law provides a much simpler and streamlined process as opposed to the process that is often associated with the recognition of other kinds of judgments and proceedings internationally. In addition, the Model Law establishes a rebuttable presumption that the debtor's centre of main interests is in the country in which the registered office is located. The assumption is that the country of registration will also correspond to the location of the debtor's head office functions and principal operation. In the vast majority of cases, these assumptions will prove to be both valid and adequate.

11. In some cases, country of registration will not correspond to the debtor's centre of main interests. The debtor might, for example, be registered in one country, but have no other significant ties with that jurisdiction other than registration. Or its registration location might have been selected for some other advantage having little to do with its actual operations. In such cases, it may be necessary for a court in the enacting State to examine other factors in order to determine whether a given proceeding is taking place in a State that is, in fact, the debtor's centre of main interests. If it is not, then the court in the enacting State may accord the proceeding more limited relief, or (if there is also no establishment) no relief at all.

12. **In all events, the debtor's centre of main interests needs to be both predictable and transparent. When there is reason to address the question, the resulting determination must result from a factual inquiry. Three factors stand out as particularly indicative in determining the debtor's centre of main interests. These factors are:**

- ***(a)*** **the location is readily ascertainable by creditors;**
- ***(b)*** **the location is one in which the principal assets and operations of the debtor are found; and**
- ***(c)*** **the location is where the management of the debtor takes place.**

13. In most cases, these primary factors will yield a ready answer. For those cases in which they do not, a court may take into consideration a variety of other additional factors, including the location of the debtor's books and records, the location where financing was organized or authorized, the location from which the cash management system is run, the location of the principal bank, the location of employees, the location in which commercial policy is determined, the site of controlling law governing the main contracts of the company, the location from which purchasing or sales staff, accounts payable and computer systems are

managed, the location where reorganization is being conducted, the location whose law will apply to most disputes, the location in which the debtor is subject to supervision or regulation, and the location whose law governs the preparation and auditing of accounts.

## III. Proposal to Supplement Annotations

14. The ultimate focus, however, is in arriving at a supportable determination whether the proceeding is originating from a country that is, in fact, the debtor's true centre of main interests. The first three factors should be considered as primary, with resort to other considerations only when the evidence with regard to the primary factors fails to yield a clear result.

15. There is a growing body of decisions interpreting and applying the various provisions of the Model Law. While many of these decisions are accessible by way of various private research services many more are not. In addition, for one reason or another, private research services are not available to many jurists and insolvency practitioners.

16. The delegation of the United States believes that greater uniformity and predictability in the application of the Model Law is likely to result if users of the law are able to readily access decisions in a single location, maintained by UNCITRAL itself. Accordingly, we recommend that an online annotation system be set up and maintained, as a supplement to the Guide to Enactment. The annotations should be organized, transparent and user-friendly and should refer to specific provisions of the Model Law being addressed in the reported decision. In addition, the annotations would contain hyperlinks to the underlying written decisions.

17. The annotations should be compatible with other systems and publications of UNCITRAL, including cases reported under the CLOUT system and to the extent possible should be formatted in a way to provide consistency.

## IV. Conclusion

18. The delegation of the United States appreciates the opportunity to present these concepts to the Working Group.