FEDERACIÓN INTERAMERICANA DE ABOGADOS
INTER-AMERICAN BAR ASSOCIATION

Report of IABA Committee Delegation at UNCITRAL Working Group V (Insolvency) 43d Session New York, 15-19 April 2013

REPORT OF IABA COMMITTEE V DELEGATION TO UNCITRAL WORKING GROUP V (INSOLVENCY)

At invitation of the United Nations Commission on International Trade Law (UNCITRAL), IABA through its Secretary General deployed an observer team of four IABA members to the 43rd Session of UNICTRAL Working Group V, meeting at UN headquarters in New York, April 15-19 (hereinafter, the "Session"): IABA Council Member and Committee V Chair Dr.

David P. Freedman (Puerto Rico); Dr. Felipe Moutinho Cordeiro (Brazil).; Dr. Veronica Ortiz (Uruguay); Dr. Jose Alejandro Zeind (Mexico), collectively "IABA Observers".

As an NGO observer, IABA had opportunity to comment and contribute to the matters on the agenda, and did so as detailed below. This UNCITRAL Working Group V is completing a Legislative Guide to the Model Law on Insolvency (2007) to assist nation states in enacting legislation to accommodate cross-border insolvency cases. The Model Law has been adopted already by many states in the Americas, including Mexico, Canada, and the United States (as chapter 15 of the U.S. Bankruptcy Code).

The beginning of the Session, Judge Wisit Wisitsora-At of Thailand was re-elected Chair of the Working Group. Later the same day, the IABA Observers introduced themselves to the Chair

and the Secretariat's attending staff, Secretary Dr. Jenny Clift and her colleague Dr. Kate Lannan (photograph during Day Three, shown here).

During Day One of the Session, the IABA' Observers presented themselves to delegations from Mexico, Spain, France, Brazil, United States, Switzerland, Colombia, Guatemala; and other Observers including INSOL, American Bar Association, International Bar Association, and European Law Students Union.

The agenda for the meeting, showing on UNCITRAL Document [1] A/CN.9/WG.V/WP.111 continued the work on the 42d Session in Vienna. IABA had deployed to that previous session, Dr. Delphine Patetif (France) and her report is included here as Appendix I. Topics addressed at both the current Session (and previous session): (a) center of main interests[2]; (b) directors' responsibilities as their company approaches insolvency[3]; and insolvency administration of large and complex financial institutions[4].

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[1] Documents cited available at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html
[2] UNCITRAL Working Papers ("WP") A/CN.9/WG.V/WP.112 and A/CN.9/WG.V/WP.114
[3] WP A/CN.9/WG.V/WP.113 ("WP.113"); and A/CN.9/WG.V/WP.115 ("WP.115")
[4] WP A/CN.9/WG.V/WP.116 .

During various consultations prior to the Session, the IABA Observers decided to emphasize director's responsibilities (WP.113). IABA Observers considered that the Working Group should encourage transparency with creditor constituencies, as insolvency approaches, for at least two reasons: (a) to enable companies in distress to obtain creditor support for restructuring proposals; (b) negate inferences of fraud, and limit directors' liability relative to specific restructure transactions or actions. Also, the IABA Observer from Brazil, Dr. Moutinho, detected an inaccuracy in WP.115's description of Brazilian law relative to corporate groups, and IABA's action on that point is described in this report.

Day One of the Session was fully consumed with discussion of the COMI. Substantial time was devoted to a court's independent duty, if any, to question a petitioner's allegation that the COMI is located in a particular jurisdiction. Other points noted by the IABA Observers appear in Appendix II to this report. Delegations and observers (including IABA) were invited to a reception immediately following the Day One Session, sponsored by the Haynes & Boone law firm and the IBA. This afforded opportunity for IABA Observers to visit with delegates from Japan, Guatemala, Colombia, IBA members, and bankruptcy judges including James Peck, who presides over the Lehman Brothers case in the U.S. Bankruptcy Court for the Southern District of New York.

The Working Group started late afternoon on Session Day Two on the subject of director's duties. Near the beginning of the discussion, the Chair recognized IABA, so IABA advanced that it would propose additional language (in ¶20 of WP.113) for directors' measures to be taken as insolvency approaches. IABA was thanked for its suggestion, and requested to present the matter later during the deliberations on Commentary once the discussion on Recommendations were completed. The IABA proposal was circulated in writing (Appendix III to this report) to key delegations and Secretary later that day.

After a backtrack to the COMI, Session Day Three resumed with discussion on recommendations concerning directors' liability as set forth in WP 113, and IABA Observers' notes appear as Appendix IV to this report. During the discussion on Recommendation No. 5, IABA suggested wording to shorten and combine Recommendation 5(a) and 5(b). This suggestion was supported by Spain, and opposed by France, Italy, and the World Bank, who insisted on keeping saliently separate the issues of imposition of directors' liability, from limitations on such liability. Consequently the suggestion proceeded no further.

Later in the afternoon of Day Three, when discussion turned to commentary at ¶ 20, the Chair recognized IABA, and the IABA suggestions in support of disclosure to creditors. All of France, Korea, and Italy were concerned that such disclosure would trigger immediate enforcement actions by creditors ("race to the court house"); and impact the "confidentiality" of directors' deliberations. IABA thanked Korea especially for its concerns, and explained the need for a balance between the normal confidentiality of directors' deliberations and the need for transparency with creditor constituencies in an insolvency situation coupled with the directors'

opportunity to limit their potential liability to the creditors from restructure transactions. The explanation, however, did not change the position of Korea and their other objectors, joined later by Mexico[5]. Consequently the IABA suggestion was not discussed further.

IABA Observers discussed internally on Days Two and Three the findings by Dr. Felipe Montinho Cordero relative to ¶18 of WP.115. This provision presented Brazilian law as favoring director loyalty to a corporate group as a whole rather than to the specific corporation of the directorship. On the other hand, Dr. Montinho identified substantial Brazilian law that shows this issue is not settled. Consequently the IABA Observers prepared a written proposal for further review (Appendix V). IABA Observers contacted both the Brazilian delegate and the Brazilian Mission to the United Nations to apprise them of IABA's activity on the point. When WP.115 came up for discussion during Session Day Four, IABA Observers, through Dr. Alejandro Zeind, apprised the Working Group V that while IABA had concerns over the wording used in WP 115 in the paragraphs mentioning Brazil, IABA had communicated it to the Brazilian delegation, the appropriate channel before the Working Group to suggest the addition in that sense. The Brazilian delegation immediately thanked IABA for raising these concerns, and asked the Chair to apply IABA's additions in the WP.115 with minor changes and consider them for the final report of the Session. IABA Observers' notes on other Day Four proceedings appear as Appendix VI to this report.

Accordingly, IABA's suggestions impacted here more significantly with the support of the Brazilian delegation, who thanked IABA for its intervention. Moreover, having the Brazilian delegation expose the point before the Chair and Secretary, rather than IABA as a NGO observer, contributed to the success of the intervention, *a fortiori* where it concerned Brazilian law specifically.

During Session Day Five, the work of the Session was summarized, and the final report read. This report was published subsequently as UNCITRAL document A/CN.9/766, and is included as Appendix VII to this report. IABA's participation is reflected in page 17 (IX. Other Business, ¶ 110) and page 10 ¶67.

The IABA Observers thank Secretary General Dante Figueroa for arranging IABA's attendance to the Session, and the warm welcome afforded by Chair Judge Wisit Wisitsora-At and helpful orientations by UNCITRAL Legal Officers Jenny Clift and Kate Lannan, and UN Conference Management staff Miguel Ramarachín (native of Lima, Peru). We believe that our participation raised IABA's profile at UNCITRAL and will encourage UNCITRAL and perhaps other United Nations dependencies and agencies to consult IABA on specific issues and invite IABA to future deliberative conferences.

[5] The Mexican delegate privately apologized for his position, but this appeared to reflect more cordiality toward IABA than a change in institutional position on the issue.

APPENDIX I

FEDERACIÓN INTERAMERICANA DE ABOGADOS
INTER-AMERICAN BAR ASSOCIATION

Working Group V (Insolvency Law)
Forty second session
Vienna, 26-30 November 2012

Author: Delphine Patétif

I- Introduction

The Working Group commenced its session by electing a Judge from Thailand as its Chairperson, proposed by Canada.

The session began then with a discussion of two issues raised by the Commission as its forty-fifth session relating to whether the WG's mandate on COMI covered issues relating to enterprise groups and if so when the WG should handle this topic.

In relation to the scope of the mandate on COMI, the WG noted that it was necessary to look at issues of COMI as it related to enterprise groups because most commercial activity was currently conducted through enterprise groups.

The WG recommended that the Commission should confirm that the scope of the WG's mandate on COMI included COMI in the context of enterprise groups.

Regarding the timing of such consideration, it was agreed that that topic should be handled upon completion of the current revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross Border Insolvency relating to COMI of individual debtors.

The WG then started its discussion of the draft revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross Border Insolvency as contained in document A/CN.9/WG.V/WP.107. (For further information, see documents in annex).

The WG then started on November 27 and finished on November 28 the study of the Director's obligations in period of approaching insolvency.

As requested by the President of the Committee V, I assisted to the entire session.

All the documents issued by the Secretariat will be scanned and sent to the Secretary General as well as to the President of the President of the Committee V by the end of next week.

Once again, I want to thank Dante Figueroa, our Secretary General, for his trust for this mission. I was honored to represent the IABA to the United Nations, Working Group V (Insolvency Law), forty second session held in Vienna, from November 26th to November 30^{th,} 2012, and I hope that this report will be useful for both the IABA and the person who will represent the IABA to the next session to be held in New York, 2013.

II- Director's obligations in the period approaching insolvency

The Working Group resumed its consideration of the topic of director's obligations in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.108.

A. Purpose of legislative provisions

The Secretariat drew the WG's attention to two issues for consideration under the purpose of the legislative provisions. The first related to the choice of a term or description to be given to persons who would be responsible for taking the necessary action to avoid insolvency or minimize the effects of insolvency. The second issue was with regard to use of the word "likely", "imminent" or "unavoidable" to describe the period before insolvency within which the obligations or duties should be carried out.

Concerning the term or description to be given to persons in a company who would be responsible for taking the necessary action, it was agreed that a more generic description like "those charged with making decisions concerning management of the company" should be used on the basis that the term "directors" had different meanings in various jurisdictions, and that the generic description would cover persons who were not *de facto* directors but made decisions on behalf of the company. The WG agreed to use the more generic description with a modification to delete the words "charged with". This change should be reflected throughout the draft recommendations.

Regarding the use of the words "likely", "imminent" or "unavoidable", the WG agreed to delete the word "likely" and use "imminent or unavoidable". This change should be reflected throughout the draft recommendations.

B. Contents of legislative provisions

Recommendation 1- The obligation

The WG agreed that the words "law relating to insolvency" should be retained throughout the draft recommendations. Since that formulation differed from the references to the "insolvency law" in parts one, two and three of the Legislative Guide, some text should be included to explain that the broader formulation had been adopted to take account of the relevance of other law, particularly company law, to the obligations of directors.

Various views were expressed with respect to paragraph 2 of draft recommendation 1 and the steps that should be taken, bearing in mind the goal of encouraging directors to use reorganization and appropriate informal procedures in a timely manner, the need to broaden the focus of directors to include the interests of creditors and the desirability of specifying steps that were typically included in the general obligations of a director. It was suggested that reasonable steps might be grouped under several phases, such as those relating to evaluation of the current situation of the business, identification of the options that might be open to the company to avoid or, where it was unavoidable, to minimize the impact of insolvency and finally, the taking of appropriate action. It was proposed that paragraph 32 of the commentary discussed reasonable steps in some detail and should inform revision of recommendation 1, paragraph 2. It was suggested also that although avoidance of insolvency and minimization of its impact where it was unavoidable were different situations that might be regarded as

requiring different measures, many of the steps that should be taken in either event overlapped and different sets of steps were not required.

Concern was expressed that including an obligation to avoid transactions that might be subject to avoidance if insolvency proceedings commenced, might establish a ground for liability that did not typically exist under avoidance provisions. In response, it was suggested that since the Legislative Guide on Insolvency Law provided the mechanism for avoidance of certain transactions, it was appropriate to include in this work an obligation to avoid such transactions where they had no reasonable business justification. It was agreed that draft recommendation 1 should refer to "obligations" as there was reference to more than one obligation, and that that revision should be reflected throughout the draft recommendations.

After a long discussion, the Secretariat was asked to prepare a revised text, taking into account the issues discussed, for further consideration.

Recommendation 2- The time at which the obligation arises

The WG approved the draft recommendation as drafted

Recommendation 3- Persons that owe the obligation

The WG agreed to amend draft recommendation 3 by deleting the square brackets around the words "the person", deleting the words "defined under national law as fulfilling the role of directors" and "undertaking the responsibilities of a director" and retaining the words "formally appointed as a director and any other person exercising factual control and performing the functions of a director". The remaining draft recommendations should also use the phrase "the person who owes the obligation". The amended recommendation would state: "The law relating to insolvency should specify the person who owes the obligation, which may include any person formally appointed as a director and any other person exercising factual control and performing the functions of a director."

Recommendation 4- Liability

With respect to subparagraph 1, the WG agreed after discussion that the phrase "creditors have suffered loss or damage" should be retained and that the phrase "creditors' interests have been harmed" should be deleted; and that the phrase "committed in the period referred to in recommendation 2" should be deleted.

With those revisions, the substance of draft recommendation 4 was adopted.

Recommendation 5- Elements of liability and defences

The WG agreed that, although the aspects of the recommendation referring to draft recommendation 1 would have to be discussed once that recommendation had been revised and agreed, the phrase "creditors have suffered loss or damage" should be retained and the

phrase "creditors' interests have been harmed" should be deleted. The WG also agreed that the final sentence of the draft recommendation should be deleted.

Recommendation 6- Remedies

After discussion the WG agreed, with respect to the first sentence of the draft recommendation, that (a) it should be made clear that payment would not be due until after the question of a director's liability had been litigated and that the damages referred to would be assessed by the Court; (b) that any compensation payable was linked to the liability in recommendation 4, paragraph 2; and (c) that with respect to the second sentence, concern was expressed that the current formulation was too broad, referring generally to rights and claims in a manner that might preclude directors from exercising their rights as creditors and participating in the ordinary processes of insolvency in the period before any cause of action with respect to draft recommendation 1 had been litigated. It was proposed that the draft recommendation should be limited to restricting a director's right to set-off. In that regard, a proposal was made to use the original formulation in draft recommendation 7, paragraph (c) of A/CN.9/WG.V/WP.104- "a limitation on the exercise of set-off with respect to any debts owed by the company to the director". That proposal was supported.

Further concerns were raised with respect to the issue set-off in recommendation 6, particularly with respect to distinguishing between pre and post application aspects of set-off as they related to directors obligations and liability, and the relevance, for example, of director insurance. It was observed that set-off was difficult to define and could exist in several different forms, both legal and equitable and that it raised important issues of timing and questions of conduct. The uncertainty caused by set-off might be remedied through the use of subordination. It was suggested that those issues might be further considered in the commentary or in a footnote to recommendation 6.

Recommendation 7- Conduct of proceedings for breach of the obligation

The substance of the draft recommendation was approved with the addition of a cross-reference to recommendation 4.

Recommendations 8 & 9- Funding of proceedings for breach of the obligation

It was approved as well by the WG.

Recommendation 10- Additional measures

Differing views were expressed with respect to the second sentence in square brackets. One view was that the financial sanctions provided for in draft recommendation 6 should be complemented by additional measures so as to prevent egregious behavior of directors and to protect the public from directors who had acted negligently or improperly. Another view was other examples additional to disqualification should be included. A different view was that such a limitation was not warranted on the basis that it would be punitive, infringe on certain constitutional rights, discourage competent directors from taking up such positions and be

outside the ambit of insolvency law. A2fter discussion, the WG agreed that the second sentence should be deleted.

Regarding the first sentence, there was concern that deletion of the second sentence emptied the first sentence of much of its meaning. Some support was expressed in favor of deleting recommendation 10 completely and having recommendation 6 as the only remedy. A different view was that the first sentence could be retained to flag that States might include in national legislation measures additional to the payment of compensation. A suggestion was made that any revised recommendation should address the nature, duration, and proportionality of such measures. Support was expressed both in favor of revising the first sentence and deleting it and addressing the issue in the commentary. Before reaching a final decision, the Secretariat was requested to prepare a revised text, taking into account the issues discussed, for further consideration.

C. Issues relating to Directors of Enterprise Group Members

The WG considered the issues relating to directors of enterprise group members. It was agreed that although the topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, it was nevertheless one that should be given particular consideration. The WG agreed that once it had completed its consideration of recommendations 1-10 and the related commentary, it should consider the issues that might be relevant in the context of enterprise groups. To facilitate those deliberations, the Secretariat was requested to provide further information, particularly as to different national approaches and solutions that might inform the discussion in the WG.

D. Cross-Border Issues

The WG agreed to defer its consideration of those issues to the next session.

Following the re-election of Wisit Wisitsroa-At as Chair, examination proceeded upon WP 112, which is included with these notes.

¶2 last sentence raised sensitivities. World Bank suggested modification: "States recognize... that laws relating to insolvency have been or may have to be amended". Seconded by Mexico, supported by El Salvador and (with amendment to repeat a work) Korea.

¶3 approved. No comment on subpart Part B

Part II. Purpose of the Guide approved.

At ¶33D, substitute language would recite: "cross-border....239-254 in the Legislative Guide" (to highlight cross-border corporate insolvency)...and concern members of the same corporate group." Many delegations would prefer a footnote instead.

Part V: during Article-by-Article remarks, U.S. expressed concern over last sentence of ¶51. U.S. wishes a substantial addition to ¶51. Sense of Working Group is to keep solvent entities from abusing cross-border procedures. INSOL recommends putting the example in a footnote. Canada suggests lunch-hour discussion of the point, as "fully solvent" is a problematic term. France criticizes the U.S. for bring the issue out of order, but concedes that "fully" is redundant when characterizing an entity as "solvent". Germany would make no distinction between "solvent" and "insolvent" entities in this Part. Matter is tabled, to allow for lunchtime discussion. Following lunch recess, France indicates it might support treating the issue between ¶¶23B and 24. U.S. asks that the matter be tabled (again) until tomorrow.

¶31 addition proposed by U.S. elicits concern by Chair; U.S. withdraws proposed addition.

¶73D. Mexico proposes court certification of representative status of a petitioner, for which Mexico will supply later the wording.

¶122: "fast" substituted by "expedited".

¶123 shortened, and "receiving" substituted for "enacting".

¶123C will be retained.

¶123G: add at end "as readily ascertainable by creditors."

Fn. 23 may be unnecessary.

[End of Day One]

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Insolvency Law

Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)

Note by the Secretariat

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics, both of which were of current importance, where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the first of those two topics, concerning a proposal by the United States of America, as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.[1] The second topic concerning the obligations of directors in the period approaching insolvency is addressed in A/CN.9/WG.V/WP.113.

4. Pursuant to a decision taken by the Working Group at its fortieth session that, as a working assumption, the Guide to Enactment of the Model Law should be revised and enriched (A/CN.9/738, para. 13), proposals to revise the Guide to Enactment are set forth in documents A/CN.9/WG.V/WP.95 and Add.1, A/CN.9/WG.V/WP.99, A/CN.9/WG.V/WP.103 and Add.1, A/CN.9/WG.V/WP.105 and A/CN.9/WG.V/WP.107, as well as the reports of the Working Group of its thirty-ninth, fortieth, forty-first and forty-second sessions (A/CN.9/715, 738, 742 and 763, respectively).

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

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

[1] See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

Enactment have been retained to indicate the reordering of the text and the additional paragraphs proposed. The numbering of the paragraphs in this note is therefore not necessarily sequential. Where a new paragraph has been added, it takes the number of the immediately preceding paragraph with the addition of an alpha character. All headings from the published text have been included to indicate content and facilitate comparison with the published text.

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

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

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

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

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

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

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

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

1. The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.

2. The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Thus, the States enacting the Model Law ("enacting States") would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. By enacting the Model Law, States acknowledge that certain insolvency laws may have to be modified in order to meet internationally recognized standards.

3. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate a certain level of harmonization. Those solutions include the following:

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

(b)-(f) [...];

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

3A. For jurisdictions that currently have to deal with numerous cases of cross-border insolvency, as well as jurisdictions that wish to be well prepared for the increasing likelihood of cases of cross-border insolvency, the Model Law is an essential reference for developing an effective cross-border cooperation framework.

B. Origin of the Model Law

13. [...]

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

19. [...]

C. Preparatory work and adoption

4. The project was initiated by the United Nations Commission on International Trade Law (UNCITRAL), in close cooperation with INSOL International. The project benefited from the expert advice of INSOL during all stages of the preparatory work. In addition, during the formulation of the Law, consultative assistance was provided by the former Committee J (Insolvency) of the Section on Business Law of the International Bar Association.

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

8. [...]

II. Purpose of the Guide to Enactment and Interpretation

9. UNCITRAL considered that the Model Law would be a more effective tool if it were accompanied by background and explanatory information. While such information would primarily be directed to executive branches of Governments and legislators preparing the necessary legislative revisions, it would also provide useful insight to those charged with interpretation and application of the Model Law, such as judges,[3] and other users of the text such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions should be adapted to address particular national circumstances.

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

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

[3] Where "judges" would include a judicial officer or other person appointed to exercise the powers of the court or other competent authority having jurisdiction under domestic insolvency laws [enacting the Model Law].

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

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

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

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

11. [...]

A. Flexibility of a model law

12. [...]

B. Fitting the Model Law into existing national law

20. [...]

(a), (d)-(f) [...];

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

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

21. The flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see paras. 91-92) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency matters. Thus it is advisable to limit deviations from the uniform text to a minimum. This will assist in making the national law as transparent as possible for foreign users (see also paras. 11 and 12 above). The advantage of uniformity and transparency is that it will make it easier for enacting States to demonstrate the basis of their national law on cross-border insolvency and obtain cooperation from other States in insolvency matters.

49. [...]

IV. Main features of the Model Law

49A. The text of the Model Law focuses on four key elements identified, through the studies and consultations conducted in the early 1990s prior to the negotiation of the Model Law, as being the areas upon which international agreement might be possible:

(a) Access to local courts for representatives of foreign insolvency proceedings and for creditors and authorization for representatives of local proceedings to seek assistance elsewhere;

(b) Recognition of certain orders issued by foreign courts;

(c) Relief to assist foreign proceedings;

(d) Cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings.

A. Access

49B. The provisions on access address both inbound and outbound aspects of cross-border insolvency. In terms of outbound aspects, article 5 authorises the person or body administering a reorganization or liquidation under the law of the enacting State (referred to as the insolvency representative)[6] to act in a foreign State (article 5) on behalf of local proceedings. In terms of inbound requests, a foreign representative applying in the enacting State has the following rights: of direct access to courts in the enacting State (article 9); to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (article 11); and to apply for recognition of the foreign proceedings in which they have been appointed (article 15). Upon recognition, a foreign representative is entitled to participate in insolvency-related proceedings conducted in the enacting State under the law of that State (article 12); to initiate in the enacting State an action to avoid or otherwise render ineffective acts detrimental to creditors (article 23); and to intervene in any local proceedings in which the debtor is a party (article 24).

49C. The fact that a foreign representative has the right to apply to the courts of the enacting State does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the enacting State for any purpose other than that application (article 10).

49D. Importantly, foreign creditors have the same right as local creditors to commence and participate in proceedings in the enacting State (article 13).

37. [...]

B. Recognition

37A. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Article 17 provides that, subject to article 6, when the specified requirements of article 2 concerning the nature of the foreign proceeding (i.e. that the foreign proceeding is, as a matter of course, a collective proceeding[7] for the purposes of liquidation or reorganization under the control or supervision of the court) and the foreign representative are met and the evidence required by article 15 has been provided, the court should recognize the foreign proceeding without further requirement. The process of application and recognition is aided by the presumptions provided in article 16 that enable the court in the enacting State to presume the authenticity and validity of the certificates and documents, originating in the foreign State, that are required by article 15.

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

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

37B. Article 6 allows recognition to be refused where it would be "manifestly contrary to the public policy" of the State in which recognition is sought. This may be a preliminary question to be considered on an application for recognition. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that the exception be interpreted restrictively and that article 6 be used only in exceptional and limited circumstances (see paras. 86-89). Differences in insolvency schemes do not themselves justify a finding that enforcing one State's laws would violate the public policy of another State.

37C. A foreign proceeding should be recognized as either a main proceeding or a non-main proceeding (article 17, paragraph 2). A main proceeding is one taking place where the debtor had its centre of main interests (COMI) at the date of commencement of the foreign proceeding (see paras. .... on timing). In principle, a main proceeding is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs. Centre of main interests is not defined in the Model Law, but is based on a presumption that it is the registered office or habitual residence of the debtor (article 16, paragraph 3).

37D. A non-main proceeding is one taking place where the debtor has an establishment. This is defined as "any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services" (article 2, subparagraph (f)). Proceedings commenced on a different basis, such as presence of assets, without a centre of main interests or establishment, would not qualify for recognition under the Model Law scheme. Main and non-main proceedings are discussed in more detail below in paras. [...].

37E. Acknowledging that it might subsequently be discovered that the grounds for granting recognition were lacking at the time of recognition, have changed or ceased to exist, the Model Law provides for modification or termination of the order for recognition (article 17, paragraph 4).

37F. Recognition of foreign proceedings under the Model Law has several effects. Principal amongst them is the relief accorded to assist the foreign proceeding (articles 20 and 21), but additionally, as noted above, the foreign representative is entitled to participate in any local insolvency proceeding regarding the debtor (article 13), has standing to initiate an action for avoidance of antecedent transactions (article 23) and may intervene in any proceeding in which the debtor is a party (article 24).

C. Relief

37G. A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. Accordingly, the Model Law specifies the relief that is available in both of those instances. As such, it neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the foreign proceeding the relief that would be available under the law of the enacting State.

However, it is possible, as noted above, to align the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding commenced under the law of the enacting State (article 20).

37H. Interim relief is available at the discretion of the court between the making of an application for recognition and the decision on that application (article 19); specified forms of relief are available on recognition of main proceedings (article 20); and relief at the discretion of the court is available for both main and non-main proceedings following recognition (article 21). In the case of main proceedings, that discretionary relief would be in addition to the relief available on recognition. Additional assistance might be available under other laws of the enacting State (see article 7).

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

33. [...]

33A. With respect to interim and discretionary relief, the court can impose conditions and modify or terminate the relief to protect the interests of creditors and other interested persons affected by the relief ordered (article 22).

D. Cooperation and coordination

Cooperation

33B. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between foreign representatives is also authorized. Cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition is made. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Moreover, cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets. Cooperation is discussed in detail in paragraphs 173-183.

33C. Recognizing that the idea of cooperation might be unfamiliar to many judges and insolvency representatives, article 27 sets out some of the possible means of cooperation. These are further discussed and amplified in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation,[8] which also compiles practice and experience with respect to the use and negotiation of cross-border insolvency agreements.

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

Coordination of concurrent proceedings

33D. Several provisions of the Model Law address coordination of concurrent proceedings and aim to foster decisions that would best achieve the objectives of both proceedings.

33E. The recognition of foreign main proceedings does not prevent commencement of local proceedings in the enacting State (article 28), nor does the commencement of local proceedings in that State terminate recognition already accorded to foreign proceedings or prevent recognition of foreign proceedings.

33F. Article 29 addresses adjustment of the relief available where there are concurrent proceedings. The basic principle is that relief granted to a recognized foreign proceeding should be consistent with the relief granted in local proceedings, irrespective of whether the foreign proceeding was recognized before or after the commencement of the local proceeding. For example, where local proceedings have already commenced at the time the application for recognition is made, relief granted to the foreign proceeding must be consistent with the local proceeding. If the foreign proceeding is recognized as a main proceeding, the automatic relief available on recognition under article 20 will not apply.

33G. Articles 31 and 32 contain additional means of facilitating coordination. Article 31 establishes a presumption to the effect that recognition of a foreign proceeding is proof that the debtor is insolvent where insolvency is required for commencement of a local proceeding. Article 32 establishes the hotchpot rule to avoid situations in which a creditor might make claims and be paid in multiple insolvency proceedings in different jurisdictions, thereby potentially obtaining more favourable treatment than other creditors.

V. Article-by-article remarks

Preamble

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

55. [...]

Use of the term "insolvency"

51. Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency".[9] However, as used in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The reason is that the Model Law covers proceedings concerning different types of debtors and, among those proceedings, deals with proceedings aimed at liquidating or reorganizing the debtor. A judicial or administrative proceeding to wind up a solvent entity where the goal is

[9] The UNCITRAL Legislative Guide on Insolvency Law explains insolvency as being "when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets" and insolvency proceedings as being "collective proceedings, subject to court supervision, either for reorganization or liquidation".

to dissolve the entity and other foreign proceedings not falling within article 2, subparagraph (a) are not insolvency proceedings within the scope of the Model Law.

51A. Debtors covered by the Model Law would generally fall within the scope of the UNCITRAL Legislative Guide on Insolvency Law and would therefore be eligible for commencement of insolvency proceedings in accordance with recommendations 15 and 16 of the Legislative Guide,[10] being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets.

52-53. [...]

"State"

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

Chapter I. General provisions

Article 1. Scope of application

Paragraph 1

57. [...]

58. [*Incorporated into paragraph 56*]

59. "Assistance" in paragraph 1, subparagraphs (a) and (b), is intended to cover various situations dealt with in the Model Law, in which a court or an insolvency representative in one State may make a request to a court or an insolvency representative in another State for assistance within the scope of the Model Law. The Law specifies some of those measures (e.g. article 19, subparagraphs 1 (a) and (b); article 21, subparagraphs 1 (a)-(f) and paragraph 2; and article 27, subparagraphs (a)-(e)), while other possible measures are covered by a broader formulation (such as the one in article 21, subparagraph 1 (g)).

Paragraph 2 (Specially regulated insolvency proceedings)

60-64. [...]

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

Non-traders or natural persons

66. [...]

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[10] Recommendations 15 and 16 provide:

15. The insolvency law should specify that insolvency proceedings can be commenced on the application of a debtor if the debtor can show either that:

(a) It is or will be generally unable to pay its debts as they mature; or

(b) Its liabilities exceed the value of its assets.

16. The insolvency law should specify that insolvency proceedings can be commenced on the application of a creditor if it can be shown that either:

(a) The debtor is generally unable to pay its debts as they mature; or

(b) The debtor's liabilities exceed the value of its assets.

Article 2. Definitions

Subparagraphs (a)-(d)

67. [...]

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

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

Subparagraph (a) — Foreign proceeding

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

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

23. The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding (article 2, subparagraph (a)). Whether a foreign proceeding possesses those elements would be determined at the time the application for recognition is considered.

23A. As noted in subparagraph (e) of the preamble, the focus of the Model Law is upon severely financially distressed and insolvent debtors and the laws that prevent or address the financial distress of those debtors. As noted above (para. 51A), these are debtors that would generally fall within the commencement criteria discussed in the Legislative Guide, being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets (recommendations 15 and 16).

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

(i) Collective proceeding

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

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

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

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

24. Within the parameters of the definition of a foreign proceeding, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. The definition would also include those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, "debtor in possession").

24A. The Model Law recognizes that, for certain purposes, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent. Paragraph 194 below notes that those circumstances might include cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment. Paragraph 195 below notes that for use in jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of foreign main proceedings, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding.

(ii) Pursuant to a law relating to insolvency

24B. This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained[12] and irrespective of

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

whether the law that contained the rules related exclusively to insolvency. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress.

(iii) Control or supervision by a foreign court

24C. The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 24, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.

24D. Expedited proceedings of the type referred to in the Legislative Guide (see part two, chap IV, paras. 76-94 and recommendations 160-168) should not be excluded. These are proceedings in which the court exercises control or supervision at a late stage of the insolvency process. Proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so should also not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open or pending and the court retains jurisdiction until implementation is completed.

24E. Subparagraph (a) of article 2 makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding.

(iv) For the purpose of reorganization or liquidation

24F. Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding in article 2, subparagraph (a) may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets.

24G. Types of procedures that might not be eligible for recognition could include financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt where the negotiations do not lead to the commencement of an insolvency proceeding,

conducted under the insolvency law.[13] Such measures would generally not satisfy the requirement for collectivity nor for control or supervision by the court (see paras. 24C-E). Because they could take a potentially large number of forms, those measures would be difficult to address in a general rule on recognition.[14] Other procedures that do not require supervision or control by the court might also be ineligible.

Interim proceeding

69. [...]

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

Subparagraph (b) — foreign main proceeding

31. A foreign proceeding is deemed to be the "main" proceeding if it has been commenced in the State where "the debtor has the centre of its main interests". This corresponds to the formulation in article 3 of the EC Regulation (based upon the formulation previously adopted in the European Union Convention on Insolvency Proceedings (the European Convention)), thus building on the emerging harmonization as regards the notion of a "main" proceeding. The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21 and coordination of the foreign proceeding with proceedings that may be commenced in the enacting State under chapter IV and with other concurrent proceedings under chapter V.

31A. The Model Law does not define the concept "centre of main interests". However, an explanatory report (the Virgos-Schmit Report),[15] prepared with respect to the European Convention, provided guidance on the concept of "main insolvency proceedings" and notwithstanding the subsequent demise of the Convention, the Report has been accepted generally as an aid to interpretation of the term "centre of main interests" in the EC Regulation. Since the formulation "centre of main interests" in the EC Regulation corresponds to that of the Model Law, albeit for different purposes (see para. 123A), jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law.

31B. Recitals (12) and (13) of the EC Regulation state:

> "(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings[16] to be opened to run in parallel with the main

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

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

[15] M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996. The report was published in July 1996 and is available from http://aei.pitt.edu/952.

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

proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

"(13) The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

31C. The Virgos-Schmit Report explained the concept of "main insolvency proceedings" as follows:

"**73. Main insolvency proceedings**

"Article 3 (1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at encompassing all the debtor's assets on a world-wide basis and at affecting all creditors, wherever located.

"Only one set of main proceedings may be opened in the territory covered by the Convention.

"...

"75. The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

"The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

"By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

"In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

"Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office."

Centre of main interests is discussed further in the remarks on article 16.

Subparagraph (c) — foreign non-main proceeding

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

Subparagraph (d) — foreign representative

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

Subparagraph (e)

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

Subparagraph (f)

75. The definition of the term "establishment" was inspired by article 2, subparagraph (h), of the EC Regulation. The term is used in the Model Law in the definition of "foreign non-main proceeding" (article 2, subparagraph (e)) and in the context of article 17, paragraph 2, according to which, for a foreign non-main proceeding to be recognized, the debtor must have an establishment in the foreign State (see also para. 73 above).

75A. The Virgos-Schmit Report on that Convention provides some further explanation of "establishment":

> "Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.
>
> "The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an 'establishment'. A certain stability is required. The negative formula ('non-transitory') aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor."[17]

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

75B. Since "establishment" is a defined term, the inquiry to be made by the court as to whether the debtor has an establishment is purely factual in nature. Unlike "foreign main proceeding" there is no presumption with respect to the determination of establishment. There is a legal issue as to whether the term "non-transitory" refers to the duration of a relevant economic activity or to the specific location at which the activity is carried on. The commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts or of property would not in principle satisfy the definition of establishment.

Article 3. International obligations of this State

76-77. [...]

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

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

79-83. [...]

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

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

85. [...]

Article 6. Public policy exception

86-89. [...]

Article 7. Additional assistance under other laws

90. [...]

Article 8. Interpretation

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

92. [...]

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

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

Article 9. Right of direct access

93. The following introductory sentence has been added: "An important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State."

Article 10. Limited jurisdiction

94-95. [...]

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

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

97. [...]

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

99. [...]

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

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

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

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

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

103-105. [...]

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

106-111. [...]

Chapter III. Recognition of a foreign proceeding and relief

Article 15. Application for recognition of a foreign proceeding

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

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

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

113-118. [...]

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

Notice

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

121. [...]

Article 16. Presumptions concerning recognition

Paragraph 1

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

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

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

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

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

Paragraph 2

123. [...]

Paragraph 3

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

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

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

Centre of main interests

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

Factors relevant to the determination of centre of main interests

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

123G. When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests.

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

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

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

Movement of centre of main interests

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

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

Article 17. Decision to recognize a foreign proceeding

Paragraph 1

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

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

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

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

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

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

Paragraph 2

126-128. [...]

Date at which to determine centre of main interests and establishment

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

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

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

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

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

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

Abuse of process

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

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

Paragraph 3

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

Paragraph 4

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

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

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

Notice of decision to recognize foreign proceedings

132. [...]

Article 18. Subsequent information

Subparagraph (a)

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

Subparagraph (b)

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

Paragraphs 1-4

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

Article 20. Effects of recognition of a foreign main proceeding

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

142. [...]

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

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

147-148. [...]

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

150. [...]

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

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

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

155. [...]

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

157. [...]

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

159. [...]

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

Article 22. Protection of creditors and other interested persons

161. [...]

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

Article 23. Actions to avoid acts detrimental to creditors

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

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

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

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

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

168-169. [...]

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

171-172. [...]

Chapter IV. Cooperation with foreign courts and foreign representatives

38-39. [...]

173. [...]

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

174-178. [...]

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

179-180. [...]

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

182. [...]

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

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

Chapter V. Concurrent proceedings

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

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

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

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

187. [...]

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

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

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

189-191. [...]

[24] See footnote 8.

Article 30. Coordination of more than one foreign proceeding

192-193. [...]

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

194-196. [...]

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

Article 32. Rule of payment in concurrent proceedings

198-200. [...]

VI. Assistance from the UNCITRAL Secretariat

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

APPENDIX III

FEDERACIÓN INTERAMERICANA DE ABOGADOS
INTER AMERICAN BAR ASSOCIATION
FEDERAÇAO INTERAMERICANA DE ADVOGADOS
FEDERATION INTERAMERICAINE DES AVOCATS

The Inter-American Bar Association offers the following suggestions to the UNCITRAL Working Group V, relative to A/CN.9/WG.V/WP.113 pp. 11-12 **(Directors' obligations in the period approaching insolvency):**

20(g): Add at end, after "those interests": "for which notice of intended remedial transactions and actions may be considered, to show transparency and obtain the support of such interests."

Add new 20(k): "Directors could show transparency and build creditor support by ensuring notice of intended remedial actions and transactions, in such public registries as enacting States may establish."

Appendix IV

Supplemental notes on discussions concerning directors' liability

The document considered by the Working Group, WP 113 (included with these notes), concerns director's liability in the period approaching insolvency.

The first discussion related to paragraph 1 (Introduction) as World Bank representatives suggested to modify the last part of it, supported by Germany and Spain representatives. World Bank was going to present a new text.

The second discussion related to the nature of director's liability. Specifically on Section 2 – Civil Liability – Paragraph 19 (31), Italy proposed to modify the first part, and presented a four-page work (identified as A/CN.9/WG.V/XLIII/CRP.3) that did not receive enough support to be adopted as a recommendation.

IABA Observers then presented two suggestions on paragraph 20: - adding a phrase on g) to encourage transparency on resolutions taken in this period and a new 20 (k) as follows: "Directors could show transparency and build creditor support by ensuring notice of intended remedial actions and transactions, in such public registries as enacting States may establish". IABA Observers mentioned that disclosure of director's actions in this period could (i) build creditor support for the directors' remedial measures; and (ii) diminish or negate the directors' exposure to future allegations of fraud. However, not surprisingly, the representatives of several countries (Korea, Germany, Spain and Mexico for example) expressed concern over a need for business secrecy, particularly in public companies. Consequently this IABA proposal was not discussed further, because it lacked support from Member delegations.

Next, in Paragraph 32 (36) the last clause was removed as it was considered a guessing situation.

Parts of Paragraph 34 (37) relative to director's bad administration examples, were removed: when directors do not give enough information; and when they do not take care of finances properly.

Recommendations 5 & 6, regarding liabilities were discussed extensively. Paragraph 5 (4) and 6 (4) were viewed as independent issues by some representatives, and others representatives considered them the same and wanted to redraft them. IABA Observers suggested combining the two phrases through a transitional "but". That idea was supported by Spain but, most of the representatives preferred not to combine the clauses, and underscore the separate character of the issues addressed

The last clause of paragraph 43 (42) was excised, as suggested by World Bank representatives.

The Working Group detected that paragraphs 51 (49A9) and 52 (49B9) said different thing in Spanish and English versions. The Secretariat will correct this translation mistake.

A new clause 58 was approved and will appear in the report of this Working Group Session.

Extensive discussion was had regarding the director's ability to offset (compensate) claims in the company's liquidation process. The World Bank and Mexico representatives urged that such offset not be allowed. This appears to be the majority view among the delegations, as the best solution.

The IABA Observers, having discussed and compared the insolvency systems of their own countries and others, are honored to have the opportunity to contribute their comments to the Working Group.

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Insolvency Law

Directors' obligations in the period approaching insolvency

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 contained in document A/CN.9/691, paragraph 104, that activity be initiated on two insolvency topics, both of which were of current importance, and 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 second topic, proposed by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.V/WP.93/Add.4), INSOL International (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6), concerning the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases.[1] In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on that topic should only be upon those responsibilities and liabilities that arose in the context of insolvency, and that it was not intended to cover areas of criminal liability or to deal with core areas of company law.

4. Discussion of this topic commenced at the Working Group's thirty-ninth session (December 2010, Vienna) and continued at its fortieth, forty-first and forty-second sessions (31 October-4 November 2011, Vienna; 30 April-4 May 2012, New York and 26-30 November 2012, Vienna). The deliberations and conclusions of the Working Group are set forth in the reports of those sessions (A/CN.9/715, A/CN.9/738, A/CN.9/742 and A/CN.9/763, respectively).

5. The material set forth below builds upon documents A/CN.9/WG.V/WP.96, 100, 104 and 108, as well as decisions taken by the Working Group at its thirty-ninth, fortieth, forty-first and forty-second sessions. For ease of reference, this note retains in square brackets the paragraph and recommendation numbers used in previous drafts of the text (i.e. A/CN.9/WG.V/WP.104 and 108).

6. In accordance with the working assumption adopted by the Working Group at its forty-first session (A/CN.9/742, para. 74) that the work will form part of the Legislative Guide on Insolvency Law, the text below follows the format of the Legislative Guide. The Working Group may wish to consider whether it should be a new part of the Guide or whether it may be included as an additional section of an existing part, for example, part two, chapter III Participants. In accordance with a request made at the forty-second session, the order of the commentary now reflects the order of the recommendations and the recommendations no longer appear

[1] The first topic, concerning centre of main interests and related issues is discussed in A/CN.9/WG.V/WP.112.

together at the end of the text but follow the related parts of the commentary. Each set of recommendations is introduced by a purpose clause, consistent with the parts one-three of the Guide.

7. The Working Group may also wish to consider whether any specific terms should be included in a glossary for this [part].

8. The Working Group may wish to note that the following paragraphs contain new text in square brackets for consideration: introduction and purpose, paragraphs 1 and 2; Background, paragraph 2; section II, paragraphs 20 (d), (f), (j), 21, 21A, 22, 25, 33, 35, 36, 47, 48, 51, 55 and 57. Purpose clauses for draft recommendations 3-12 are for consideration, as well as some words in draft recommendations 1, 3, 6, 8 and draft recommendation 12 and its associated footnote.

UNCITRAL Legislative Guide on Insolvency Law

Directors' obligations in the period approaching insolvency

Introduction and purpose of this [part]

[1. This [part] focuses on the obligations that might be imposed upon those responsible for making decisions with respect to management of an enterprise when that enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which would become enforceable once insolvency proceedings commence, is to protect the legitimate interests of creditors and other stakeholders and encourage timely action to minimize the effects of financial distress experienced by the enterprise. The constitution of a board of directors is an important factor in addressing these issues. Generally, it is comprised of individuals who have an ownership interest in the enterprise and individuals who work for the company, such as managing its business operations, or are connected to its shareholders ("inside directors"), along with individuals who are independent and are often chosen as a result of their experience and business acumen ("independent directors"). Independent directors may not have access to information to the same extent that it is known or available to inside directors or to creditors or third parties. Liability may vary between inside and independent directors depending on the factual situation.]

[2. The key elements of provisions imposing such obligations are addressed, including (a) the nature and extent of the obligations, (b) the time at which the obligations should arise, (c) the persons to whom the obligations would attach, (d) liability for breach of the obligations, (e) enforcement of those obligations, (f) applicable defences, (g) remedies, (h) the persons who may bring an action to enforce the obligations and (i) how those actions might be funded.]

I. Background

1. [6] Corporate governance frameworks regulate a set of relationships between a company's management, its board, its shareholders and other stakeholders and provide not only the structure through which the objectives of the company are established and attained, but also the standards against which performance can be monitored. Good corporate governance should provide incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders, as well as fostering the confidence necessary for promoting business investment and development. Much has been done at the international level to develop widely adopted principles of corporate governance[2] that include the obligations of those persons responsible for making decisions concerning the management of an enterprise (in this [part] referred to as "directors")[3] when it is solvent.

[2] See for example the OECD Principles of Corporate Governance, 2004.

[3] The question of who may be considered a director for the purposes of this [part] is discussed below in paras. ... . Although there is no universally accepted definition of the term, this part refers generally to "directors" for ease of reference.

2. [7] Once insolvency proceedings commence, many insolvency laws recognize that the obligations of directors will differ both in substance and focus from those applicable prior to the commencement of those proceedings, with the emphasis on prioritizing maximization of value and preservation of the estate for distribution to creditors. Often directors will be displaced from ongoing involvement in the company's affairs by an insolvency representative, although under some insolvency laws they may still have an ongoing role, particularly in reorganization. [Recommendation 112 addresses several possibilities for the role the debtor may play in the continuing operation of the business, including retention of full control, limited displacement and total displacement.] The obligations of the directors once insolvency proceedings commence are addressed above in recommendations 108-114 and in the commentary, part two, chapter III, paragraphs 22-34. Recommendation 110 specifies in some detail the obligations that should arise under the insolvency law on commencement of insolvency proceedings and continue throughout those proceedings, including obligations to cooperate with and assist the insolvency representative to perform its duties; to provide accurate, reliable and complete information relating to the financial position of the company and its business affairs; and to cooperate with and assist the insolvency representative in taking effective control of the estate and facilitating recovery of assets and business records. The imposition of sanctions where the debtor fails to comply with those obligations is also addressed (recommendation 114 and paragraphs 32-34 of the commentary).

3. [8] Effective insolvency laws, in addition to providing a predictable legal process for addressing the financial difficulties of troubled enterprises and the necessary framework for their efficient reorganization or orderly liquidation, should also permit an examination to be made of the circumstances giving rise to insolvency and in particular the conduct of directors of such an enterprise in the period before insolvency proceedings commence. However, little has been done internationally to harmonize the various approaches of national law that might facilitate examination of that conduct and significant divergences remain. The nature and extent of the obligations directors might have in that period when the business might be experiencing financial distress but is not yet insolvent or subject to insolvency proceedings are not well established, but they are increasingly the subject of extensive debate, particularly in view of widespread failures following the global financial crisis of 2008.

4. [9] A business facing an actual or imminent inability to meet its financial and contractual obligations as they fall due needs robust management, as often there are difficult decisions and judgements to be made that will be critical to the company's survival, with corresponding benefits to its owners, creditors, customers, employees and others. Competent directors should understand the company's financial situation and possess all reasonably available information necessary to enable them to take appropriate steps to address financial distress and avoid further decline. At such times, they are faced with choosing the course of action that best serves the interests of the enterprise as a whole, having weighed the interests of the relevant stakeholders in the circumstances of the specific case. Under some laws, those stakeholders will be the corporation itself and its shareholders. Under other laws, it may involve a broader community of interests that includes creditors. Directors concerned with personal liability and the possible financial repercussions of making difficult decisions in those circumstances may prematurely close down a

business rather than seek to trade out of the problems, they may engage in inappropriate behaviour, including unfairly disposing of assets or property or they may also be tempted to resign, often adding to the difficulties that the company is facing.

5. [9A] The different interests and motivations of stakeholders are not easy for directors and managers to balance and provide a potential source of conflict. For example, shareholders of an enterprise, who typically are unlikely to share in any distribution in insolvency proceedings, are interested in maximizing their own position by seeking to trade out of insolvency or to hold out on any potential sale in the hope of a better return, especially where the sale price would cover only creditor claims and leave nothing for shareholders. Such courses of action may involve adopting high-risk strategies to save or increase value for shareholders, at the same time putting creditors' interests at risk. Those actions may also reflect limited concern for the chances of success because of the protection of limited liability or director liability insurance if the course of action adopted fails.

6. [10] Despite the potential difficulties associated with taking appropriate business decisions, when a company faces financial difficulties it is essential that early action be taken. Financial decline typically occurs more rapidly than many parties would believe and as the financial position of an enterprise worsens, the options available for achieving a viable solution also rapidly diminish. That early action must be facilitated by ease of access to relevant procedures; there is little to be gained by urging directors to take early action if that action cannot be directed towards relevant and effective procedures.[4] Moreover, those laws that expose directors to liability for trading during the conduct of informal procedures such as restructuring negotiations (discussed in part one, chap. II, paras. 2-18) may operate to deter early action. While there has been an appropriate refocusing of insolvency laws in many countries to increase the options for early action to facilitate rescue and reorganization of enterprises, there has been little focus on creating appropriate incentives for directors to use those options. Often, it is left to creditors to pursue those options or commence formal insolvency proceedings because the directors have failed to act in a timely manner.

7. [11] A number of jurisdictions address the issue of encouraging early action by imposing an obligation on a debtor to apply for commencement of formal insolvency proceedings within a specified period of time after insolvency occurs in order to avoid trading whilst insolvent. Other laws address the issue by focusing on the obligations of directors in the period before the commencement of insolvency proceedings and imposing liability for the harm caused by continuing to trade when it was clear or should have been foreseen that insolvency could not be avoided. The rationale of such provisions is to create appropriate incentives for early action through the use of restructuring negotiations or reorganization and to stop directors from externalizing the costs of the company's financial difficulties and placing all the risks of further trading on creditors.

[4] It has been suggested that the dearth of cases under insolvent trading legislation in one State is because of the relative ease of access to voluntary procedures and only those companies that are hopelessly insolvent are ultimately liquidated.

8. [12] The imposition of such obligations has been the subject of continuing debate. Those who acknowledge that such an approach has advantages[5] point out that the obligations may operate to encourage directors to act prudently and take early steps to stop the company's decline with a view to protecting existing creditors from even greater losses and incoming creditors from becoming entangled in the company's financial difficulties. Put another way, the obligations may also have the effect of controlling and disciplining directors, dissuading them from embracing excessively risky courses of action or passively acquiescing to excessively risky actions proposed by other directors because of the sanctions attached to the failure to perform the obligations. An associated advantage may be that they provide an incentive to directors to obtain competent professional advice when financial difficulties loom.

9. [13] Those commentators who suggest that there are significant disadvantages cite the following examples. A rule that presumes mismanagement based solely on the fact of financial distress often causes otherwise knowledgeable and competent directors to leave a company, and the opportunity to reorganize that company and return it to profitability is missed. There is a possibility that directors seeking to avoid liability will prematurely close a viable business that otherwise could have survived, instead of attempting to trade out of the company's difficulties. Properly drafted provisions would discourage overly hasty closure of businesses and encourage directors to continue trading where that is the most appropriate way of minimizing loss to creditors and are more likely to balance the rights and legitimate expectations of all stakeholders, distinguishing cases of bad conduct from those involving market conditions or other exogenous factors. A further disadvantage cited is that the obligations may be regarded as an erosion of the legal status brought by incorporation, although it can be argued that limited liability should be seen as a privilege and courts have been alive to the potential for abuse of limited liability where it is to the detriment of creditors. Such obligations might also be regarded as a weakening of enterprise incentives on the basis that too much risk may discourage directors. Properly drafted provisions, however, would focus not so much on the causes of distress, but rather on the directors' acts (or omissions) subsequent to that point. Examples from jurisdictions that include such obligations in their laws suggest that only the most clearly irresponsible directors are found liable.

10. [14] It is also said that such obligations may increase unpredictability, because liability depends on the particular circumstances of each case and also on the future attitudes of the courts. It is suggested that many courts lack the experience to examine commercial behaviour after the event and may be inclined to second guess the decisions that directors took in the period in question. However, in jurisdictions with experience of enforcing such obligations, courts have tended to defer to directors' actions, especially when those directors have acted on independent advice. A further suggestion is that there is an increased risk of unexpected liabilities for banks and others who might be deemed to be directors by reason of their involvement with the company, particularly at the time of the insolvency. It is desirable that relevant legislation provide due protection for such parties when they are acting in good faith, at arm's length to the debtor and in a commercially reasonable manner.[6] It is also argued that imposing such obligations

[5] E.g. Directors in the Twilight Zone III (2009), INSOL International, Overview, p. 5.

[6] See para. 27 [21].

overcompensates creditors who are able to protect themselves through their contracts, making regulation superfluous. However, this approach presupposes that, for example, all creditors have a contract with the debtor, that they are able to negotiate appropriate protections to cover a wide range of contingencies and that they have the resources, and are willing and able, to monitor the affairs of the company. Not all creditors are in this position.

11. [15] Director obligations and liabilities are specified in different laws in different States, including company law, civil law, criminal law and insolvency law and in some instances, they may be included in more than one of those laws or be split between those laws. In common law systems, the obligations may apply by virtue of common law, as well as pursuant to relevant legislation. Moreover, different views exist as to whether the obligations and liabilities of directors are properly the subject of insolvency law or company law. These views revolve around the status of the company as either solvent, which is typically covered by laws such as company law, or subject to insolvency proceedings, which is addressed by insolvency law (although there are examples where no such clear distinction can be drawn).[7] A period before the commencement of insolvency proceedings, when a debtor may be factually insolvent, raises concerns that currently may not be adequately addressed by either company law or insolvency law. However, the imposition of obligations enforceable retroactively after commencement of insolvency proceedings may lead to an overlap between the obligations applicable under different laws and it is desirable that, in order to ensure transparency and clarity and avoid potential conflicts, they be reconciled.

12. [16] Not only do the laws in which the obligations are to be found vary, but the obligations themselves vary: as noted above, those applicable before the commencement of insolvency proceedings typically differ from those applicable once those proceedings commence (see part two, chapter III, paras. 22-33). The standards to be observed by directors in performing their functions also tend to vary according to the nature and type of the business entity e.g. a public company as distinct from a limited, closely held or private company or family business, and the jurisdiction(s) in which the entity operates and may also depend upon whether the director is an independent outsider or an inside director.

13. [17] The application of laws addressing director obligations and liabilities are closely related to and interact with other legal rules and statutory provisions on corporate governance. In some jurisdictions, they form a key part of policy frameworks, such as those protecting depositors in financial institutions, facilitating revenue collection, addressing priorities for certain categories of creditors over others (such as employees), as well as relevant legal, business and cultural frameworks in the local context.

14. [18] Effective regulation in this area should seek to balance the often competing goals and interests of different stakeholders: preserving the freedom of directors to discharge their obligations and exercise their judgement appropriately, encouraging responsible behaviour, discouraging wrongful conduct and excessive risk-taking, promoting entrepreneurial activity, and encouraging, at an early stage, the refinancing or reorganization of enterprises facing financial distress or

[7] Recognizing this issue, the recommendations in this [part] adopt the flexible approach of referring to "the law relating to insolvency".

insolvency. Such regulation could enhance both creditors' confidence and their willingness to do business with companies, encourage the participation of more experienced managers, who otherwise may be reluctant due to the risks related to failure, promote good corporate governance, leading to a more predictable legal position for directors and limiting the risks that insolvency practitioners will litigate against them once insolvency proceedings commence. Inefficient, unclear, antiquated and inconsistent guidelines on the obligations of those responsible for making decisions with respect to management of an enterprise as it approaches insolvency have the potential to undermine the benefits that an effective and efficient insolvency law is intended to produce and exacerbate the financial difficulty they are intended to address.

15. [19] The purpose of this [part] is to identify basic principles to be reflected in the law concerning directors' obligations when the company faces imminent insolvency or insolvency becomes unavoidable. Those principles may serve as a reference point and can be used by policymakers as they examine and develop appropriate legal and regulatory frameworks. Whilst recognizing the desirability of achieving the goals of the insolvency law (outlined above in part one, chap. I, paras. 1-14 and recommendation 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls to entrepreneurship that may result from overly draconian rules. This [part] does not deal with the obligations of directors that may apply under criminal law, company law or tort law, focussing only on those obligations that may be included in the relevant law and become enforceable once insolvency proceedings commence.

II. Elements of directors' obligations in the period approaching insolvency

A. The nature of the obligations

16. [28] While the underlying rationale for considering directors' obligations in the vicinity of insolvency may be similar in different jurisdictions, different approaches are taken to formulating those obligations and determining the standard to be met. In general, however, laws tend to focus upon two aspects — first, imposing civil liability on directors for causing insolvency or failing to take appropriate action in the vicinity of insolvency (which under some laws might include commencing insolvency proceedings pursuant to an obligation under national law to do so — see para. 17 [29]) and second, once insolvency proceedings have commenced, avoiding actions taken by directors, including transactions that may have been entered into, in the vicinity of insolvency.

1. Obligation to commence insolvency proceedings

17. [29] As noted above, some national laws impose on directors an obligation to apply for commencement of insolvency proceedings, which would include reorganization or liquidation, within a specified period of time, usually fairly short such as three weeks, after the date on which the company became factually insolvent. Failure to do so may lead to personal liability, in full or in part, for any resulting losses incurred by the company and its creditors, and in some cases

criminal liability, if the company continues to trade. This obligation is discussed in more detail in part two, chapter I, paragraphs 35-36.

2. Civil liability

18. [30] Civil liability imposed on a director in the vicinity of insolvency is typically based on responsibility for causing insolvency or failing to take appropriate action to monitor the financial situation of the company, avoid or ameliorate financial difficulty, minimize potential losses to creditors and avoid insolvency. Liability may arise when directors enter into transactions with a purpose other than ameliorating financial difficulty and preserving the value of the company (such as high-risk transactions or transactions that dispose of assets from the company's estate that may result in a material increase in the creditors' exposure without justification). It may also arise when the directors knew that insolvency could not be avoided or that the company could not meet its obligations as they fell due, but nonetheless continued to carry on business that involved, for example, obtaining goods and services on credit, without any prospect of payment and without disclosing the company's financial situation to those creditors. Under some laws, liability may arise when directors fail to meet various obligations, for example reporting inability to make certain payments, such as tax and social security premiums, or making a formal declaration of insolvency.

19. [31] Except under those laws that require directors to report or make formal declarations, directors generally might be expected in the circumstances outlined above to act reasonably and take adequate and appropriate steps to monitor the situation so as to remain informed and thus be able to act to minimize losses to creditors and to the company (including to its shareholders), to avoid actions that would aggravate the situation, and to take appropriate action to avoid the company sliding into insolvency.

20. [32] Adequate and appropriate steps might include, depending on the factual situation, some or all of the following:

(a) Directors could ensure proper accounts are being maintained and that they are up to date. If not, they should ensure the situation is remedied;

(b) Directors could ensure that they obtain accurate, relevant and timely information, in particular by informing themselves independently (and not relying solely on management advice) of the financial situation of the company, the extent of creditor pressure and any court or recovery actions taken by creditors or disputes with creditors. Directors may need to devote more time and attention to the company's affairs at such a time than is required when the company is healthy;

(c) Regular board meetings could be convened to monitor the situation, with comprehensive minutes being kept of commercial decisions (including dissent) and the reasons for them, including, when relevant, the reasons for permitting the company to continue trading and why it is considered there is a reasonable prospect of avoiding insolvent liquidation. The steps to be taken might involve continuing to trade, as there may be circumstances in which it will be appropriate to do so even after the conclusion has been formed that liquidation cannot be avoided because, for example, the company owns assets that will achieve a much higher value if sold on a going concern basis. When the continuation of trading requires further or new borrowing (when permitted under the law), the justification for obtaining it and thus

incurring further liabilities should be recorded to ensure there is a paper trail justifying directors' actions if later required;

(d) Specialist advice or assistance, including specialist insolvency advice could be sought. While legal advice may be important for directors at this time, key questions relating to the financial position of the company are typically commercial rather than legal in nature. It is desirable that directors examine the company's financial position and assess the likely outcomes themselves, but also seek advice to ensure that any decisions taken could withstand objective and independent scrutiny. [In this instance, the directors, either collectively, as inside directors or as independent directors, may retain independent accountants, restructuring experts, or counsel to provide separate advice as to the options available to the board to determine the viability of any proposals made by management];

(e) Early discussions with auditors could be held and, if necessary, an external audit prepared;

(f) Directors could consider the structure and functions of the business with a view to examining viability and reducing expenditure. The possibility of holding restructuring negotiations or commencing reorganization could be examined and a report prepared. [Directors may also consider the capacity of current management, with a view to determining whether it should be retained or replaced];

(g) Directors could ensure that they modify management practices to focus on a range of interested parties, which might include creditors, employees, suppliers, customers, governments, shareholders, as well as, in some circumstances, environmental concerns, in order to determine the appropriate action to take. In the period when insolvency becomes imminent or unavoidable, shifting the focus from maximizing value for shareholders to also taking account of the interests of creditors provides an incentive for directors to minimize the harm to creditors (who will be the key stakeholders once insolvency proceedings commence), that might be the result of excessively risky, reckless or grossly negligent conduct. Holding meetings with relevant groups of creditors might be an appropriate mechanism for assessing those interests;

(h) Directors could ensure that the assets of the company are protected[8] and that the company does not take actions that would result in the loss of key employees or enter into transactions of the kind referred to in recommendation 87 that might later be avoided, such as transferring assets out of the company at an undervalue. Not all payments or transactions entered into at this time are necessarily suspect; payments to ensure the continuance of key supplies or services, for example, may not constitute a preference if the objective of the payment was the survival of the business. It is desirable that the reasons for making the payment be clearly recorded in case the transaction should later be questioned. Directors with substantial stockholdings or who represent major shareholders may not be considered disinterested or objective and might need to take especial care when voting on transactions in the vicinity of insolvency;

[8] Not all assets will necessarily require protection in all circumstances. One example of the types of asset that might not require protection in all circumstances might be those that are worth less than the amount for which they are secured, are burdensome, of no value or hard to realize (this is discussed in more detail in part two, chap. II, para. 88).

(i) A shareholders' meeting could be called, in the best interests of the company and without undue delay, if it appears from the balance sheet that a stipulated proportion of the share capital has eroded (generally applicable where the law includes capital maintenance requirements);

[(j) The composition of the board could be reviewed to determine whether an adequate number of independent directors are included.]

3. Avoidance of transactions

21. [33] Recommendations 87 through 99 deal with the avoidance of transactions at an undervalue, transactions conferring a preference and transactions intended to defeat, delay or hinder creditors (see part two, chapter II, paras. 170-185). Those recommendations would apply to the avoidance of transactions entered into by a company in the vicinity of insolvency. [The avoidability of a transaction does not, on its own, serve as the basis for imposing personal liability on directors.]

21A. [33] [However, certain avoidable transactions may also have other consequences.] Some laws render certain actions of directors unlawful under, for example, wrongful or fraudulent trading provisions, or as acts having worsened the economic situation of the company or having led to insolvency, such as entering into new borrowing or providing new guarantees without sufficient business justification. In addition to avoidance of such transactions, under some laws a director may be found personally liable for permitting the company to enter into such [fraudulent or otherwise improper] transactions. Liability under those provisions would typically apply only in relation to directors who agreed to the transaction; those who expressly dissented and whose dissent was duly noted are likely to avoid responsibility.

Recommendations 1 and 2

Purpose of legislative provisions

The purpose of provisions addressing the obligations of those responsible for making decisions concerning the management of a company that arise when insolvency is imminent or unavoidable is:

(a) To protect the legitimate interests of creditors and other stakeholders;

(b) To ensure that those responsible for making decisions concerning the management of a company are informed of their roles and responsibilities in those circumstances;

(c) To provide appropriate remedies for breach of those obligations, which may be enforced after insolvency proceedings have commenced.

Paragraphs (a)-(c) should be implemented in a way that does not:

(a) Adversely affect successful business reorganization;

(b) Discourage participation in the management of companies, particularly those experiencing financial difficulties;

(c) Prevent the exercise of reasonable business judgement or the taking of reasonable commercial risk.

Contents of legislative provisions

The obligations

1. The law relating to insolvency should specify that from the point in time referred to in recommendation 3, the persons specified in [accordance with] recommendation 4 will have the obligations to have due regard to the interests of creditors and other stakeholders and to take reasonable steps:

(a) To avoid insolvency; and

(b) Where it is unavoidable, to minimize the extent of insolvency.

2. [1] For the purposes of recommendation 1, reasonable steps might include:

(a) Evaluating the current financial situation of the company and ensuring proper accounts are being maintained and that they are up-to-date; being independently informed as to the current and ongoing financial situation of the company; holding regular board meetings to monitor the situation; seeking professional advice, including insolvency or legal advice; holding discussions with auditors; calling a shareholder meeting; modifying management practices to take account of the interests of creditors and other stakeholders; protecting the assets of the company so as to maximize value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; not committing the company to enter into the types of transaction that might be subject to avoidance unless there is an appropriate business justification; continuing to trade in circumstances where it is appropriate to do so to maximize going concern value; holding negotiations with creditors or commencing other informal procedures, such as voluntary restructuring negotiations;[9]

(b) Commencing formal reorganization or liquidation proceedings where it is appropriate to do so or where it is required by national law.

B. When the obligations arise: the period approaching insolvency

22. [24] The point at which the obligations discussed above might arise has been variously described as the "twilight zone", the "zone of insolvency" or the "vicinity of insolvency". Although a potentially imprecise concept, it is intended to describe a period in which there is a deterioration of the company's financial stability to the extent that insolvency has become imminent (i.e. where the company will generally be unable to pay its debts as they mature (recommendation 15 (a) of the Legislative Guide) or unavoidable. Determining exactly when these obligations arise is a critical issue for directors seeking to make decisions in a timely manner consistent with those obligations. Moreover, without a clear reference point, it would be difficult for directors to predict with confidence the point in time [in the period before insolvency proceedings commence] to which a court would have reference in considering an action for breach of those obligations.

23. [25] There are various possibilities for determining the time at which directors' obligations might arise in the period before commencement of insolvency proceedings and different approaches are taken. One possibility may be the point at

[9] See UNCITRAL Legislative Guide on Insolvency Law, part one, chapter II, paras. 2-18.

which an application for commencement of insolvency proceedings is made, arguably the possibility that delivers the most certainty. If, however, the insolvency law provides for automatic commencement of proceedings following an application or the gap between application and commencement is very short (see recommendation 18), this option will have little effect in terms of encouraging directors to take early action.

24. [26] Another possibility focuses on the obligations arising when a company is factually insolvent, which under some laws may occur well before an application for commencement of insolvency proceedings is made. Taking the general approach of the Legislative Guide, insolvency might be said to have occurred in fact when a company becomes unable to pay its debts as and when they fall due, or when a company's liabilities exceed the value of its assets (recommendation 15). A further possibility is when insolvency is imminent, i.e. where the company will generally be unable to pay its debts as they mature (recommendation 15 (a)). These tests, however, are increasingly used in insolvency laws as commencement standards and in some States form the basis for imposing an obligation on directors to apply for commencement of insolvency proceedings within a specified period of time, usually rather short, after a company becomes insolvent. Accordingly, these tests are also unlikely to encourage appropriate steps to be taken at a sufficiently early time.

25. [27] A somewhat different approach examines the knowledge of a director at a point before commencement of insolvency proceedings when, for example, the director knew, or ought to have known, that the company was insolvent or that insolvency was imminent and there was no reasonable prospect that the company could avoid having to commence insolvency proceedings or that the continuity of the business was threatened. [The rationale of this approach is to catch directors who are unreasonable in their running of a company that is experiencing financial difficulty and to provide incentives to take appropriate action at an optimal time.] Although a concern with that type of standard might be the difficulty of determining with certainty the exact point at which the requisite knowledge could be imputed, provided a company's accounts have been properly kept and are accurate, a director should be able to deduce when the company is in difficulty and when it might be in danger of satisfying these insolvency tests. Alternatively, the director can be assumed to have known the information that would have been revealed had the company complied with its obligations to maintain proper books of account and to prepare annual accounts. Essentially, the standard requires a director's judgement to be assessed against the knowledge that a reasonable director should or ought to have had in the circumstances. Such a standard would require a wider consideration of circumstances and context, including, for example, examining the books of the company and its financial position in its entirety. It could involve looking at revenue flows and debts incurred and contingencies, including the ability to raise funds. Generally speaking, evidence of a temporary lack of liquidity would not be sufficient.

Recommendation 3

Purpose of legislative provisions

[The purpose of provisions relating to timing is to identify when, in the period before the commencement of insolvency proceedings, the obligations should arise.]

Contents of legislative provisions

The time at which the obligation arises

3. [2] The law relating to insolvency should specify that the obligations in recommendation 1 arise at the point in time when the person specified in [accordance with] recommendation 4 knew, or ought reasonably to have known, that insolvency was imminent or unavoidable.

C Identifying the parties who owe the obligations

26. [20] In most States, a number of different persons associated with a company have obligations with respect to management and oversight of the company's operations. They may be the owners of a company, formally appointed directors, (who may be independent outsiders or officers or managers of a company serving as executive directors, referred to as "inside directors") and non-appointed individuals and entities, including third parties acting as de facto[10] or "shadow" directors,[11] as well as persons to whom the powers or duties of a director may have been delegated by the directors.[12]

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[10] A de facto director is generally considered to be a person who acts as a director, but is not formally appointed as such or there is a technical defect in their appointment. A person may be found to be a de facto director irrespective of the formal title assigned to them if they perform the relevant functions. It may include anyone who at some stage takes part in the formation, promotion or management of the company. In small family-owned companies, that might include family members, former directors, consultants and even senior employees. Typically, to be considered a de facto director would require more than simply involvement in the management of the company and may be determined by a combination of acts, such as the signing of cheques; signing of company correspondence as "director"; allowing customers, creditors, suppliers and employees to perceive a person as a director or "decision maker"; and making financial decisions about the company's future with the company's bankers and accountants.

[11] A shadow director may be a person, although not formally appointed as a director, in accordance with whose instructions the directors of a company are accustomed to act. Generally, shadow directors would not include professional advisors acting in that capacity. To be considered a shadow director may require the capacity to influence the whole or a majority of the board, to make financial and commercial decisions which bind the company and, in some cases, that the company have ceded to the shadow director some or all of its management authority. In an enterprise group context, one group member may be a shadow director of another group member. In considering the conduct that might qualify a person to be a shadow director, it may be necessary to take into account the frequency of the conduct and whether or not the influence was actually exercised.

[12] Note to the Working Group: The following text may be included in any material to prepared with respect to enterprise groups or otherwise deleted. — Although some laws may provide that an enterprise group member cannot be appointed as a director of another group member, nevertheless, a group member may be considered, under a broad definition of "director", to be a director of other group members. This would typically occur where a group member (or its directors) performs functions concerning the management and oversight of other group members. The issue may be most relevant in the context of controlled and parent group members, where the parent interferes in a sustained and pervasive manner in the management of the controlled group member. However, a decision by a controlled group member to support the parent in circumstances where it was in the controlled group member's interests to do so and not the result of interference from the parent would not render the parent a director of the other group member.

27. [21] A broad definition may also include special advisors and in some circumstances, banks and other lenders, when they are advising a company on how to address its financial difficulties. In some cases, that "advice" may amount to determining the exact course of action to be taken by the company and making the adoption of a particular course of action a condition of extending credit. Nevertheless, provided the directors of the company retain their discretion to refuse that course of action, even if in reality they may be regarded as having little option because it will result in liquidation, and provided the outside advisors are acting at arm's length, in good faith and in a commercially appropriate manner, it is desirable that such advisors not be considered as falling within the class of person subject to the obligations.

28. [22] There is no universally accepted definition of what constitutes a "director". As a general guide, however, a person might be regarded as a director when they are charged with making or do in fact make or ought to make key decisions with respect to the management of a company, including functions such as the following:[13] determining corporate strategy, risk policy, annual budgets and business plans; monitoring corporate performance; overseeing major capital expenditure; monitoring corporate governance practices; selecting, appointing, and supporting the performance of the chief executive; ensuring the availability of adequate financial resources; addressing potential conflicts of interest; ensuring integrity of accounting and financial reporting systems; and accounting to the stakeholders for the organization's performance.

29. [22] The obligations discussed above would attach to any person who was a director at the time the business was facing actual or imminent insolvency, and may include directors who subsequently resigned (see para. 40 below). It would not include a director appointed after the commencement of insolvency proceedings.

Recommendation 4 [3]

Purpose of legislative provisions

[The purpose of the provisions is to identify the persons to whom the obligations should apply.]

Contents of legislative provisions

Persons that owe the obligations

4. [3] The law relating to insolvency should specify the person who owes the obligations, which may include any person formally appointed as a director and any other person exercising factual control and performing the functions of a director.

D. Liability

1. The standard to be met

30. [34] Laws dealing with the obligations of directors in the vicinity of insolvency judge the behaviour of directors in that period against a variety of

[13] These examples are provided for information and are not listed in any particular order of importance.

standards to determine whether or not they have failed to meet these obligations. [24] Typically those obligations only become enforceable once insolvency proceedings commence and as a consequence of that commencement, apply retroactively in much the same way as avoidance provisions (see discussion at part two, chap. II, paras. 148-150, 152).

31. [35] Under some laws, the question of when a director or officer knew, or ought to have known, that the company was insolvent or was likely to become insolvent is judged against the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company. More may be expected of a director of a large company with sophisticated accounting systems and procedures. If the director's skills and experience exceed those required for the job, the judgement may be made against the skills and experience actually possessed, instead of against those required for the job. In contrast, inadequate skill and experience for the job may not excuse a director and they could be judged against the skill and experience required for the job.

32. [36] Another approach requires there to be reasonable grounds for suspecting the company was insolvent or would become insolvent at the time of incurring the debt or entering into the transaction leading to insolvency. Reasonable grounds for suspecting insolvency would require more than mere speculation and the director must have an actual apprehension that the company is insolvent. This is a lower threshold than expecting or knowing the company is insolvent. Under this approach, the standard is that of a director of ordinary competence who is capable of having a basic understanding of the company's financial status and the assessment is made on the basis of knowledge such a director could have had and not on information that might later become apparent. Empirical evidence from jurisdictions with such provisions suggests that when reviewing what occurred, often some time before the review takes place, courts have demonstrated a good deal of understanding of the position in which directors find themselves, carefully analysing the situation they confronted and demonstrating appreciation for the business issues encountered. Courts have been reluctant to second guess directors in their commercial dealings, indicating that it is not appropriate to assume that what in fact happened was always bound to happen or was necessarily apparent at the time.

33. [38] Some laws provide a safe harbour for directors, such as by way of a business judgement rule, that establishes a presumption that directors have, for example, acted in good faith and had a rational belief that they acted in the best interests of the company, that they have had no material personal interest, and that they have properly informed themselves. [Provided the actions of the director were taken in good faith, with due care and within the director's authority, they will be shielded from liability. To rely upon the rule, directors must inform themselves with respect to the matters to be decided by acquiring, studying and relying upon information that a reasonable person in similar circumstances would find persuasive and be free from any conflict of interest with respect to those matters.]

34. [37] A further approach focuses on mismanagement. Laws adopting this approach may require a causal link between the act of mismanagement and the debts arising from it or that the mismanagement is an important cause of the company's insolvency. This approach requires that a director be guilty of a fault in management when judged against the standards of a normally well-advised director. Examples of

behaviour or actions that might give rise to liability under those laws include imprudence, incompetence, lack of attention, failure to act, engaging in transactions that were not at arm's length or of a commercial nature and improperly extending credit beyond the company's means, while the most common failures have involved directors permitting the company to trade while manifestly insolvent and to have embarked on projects beyond its financial capacity and which were not in its best interests. Other examples of mismanagement include where directors have failed to undertake sufficient research into the financial soundness of business partners or other important factors before entering into contracts; where directors fail to provide sufficient information to enable a supervisory board to exercise supervision over management; where directors neglect the proper financial administration of the company; where they also neglect to take preventative measures against clearly foreseeable risks; and where bad personnel management by the directors leads to unrest and strikes. Under some laws that adopt this approach, a finding of mismanagement does not require that a director have actively engaged in the management of the company; passive acquiescence may be sufficient.

2. The nature of the liability

35. [32A] [Whether a particular director has breached their obligations involves consideration of the personal circumstances of that director. Once a breach of the obligations has been determined under the relevant standard of proof, liability can be apportioned in several ways. Under one approach, liability will be apportioned to individual directors in proportion to their specific involvement in the decisions or behaviour under examination, requiring consideration of that involvement in the totality of the circumstances.]

36. [32A] [A number of other laws establish the general rule that directors will be held jointly and severally liable for their failure to meet such obligations. This may be the case even if each director is not responsible for the performance of all relevant obligations. Some of these laws provide, however, that the court may still have the discretion to allocate contributions as between directors taking into account the facts of the case, including different levels of culpability. The court may, for example, order one of a number of directors to bear the whole burden of liability (where, for example, that director had been personally assigned specific obligations that relate to the damage under examination) or order one director to contribute more when, for example, it is found that culpability for the damage caused is not equal. Under one law, directors may be jointly and severally liable only if it is established that they knowingly engaged in fraud or dishonesty; in all other cases, liability is proportionate to the extent a director's actions contributed to the loss to the company. Another law adopts a slightly different approach in which the court determines whether a person found liable must pay damages to the company, based upon the seriousness of the fault and the strength of the causal link, but the assessment of damages is not necessarily proportionate to the level of responsibility or fault. Under some laws, the issue of whether liability is joint or allocated specifically to those directors responsible for the conduct in question (which may include failure to act or to ensure that other directors meet their own obligations) depends upon the action giving rise to liability.]

Recommendations 5 and 6

Purpose of legislative provisions

[The purpose of provisions on liability is:

(a) To provide rules for the circumstances in which the actions of a person subject to the obligations in recommendation 1 that occur prior to the commencement of insolvency proceedings may be considered injurious and therefore a breach of those obligations; and

(b) To identify the consequences of that breach.]

Contents of legislative provisions

Liability

5. [4] The law relating to insolvency should specify that where creditors have suffered loss or damage as a consequence of the breach of the obligations in recommendation 1 the person owing the obligations may be liable.

6. [4] The law relating to insolvency should provide that the liability [for] [arising from] breach of the obligations in recommendation 1 is limited to the extent to which the breach caused loss or damage.

E. Enforcement of the directors' obligations on commencement of insolvency proceedings

1. Defences

37. [38] Under some laws, where directors do have obligations in the vicinity of insolvency, they may nevertheless rely on certain defences, such as the business judgement rule, to show that they have behaved reasonably. A slightly different approach gives directors the benefit of the doubt on the assumption that business risks are an unavoidable and incidental part of management. As noted above, courts are reluctant to second guess a director who has satisfied the duties of care and loyalty, or to make decisions with the benefit of hindsight. It may also be the case that the business judgement rule provides a defence to some, but not all, of the obligations specified under the law.

38. [39] Under some laws, directors would need to show that they had taken appropriate steps to minimize any potential loss to the company's creditors once they had concluded that the company would have difficulty avoiding liquidation. Provided they can show that they took reasonable and objective business decisions based on accurate financial information and appropriate professional advice, they are likely to be able to rely on this as a defence even if those decisions turn out to have been commercially wrong.

39. [32B] Some laws also provide for directors to take certain procedural or formal steps to avoid or reduce their liability for decisions or actions that are subsequently called into question, such as entering a dissent in the minutes of a meeting; delivering a written dissent to the secretary of a meeting before its adjournment; or delivering or sending a written dissent promptly after the adjournment of a meeting to the registered office of the corporation or other authority as provided under

national law. Directors who are absent from a meeting at which such decisions were taken may be deemed to have consented unless they follow applicable procedures, such as taking steps to record their dissent within certain specified periods of time after becoming aware of the relevant decision.

40. [40] The fact that a director has no knowledge of the company's affairs would generally not excuse failure to meet the obligations. Moreover, resignation in the vicinity of insolvency will not necessarily render a director immune from liability, as under some laws they may leave themselves open to the suggestion that the resignation was connected to the insolvency, that they had become aware or ought to have been aware of the impending insolvency and that they had failed to take reasonable steps to minimize losses to creditors and ameliorate the situation. Where a director has dissented to a decision that is subsequently being examined, that dissent typically would need to have been recorded in order for the director to rely on it. Where a director is at odds with fellow directors over the action to be taken, and despite taking reasonable steps to persuade them has failed to do so, it may be appropriate for the director to resign, provided his or her efforts and advice are recorded.

41. [32C] Liability may be minimized through specific insurance, which may be purchased by the company for its directors, or by the use of indemnities. [Where insurance is available, the principal limits are typically deliberate fraud and self-dealing, leaving directors generally covered for breach of the obligations discussed here unless the insurance coverage is inadequate, as may occur in insolvency.] Once a claim has been made against a director, it may be possible under some laws to reach a settlement through negotiation with the insolvency representative; in some jurisdictions that is the usual approach.

2. Remedies

42. [41] Different remedies and combinations of remedies for breach of a director's obligations are provided under civil law. The remedies focus on the provision of compensation for breach of the obligation and the damage caused, although the manner of measuring quantum varies. Typically, there is no punitive damages element. [A number of] [Many] laws also provide for disqualification of a director from acting as a director or taking part in the running and management of a company.

(a) Damages and compensation

43. [42] Where directors are found liable for actions or omissions in the vicinity of insolvency, the extent of the liability varies. Under some laws, directors may be liable for loss or damage suffered by individual creditors and employees, as well as the company itself, where the loss is a direct result of their acts or omissions. They may also be liable for payments that result in a reduction of the insolvency estate or that have resulted in the diminution of the company's assets. Some laws permit the court to adjust the level of liability to match the nature and seriousness of the mismanagement or other act leading to liability. Some laws provide that a director can be found liable for the difference between the value of the company's assets at the time it should have ceased trading and the time it actually ceased trading. An alternative formulation is the difference between the position of creditors and the company after the breach and their position if the breach had not taken place. A

slightly different approach may allow recovery from the directors of the difference between available assets and the sum necessary for the company to meet its debts.

44. [43] Some laws that include an obligation to apply for commencement of insolvency proceedings or to hold a shareholder meeting where there is a loss of capital also make provision for the award of damages.

45. [44] Where directors are found liable, the amount recovered may be specified as being for the benefit of the insolvency estate, on the basis that the principal justification for pursuing directors is to recover some of the value lost as a result of the directors' actions in the form of compensation for the estate. It is thus for the benefit of all, rather than individual, creditors. Some laws provide that where the company has an all-enterprise mortgage, any damages recovered are for the benefit of unsecured creditors. It may be argued in support of that approach that compensation should not go to secured creditors as the cause of action does not arise until the commencement of insolvency proceedings and thus cannot be subject to a security interest created by the company prior to that point. Moreover, what is being sought is not the recovery of assets of the company, in contrast to an avoidance proceeding, but rather a contribution from directors to remedy the damage suffered by creditors. Where, however, the insolvency law permits creditors to pursue directors (see below), there may be grounds for suggesting that any compensation to be paid might be applied, in the first instance, to cover the costs of the creditor or creditors commencing the action.

46. [45] In addition to the above remedies, debts or obligations due from the company to directors may be deferred or subordinated and directors may be required to account for any property acquired or appropriated from the company or for any benefit obtained in the breach of the obligations.

(b) Disqualification

47. [46] A consequence provided for under [a number of] [many] laws when insolvency proceedings commence is disqualification of a director from being a director or from taking part in the running and management of a company. Such measures are typically regarded as protective measures designed to remove those directors from a position where they can cause further harm by continuing to perform management and director functions in the same or a different company. Under one law, disqualifications of between two and 15 years may be ordered where the individual is found to be "unfit" to act as a director. Factors relevant to that determination include: breach of a fiduciary duty; misapplication of moneys; making misleading financial and non-financial statements; and failure to keep proper accounts and make returns. It may also include acts relevant to the company's insolvency, such as the person's responsibility for the company entering into transactions liable to avoidance on grounds similar to those in recommendation 87 or the company continuing to trade when the director knew or should have known that it was insolvent. The various factors are generally considered cumulatively in determining unfitness in a specific case. In jurisdictions providing for disqualification, those persons found to be unfit often, though not always, have displayed a lack of commercial probity, gross negligence or serious incompetence.

48. [47] Disqualification may sit alongside other remedies and sanctions as described above, or may be sought independently where the overall conduct of the individual as a director merits such a sanction. [Where disqualification is available, the persons who may seek it may be limited to specified agencies or officials, the insolvency representative and, in some cases, creditors.]

3. Persons who may bring an action

49. [48] A number of laws limit the right to bring an action against a director for breach of the obligations discussed above by reference to the nature of the action and the person with the power to pursue it. Considerations similar to those applicable to the exercise of avoidance powers, addressed under recommendation 87 (see part two, chap. II, paras. 192-195) may apply.

50. [49] A number of laws provide that when insolvency proceedings have commenced, it is only the insolvency representative who, having reviewed a director's actions prior to insolvency, has the right to proceed against the director to recover compensation for the benefit of creditors in respect of any loss caused to the company. Wrongful trading laws, for example, may permit the insolvency representative to pursue directors for contributions to the insolvency estate where their behaviour has contributed to their company's insolvency or constitutes an act of mismanagement. Some laws also permit such action to be brought by the public prosecutor or the court acting on its own motion.

51. [49A] Although a major justification for imposing obligations on directors in the vicinity of insolvency is the protection of creditor interests, not all laws permit creditors to pursue a director for breach of those obligations. Under some laws in some circumstances, such as where the insolvency representative takes no action, creditors, and sometimes shareholders, may have a derivative right to bring an action (see part two, chap. II, paras. 192-195). [Where the benefit of any damages assessed will accrue to the insolvency estate for the benefit of creditors, there may be little incentive for shareholders to pursue such an action. Other laws only allow creditors to pursue certain types of actions or transactions, such as misfeasance or transactions at an undervalue.] Under other laws, where creditors have no independent right to pursue a claim, a single creditor can pursue a director only with the consent of the majority of creditors or the creditor committee or creditors can request the creditors' representative or committee or the court to undertake any such action.

52. [49B] Where it is deemed appropriate for the law to permit creditors to pursue directors, a distinction might be drawn between creditors whose debt arose in the period approaching insolvency as a direct result of the conduct being examined and creditors whose debt predated that period. The former might have, in addition to a right to commence an action for the benefit of the insolvency estate, a personal right to claim damages against the director on the basis that the conduct being examined occurred in the vicinity of insolvency and exacerbated the financial difficulties of the debtor. Under some laws, that individual right is limited to situations where the egregious behaviour in question has been directed at a particular creditor. Should it be regarded as desirable to permit creditors to pursue a director, the insolvency law as it applies to avoidance proceedings might provide a useful example of the procedure to be followed (see part two, paras. 192-195). The law might require, for example, the prior consent of the insolvency representative to ensure that they are

informed as to what creditors propose and have the opportunity to refuse permission, thus avoiding any negative impact those actions may have on administration of the estate.

53. [49C] Where the consent of the insolvency representative or creditors is required, but not obtained or is refused, the insolvency law might permit a creditor to seek court approval to pursue a director. The insolvency representative should have a right to be heard in any resulting court hearing to explain why it believes the action should not go ahead. At such a hearing, the court might give leave for the action to be commenced or may decide to hear the case on its own merits. Such an approach may work to reduce the likelihood of any deal making between the various parties. Where creditor-initiated actions are permitted with respect to avoidance, some laws require creditors to pay the costs of those actions or allow sanctions to be imposed on creditors to discourage potential abuse of those actions; the same approach might be adopted with respect to actions brought by creditors against directors.

54. [50] Under those laws imposing an obligation on directors to commence insolvency proceedings, the company itself, its shareholders and creditors may have a claim for damages in the event of a breach of that obligation. Where payments have been made by directors contrary to a moratorium that accompanies the obligation to commence insolvency proceedings, the company itself may have a claim for damages. The company may also have a claim under laws that impose an obligation to hold a shareholder meeting if there is a loss of capital. It is desirable that the insolvency law ensure coordination of any actions that might potentially be commenced by these different parties.

55. [Litigation involving the obligations of directors of a company subject to insolvency proceedings is likely to be not only costly, but also time consuming and can operate to postpone the completion of the related insolvency proceedings. Although beyond the scope of this discussion, this is an issue that might merit consideration in order to reduce the effects of such litigation on those related actions.]

4. Funding of actions

56. [51] A potential difficulty arising in those jurisdictions that permit an insolvency representative to bring an action for breach of these obligations relates to payment of their costs in the event that it is unsuccessful. The lack of available funding is often cited as a key reason for the relative paucity of cases pursuing the breach of such obligations. While funding might be made available from the insolvency estate when there are sufficient assets to do so, as is often the case with avoidance proceedings, insolvency representatives may be unwilling to expend those assets to pursue litigation unless there is a very good chance of success (see part two, chap. II, para. 196). In many cases, however, there will be insufficient funds available in the insolvency estate to pursue a director, even if there is a strong likelihood that the litigation will be successful.

57. [51] Devising alternative approaches to funding in such circumstances may offer, in appropriate situations, an effective means of restoring to the estate value lost through the actions of directors, addressing abuse, investigating unfair conduct and furthering good governance. [Obtaining such alternative funding would be

assisted by including appropriate authorization in any law relating to insolvency in much the same way as is provided by recommendation 95 with respect to the funding of avoidance proceedings.] The right to commence such a proceeding, or the expected proceeds of the proceeding if successful, might be assigned for value to a third party, including creditors or a lender might be approached to provide funds. Where the cause of action is pursued by a party other than the insolvency representative, the costs of commencing such a proceeding might be recovered from any compensation paid. Under some laws, claims against directors might be settled through negotiation with insolvency representatives, avoiding the need to find funding. In some jurisdictions this occurs infrequently, while in others it is usual practice and insolvency representatives typically "invite" contributions from directors. As an additional issue, it may be appropriate to consider the court in which such proceedings could be commenced; this issue is discussed above in part two, chapter. I, paragraph 19.

Recommendations 7-11

Purpose of legislative provisions

[The purpose of provisions on enforcement of the obligations is to establish appropriate remedies for breach of the obligations and facilitate the commencement and conduct of actions to recover compensation for that breach.]

Contents of legislative provisions

Elements of liability and defences

7. [5] The law relating to insolvency should specify the elements to be proved in order to establish a breach of the obligations in recommendation 1 and that, as a consequence, creditors have suffered loss or damage; the party responsible for proving those elements; and specific defences to an allegation of breach of the obligations. Those defences may include that the person owing the obligations took reasonable steps of the kind referred to in recommendation 2.

Remedies

8. [6] . The law relating to insolvency should specify that the remedies for liability found by the court to arise from a breach of the obligation in recommendation 1 should include payment in full to the insolvency estate of any damages assessed by the court [as compensation for that breach]. Failure to pay such damages in full should limit the person owing the obligation from exercising a set-off with respect to any debts owed by the company to such person until payment in full is made.

Conduct of actions for breach of the obligation

9. [7] The law relating to insolvency should specify that the cause of action for loss or damage suffered as a result of the breach of the obligations in recommendation 1 belongs to the insolvency estate and the insolvency representative has the principal responsibility for pursuing an action for breach of those obligations. The law relating to insolvency may also permit, with the agreement of the insolvency representative, a creditor or any other party in interest to commence such an action. When the insolvency representative does not agree, the

creditor or other party in interest may seek leave of the court to commence such an action.

Funding of actions for breach of the obligation

10. [8] The law relating to insolvency should specify that the costs of an action against the person owing the obligations be paid as administrative expenses.

11. [9] The law relating to insolvency may provide alternative approaches to address the pursuit and funding of such actions.

Additional measures

[12. [10] In order to deter behaviour of the kind leading to liability under recommendation 5, the law relating to insolvency may include remedies additional[14] to the payment of [compensation] [damages] provided in recommendation 8.]

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[14] The additional remedies that may be available will depend upon the types of remedies available in a particular jurisdiction and what, in addition to the payment of compensation, might be proportionate to the behaviour in question and appropriate in the circumstances of the particular case. Examples of such remedies are discussed in paras. ... [of the commentary].]

Appendix IV

Supplemental notes on discussions concerning directors' liability

The document considered by the Working Group, WP 113, concerns director's liability in the period approaching insolvency.

The first discussion related to paragraph 1 (Introduction) as World Bank representatives suggested to modify the last part of it, supported by Germany and Spain representatives. World Bank was going to present a new text.

The second discussion related to the nature of director's liability. Specifically on Section 2 – Civil Liability – Paragraph 19 (31), Italy proposed to modify the first part, and presented a four-page work (identified as A/CN.9/WG.V/XLIII/CRP.3) that did not receive enough support to be adopted as a recommendation.

IABA Observers then presented two suggestions on paragraph 20: - adding a phrase on g) to encourage transparency on resolutions taken in this period and a new 20 (k) as follows: "Directors could show transparency and build creditor support by ensuring notice of intended remedial actions and transactions, in such public registries as enacting States may establish". IABA Observers mentioned that disclosure of director's actions in this period could (i) build creditor support for the directors' remedial measures; and (ii) diminish or negate the directors' exposure to future allegations of fraud. However, not surprisingly, the representatives of several countries (Korea, Germany, Spain and Mexico for example) expressed concern over a need for business secrecy, particularly in public companies. Consequently this IABA proposal was not discussed further, because it lacked support from Member delegations.

Next, in Paragraph 32 (36) the last clause was removed as it was considered a guessing situation.

Parts of Paragraph 34 (37) relative to director's bad administration examples, were removed: when directors do not give enough information; and when they do not take care of finances properly.

Recommendations 5 & 6, regarding liabilities were discussed extensively. Paragraph 5 (4) and 6 (4) were viewed as independent issues by some representatives, and others representatives considered them the same and wanted to redraft them. IABA Observers suggested combining the two phrases through a transitional "but". That idea was supported by Spain but, most of the representatives preferred not to combine the clauses, and underscore the separate character of the issues addressed

The last clause of paragraph 43 (42) was excised, as suggested by World Bank representatives.

The Working Group detected that paragraphs 51 (49A9) and 52 (49B9) said different thing in Spanish and English versions. The Secretariat will correct this translation mistake.

A new clause 58 was approved and will appear in the report of this Working Group Session.

Extensive discussion was had regarding the director's ability to offset (compensate) claims in the company's liquidation process. The World Bank and Mexico representatives urged that such offset not be allowed. This appears to be the majority view among the delegations, as the best solution.

The IABA Observers, having discussed and compared the insolvency systems of their own countries and others, are honored to have the opportunity to contribute their comments to the Working Group.

FEDERACIÓN INTERAMERICANA DE ABOGADOS
INTER AMERICAN BAR ASSOCIATION
FEDERAÇAO INTERAMERICANA DE ADVOGADOS
FEDERATION INTERAMERICAINE DES AVOCATS

The Inter-American Bar Association offers the following suggestion to the UNCITRAL Working Group V, relative to A/CN.9/WG.V/WP.115, under

II. Different national approaches to directors' obligations in the period approaching insolvency in the context of enterprise groups

18. after "it appears" add: "under company law [1]"; and

add to the end of the paragraph: " however, under the Insolvency Law[2] and civil law[3], directors owe duties only to the company itself[4] and the creditors of that company and not[5] to the group.

[1] Brazilian Commercial Law 6.606 (1976) Art. 266 and Art.244

[2] Brazilian Federal Law 11.101 (2005) Art. 168.

[3] Brazilian Federal Law 10.406 (2002) Art. 1089.

[4] Brazilian Federal Law 10.406 (2002) Art. 50 and 985; Brazilian Federal Law 5.172 (1966) Art.127 (regarding taxation).

[5] Idem note 2.

At commencement of Day Four (Thursday April 18, 2013), the Working Group considered subjects for future meetings. Delegations of France, Italy, United States and the World Bank, all were disinclined to expand coverage over acts of the directors or the use of public registries or archives to notify or otherwise disclose publicly acts of the directors.

Given that working paper A/CN.9/WG.V/WP.115 (copy included with these notes) contained information regarding the rules of Brazilian companies connoting that subsidiaries in business groups subordinate their interests to those of the parent company, and omitted mention of the Brazilian Civil law, and the Brazilian Constitution, the Brazilian delegation with the assistance of the IABA Observers proposed the IABA-suggested change in A/CN.9/WG .V/WP.115, to include an appropriate note of such Brazilian authority.

Thus, the IABA Observers' suggestion was accepted by the Brazilian delegation in UNCITRAL, as evidenced in the report of the Working Group V 43d Session, UNCITRAL document A/CN.9/766 p.17 Item IX ¶ 110. The directors' loyalty to the corporate group, as opposed to their own company alone, must be determined by reference not only to intercompany contracts, but also the additional Brazilian authorities cited by the IABA Observers, including the Brazilian Civil Law.

At the end of Day Four, the delegation of Mexico suggested that the work of Working Group V of UNCITRAL produce certain law common to all member States,. This suggestion by the Mexican delegation further underscored the importance of suggestions and work offered by the Inter American Bar Association, to the UNCITRAL.

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Insolvency Law

Enterprise groups — Directors' obligations in the period approaching insolvency

Note by the Secretariat

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V.13-80812 (E)

I. Introduction

1. At its forty-second session (November 2012), the Working Group considered the obligations of directors in the period approaching insolvency (A/CN.9/763, paras. 66-91) based upon information contained in A/CN.0/WG.V/WP.108, which also contained information on issues relating to directors of group enterprise members in the period approaching insolvency (A/CN.0/WG.V/WP.108, paras. 52-60). The Working Group agreed that although the latter topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, the possibility of further work should be given serious consideration once work on recommendations 1-10 and the related commentary had been completed. At the request of the Working Group, the Secretariat prepared this paper on different national approaches and solutions to the issue of directors' obligations in a group context in the period approaching insolvency[1] in order to provide further information and facilitate the Working Group's deliberations on the topic (A/CN.9/763, para. 92).

2. The Working Group will recall that in preparing Part three of the UNCITRAL Legislative Guide on Insolvency Law, it acknowledged that the business of corporations was increasingly being conducted through enterprise groups. Enterprise groups were described as covering different forms of economic organization based upon the single legal entity and composed of two or more legal entities that are linked together by some form of direct or indirect control or ownership. It was recognized that enterprise groups are ubiquitous in both emerging and developed markets, with a common characteristic of operations across a large number of sometimes unrelated industries, often with family ownership in combination with varying degrees of participation by outside investors. Further, it was stated that the largest economic entities in the world include not only States, but also a number of multinational enterprise groups, which may be responsible for significant percentages of gross national product worldwide and have annual growth rates and turnovers that exceed those of many States.[2]

3. At its previous session (November 2012), the Working Group acknowledged various issues that may arise with respect to directors' obligations in the period approaching insolvency in a group context (A/CN.9/WG.V/WP.108, para. 52). Two main issues were identified for particular consideration and discussion:

(i) what is the appropriate definition of a director and the circumstances in which other group members might fall within that definition, particularly where parent and wholly owned or controlled subsidiary relationships are involved (A/CN.9/WG.V/WP.108, paras. 58-59); and

(ii) whether the single entity principle and its impact should prevail when there is a tension between acting in the interests of the group member of which

[1] The Secretariat based this paper on available existing studies on the topic of the obligations of directors in the period approaching insolvency and on any additional information in the context of enterprise groups (in particular, INSOL, Directors in the Twilight Zone III, 2009), as well as on information submitted to the Secretariat by some Member States. Only States on which there was relevant information available from these sources were included in this paper.

[2] Part three of the UNCITRAL Legislative Guide on Insolvency Law (Treatment of enterprise groups in insolvency), Section IA, paras. 2, 4 and 5, and in paras. 1-39 generally.

they are a director and the interests of the group as a whole (A/CN.9/WG.V/WP.108, paras. 53-57).

4. The Working Group may wish to recall the discussion in A/CN.9/WG.V/WP.113 with respect to the persons who owe obligations in the period approaching insolvency (paras. 26-29 and recommendation 4), in this paper referred to as "directors".

5. The Working Group may also wish to recall information prepared for its consideration at the previous session (A/CN.9/WG.V/WP.108, para. 53) indicating that while the individual group member's interests are of particular importance when the solvency of that enterprise group member may be or becomes an issue after any transaction designed to benefit the group as a whole has been entered into, the group structure may require directors to act for the benefit of the group. In such a context, the directors would have to balance the interests of their own group member against the possibly competing economic goals or needs of the group as a whole. Examples of such potential conflict could arise when one group member provides a loan to another group member or acts as a guarantor for a loan provided by an external lender to another group member; or when one group member enters into an agreement with another group member to transfer its business or assets or surrender a business opportunity to that other group member or to contract with that member on terms that could not be considered commercially viable; or where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations. The problem that may arise in relation with these transactions results from the relationship between the transacting parties or their position within the group, and because the nature of the transaction involves an allocation of benefit and detriment that differs from what might generally be considered commercially viable.

6. The Working Group may also wish to recall that information provided at its previous session indicated that the treatment of these issues is quite different from one jurisdiction to the next, particularly in terms of the duties owed by the directors to the company in the period approaching insolvency, and how the interest of the company must be evaluated by such directors in a group context (A/CN.9/WG.V/WP.108, paras. 54-57).

7. The following analysis reviews the law of several jurisdictions insofar as it deals with:

(i) the obligations of directors in the context of a group enterprise; and

(ii) any particular consideration of such obligations in the context of insolvency or the period approaching insolvency.

II. Different national approaches to directors' obligations in the period approaching insolvency in the context of enterprise groups

A. Argentina

8. The Argentine Companies Law imposes a general fiduciary duty on directors of solvent companies, which obliges them to act in good faith and with the diligence

of a good businessman.[3] Directors are therefore responsible for their loyalty and diligence in administering the company. The Law does not contain any special regime for a group of companies, nor any definition of the term.

9. According to the Argentine Bankruptcy Law,[4] the zone of insolvency is extended back to one year prior to the date of declaration of the cessation of payments.[5] In terms of the liability of natural persons, the Bankruptcy Law covers any representative, director, proxy holder or manager of the company that may have produced, facilitated, permitted or aggravated the financial situation of the debtor or its insolvency.[6] The Law does not contain any special provision for groups of companies.

10. However, groups of companies are taken into account under the Bankruptcy Law in terms of the extension of insolvency proceedings. In fact, insolvency can be extended to any person controlling the insolvent company who has improperly subjected the interests of the controlled company to the unified management of the group giving priority to the interests of the controlling company or the whole group to which it belongs.[7] The Bankruptcy Law provides for these purposes the following definition of a controlling person:[8] (i) one who directly or through another company holds any kind of ownership in the company that entitled the person to the necessary votes to make decisions;[9] or (ii) any group of persons who, acting together, hold the necessary ownership of the company entitling them to the necessary votes to make decisions.[10] The obligations of directors during insolvency proceedings are not specified, but the general regime of duties owed when the company is solvent remains applicable.

11. The Argentine Bankruptcy Law also provides a special regime for the insolvency of a group of companies: insolvency proceedings may be commenced by two or more natural or legal persons forming a permanent economic union.[11] As the duties of directors remain the same, the question arises whether such duties could be assessed on the basis of the interests of the entire group.

B. Australia

12. When a company is in liquidation, as contrasted with the period approaching insolvency, directors in Australia have a duty to prevent insolvent trading by the company, and will be held personally liable for any breach of that obligation, provided that certain requirements are met.[12] A holding company may also be held

[3] Ley 19.550 de Sociedades Comerciales de 20 de Marzo de 1984, Boletín Oficial 30 de Marzo de 1984, Artículo 59.

[4] Ley 24.522 de Concursos y Quiebras de 20 de Julio de 1995, Boletín Oficial 28.203 de 9 de Agosto de 1995.

[5] Argentine Bankruptcy Law, Article 174.

[6] Argentine Bankruptcy Law, Article 173.

[7] Argentine Bankruptcy Law, Article 161(2).

[8] Ibid.

[9] Argentine Bankruptcy Law, Article 161(2)(a).

[10] Argentine Bankruptcy Law, Article 161(2)(b).

[11] Argentine Bankruptcy Law, Article 65.

[12] Corporations Act 2001 (Cth), Section 588G.

liable for insolvent trading by its subsidiary, but that liability does not extend to the directors of the holding company.[13]

13. In terms of a group of companies, the interests to be taken into account by directors depend on whether the company is solvent or insolvent. A group of companies has been defined at common law as "a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control".[14] If the company is solvent, the directors are entitled to give consideration to the interests of the companies as a group in determining whether the best interests of the company of which they are a director would be met by a proposed course of action,[15] provided that the interests of the group remain compatible with the interests of the individual company.[16] If the group as a whole is insolvent, the interests of the company as a result of any problematic transactions would diverge significantly from the interests of the group.[17] If the directors cause the company to prejudice the interests of its creditors in a circumstance of insolvency, they would fail to discharge their duty to act in the best interests of that company.[18]

14. The Bell case provides a good summary of what is expected from directors in a group context when facing insolvency: directors do not have to ignore the interests of the wider group but are required to consider the interests of each individual company when one or more companies in a group enter into a transaction.[19] In this case, it was held that the directors had exposed the companies to a probable prospect of loss and no probable prospect of gain when concentrating on the group and failing to look to the interests of individual companies.[20]

C. Belgium

15. Belgian law imposes duties on directors to act in the corporate interest of the company and not of any particular shareholder or the company's creditors. The definition of "corporate interest" is interpreted by courts on a case by case basis.[21] Even if the interests of a Belgian company usually coincide with the interests of the whole group, depending on the circumstances, the directors of the individual company may need to act more independently of the group.[22]

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[13] Corporations Act 2001 (Cth), Section 588V.

[14] *Walker v Wimborne & Ors* (1976) 3 ACLR 529 at 532 (Mason J).

[15] *Westpac Banking Corporation v Bell Group Ltd.* (in liquidation) (No. 3) [2012] WASCA 157 at 952 (Lee AJA); *Neat Domestic Trading Property Ltd. v AWB Ltd.* [2003] HCA 35 [47]; (2003) 216 CLR 277 (McHugh, Hayne, Callinan JJ).

[16] Ibid.

[17] *Westpac Banking Corporation v Bell Group Ltd.*, supra note 15 at 952.

[18] Ibid and *Walker v Wimborne & Ors*, supra note 14 at 532.

[19] *The Bell Group Ltd. v Westpac Banking Corporation* (No. 9) [2008] WASC 239 at [4621] (Owen J).

[20] Ibid at [9746].

[21] International Insolvency Institute, Committee on Corporate and Professional Responsibility, Survey on Director and Officer Duties, Responsibilities, and Accountability, Belgium (Nora Wouters), p. 2.

[22] Ibid., p.3.

16. When balancing the corporate interest of a company against the general interest of the group, Belgian law refers to principles set out in French case law to assess whether a particular transaction is well-balanced in terms of corporate interest (see France, paras. 22-24 below).

D. Brazil

17. Brazilian law has introduced the possibility of creating a contractual group of companies. The group of companies is a contract entered into by a controlling company and one or several controlled companies whereby they commit to combine resources or efforts to achieve mutual goals or participate in common activities or ventures.[23]

18. Although each company retains its legal capacity and its own assets,[24] the group of companies can define a group direction and the powers, duties and liabilities of its directors.[25] The directors of the subsidiaries must act within the powers and duties determined by the articles of association and the group contract, and should follow the instructions established by the group directors that do not entail a breach of legal or contractual duties.[26] It appears that directors are required to take into account the interest of the whole group when assessing whether to enter into a particular transaction.

E. Colombia

19. Colombia has enacted a definition of a group of companies. A subordinated or controlled company is one whose power to make decisions is subject to the will of one or more companies, either directly or indirectly.[27] The Code of Commerce also defines an enterprise group as one where there is a unity of purpose and direction, i.e. where there is a common objective determined by the controlling company by virtue of the control and direction it exercises over the whole group, even though each company has a different activity or purpose.[28]

20. There are no special obligations on directors in the context of a group of companies, but each director remains subject to a general duty of good faith and loyalty, and administering the company of which it is a director as a good businessman.[29]

21. In the case of insolvency, the parent company will be liable for the subsidiary's commitments if the insolvency or liquidation has been produced by the transactions implemented in the interest of the controlling company or any other subsidiary, and against the interests of the insolvent company.[30] It is presumed that

[23] Lei 6404/76 of 15 December 1976, Article 265.
[24] Ibid.
[25] Ibid, Article 272.
[26] Ibid, Article 273.
[27] Code of Commerce of Colombia, Article 260.
[28] Ibid, Article 261.
[29] Ley 222 de 1995 (20 December 1995), Article 23.
[30] Ley 1116 de 2006 (27 December 2006), Article 61.

the company is in insolvency because of the actions derived from that control unless proved otherwise.[31]

F. France

22. In France, case law has defined a group of companies as the situation where certain companies are united by a dependency link and by unified control.[32] The purposes of the different companies do not have to be identical, as long as there is a certain subordination of each legal entity for the benefit of the single financial goal of the group.[33]

23. For directors to be discharged of their duties, the intra-group transaction (i) must have a financial, economic or social mutual interest that is considered together with regard to a common policy elaborated for the whole group; and (ii) it should neither be effected without consideration nor jeopardize the balance between the different commitments of the companies or exceed the financial capabilities of the company bearing the burden thereof.[34]

24. The interest of individual companies is the main rule to assess the validity of the transaction. It appears, however, that the group context is a factor that can influence the final outcome in terms of discharge of the director's duties towards the company.

G. Germany

25. Under German law, the concept of "group liability" has been introduced to create an obligation on a director who is also a controlling shareholder, to compensate for any loss due to the misuse of its managerial power.[35] The German Federal Court has held that this regime also applies where the shareholder is a natural person:[36] the director, who was also the sole shareholder, had conducted the business pursuing only his personal interests, and was regarded as a "dominating company" analogous to the concept of liability in a corporate group.

26. The doctrine of piercing the corporate veil has been further defined as a liability in tort of the director to the company when the management has induced a subsidiary into financial assistance that may have the consequence of causing the insolvency of the subsidiary.[37] As a consequence, the director has a duty in the period approaching insolvency to protect the survival of the company regardless of the existence of a group.[38]

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[31] Ibid.

[32] Cour de cassation [French Supreme Court] Chambre Criminelle, 4 February 1985, No. 84-91581.

[33] Ibid.

[34] Ibid.

[35] INSOL, Directors in the Twilight Zone III, supra note 1, p. 321.

[36] Ibid.

[37] Ibid.

[38] Ibid, p. 322.

H. Italy

27. Although Italian legislation has not enacted special provisions on directors' duties within enterprise groups in the period approaching insolvency, the Civil Code contains provisions relating to the liability of parent companies and their directors for damages caused to the subsidiaries' shareholders or creditors.[39] Legal entities exercising "direction and coordination" powers over an Italian company may be found liable to minority shareholders and creditors of the subsidiary for abuse of those powers when the controlling company acts in its own interest or in the interest of third parties.[40]

28. Although the concept of "direction and coordination" has not yet been judicially interpreted, commentators are of the view that there will be "direction and coordination" powers where a significant part of the management decisions at the subsidiary is continuously and substantively taken by management at the controlling entity, even if the decisions are formally implemented by the subsidiary's management. This legislation also applies to the case where those powers are exercised pursuant to any ad hoc arrangement or articles of association.

29. This liability regime is also extended to any person concurring in or benefitting from the mismanagement (such as the directors of the controlling entity or another of its subsidiaries), and they may be held jointly and severally liable.[41] However, liability may be avoided when such damages are fully reversed, even through subsequent transactions specifically effected for this purpose, or when damages are offset by the overall effect of the direction and coordination activities over the subsidiary.[42]

30. In addition, prejudiced parties (creditors and minority shareholders) can bring action against the controlling company and its directors only when they are unable to collect damages from the subsidiary.[43] Therefore, this action may in practice be limited to the case where the subsidiary has become insolvent.

31. Finally, in a group context, the parent company's directors can be held jointly liable with the subsidiary's directors for damages caused to the insolvent subsidiary by means of an abuse of direction powers within the group.[44]

I. Spain

32. Under Spanish law, a group of companies has been defined as the situation where a company exercises or has the possibility to exercise, directly or indirectly, control over another company, in terms of voting rights or appointment of the

[39] INSOL, Directors in the Twilight Zone III, supra note 1, pp. 446-448.

[40] Italian Civil Code, Article 2497. Control is defined by Article 2359 of the Italian Civil Code as the situation where a company can: (i) exercise a particular influence on the general shareholders' assembly of another company, whether disposing of the majority of the voting rights or not, or (ii) exercise a particular influence on the controlled company by virtue of the contractual relationships entered into between those companies.

[41] Ibid.

[42] INSOL, Directors in the Twilight Zone III, supra note 1, p. 448.

[43] Italian Civil Code, Article 2497.

[44] INSOL, Directors in the Twilight Zone III, supra note 1, p. 448.

management of the controlled company, whether by ownership of shares entitling the controlling company to voting rights or by any agreement whatsoever.[45]

33. Directors under Spanish law are subject to a duty of loyalty, which must be exercised in light of the corporate interest of the company itself.[46] According to academic doctrine, Spanish law recognizes the existence and legitimacy of a group of companies, but it remains difficult to assess whether the interest of a company can be expanded to the interest of the whole group.[47]

J. Switzerland

34. Under Swiss law, there is no provision relating to the treatment of a group of companies in the field of company or insolvency law, except for some specific provisions on accountancy and banking law. The main question in terms of the obligations of a director of a company that is part of a group is whether the subordination of the interests of the controlled company to the interests of the group as a whole may be qualified as a breach of the director's duty. This analysis is unchanged whether or not there is an insolvency.

35. Generally, the Swiss Federal Supreme Court takes a conservative position, holding that the interests of the company should be regarded from the perspective of each individual company rather than from the group as a whole.[48] This view was recently confirmed by the Court:[49] the liability of a member of the board of directors of the parent company, who was also chair of the board of directors of the subsidiary, was upheld because the parent company, later insolvent, had granted a loan to its subsidiary which at the time had already become insolvent. It was held that such a shift of the parent company's assets to a subsidiary shall be considered a breach of duty to the parent company if there were no prospects of repayment. Further, being a director for both companies subjected the board member to stricter scrutiny in respect of his liability for intra-group transactions, as he was deemed to be better informed than any external party about the financial situation of both companies and of the risks associated with the transaction.

K. United States of America

36. In the United States,[50] it has been held that the focus of directors' duties shifts somewhat upon the event of insolvency of a company. In a solvent company,

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[45] Spanish Code of Commerce, Article 42.

[46] Ley de Sociedades de Capital [Spanish Companies Act] (Real Decreto Legislativo 1/2010, de 2 de Julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital), Article 226.

[47] José Miguel Embrid Irujo, "Apuntes sobre los Deberes de Fidelidad y Lealtad de los Administradores de las Sociedades Anónimas" (2006) 46 Cuadernos de Derecho y Comercio 9.

[48] Bundesgericht [Swiss Federal Supreme Court] BGE 138 II 57, 61; BGE 130 III 213, 216 et seq.

[49] Bundesgericht [Swiss Federal Supreme Court] 4A_74/2012 (18 June 2012).

[50] As in the case of the section on the United States of America in INSOL, Directors in the Twilight Zone III (supra note 1, at 697), this section will focus on the law of Delaware, as a popular jurisdiction for incorporation, and on Federal law (for those issues resolved in US Bankruptcy Court rather than the state courts).

fiduciary duties are owed by directors to the company and its shareholders,[51] and generally not directly to creditors.[52] Upon insolvency, however, it has been held that the fiduciary duties of directors shift at least partially to include the creditors of the company.[53] Although it has been said that the question of to whom directorial fiduciary duties are owed during insolvency is an issue subject to considerable debate and confusion,[54] there is broad agreement that courts should provide creditors with some additional rights when a company is insolvent or approaching the period of insolvency.[55]

37. However, the question of the extent of those rights and when they arise is not yet settled.[56] Although the law has been clear for some time that creditors are entitled to certain fiduciary duties by directors when the company crosses into insolvency,[57] a 1991 decision created uncertainty about the content and timing of those rights by holding that "[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise".[58] A more recent decision clarified that corporate creditors do not have direct fiduciary claims against a company regardless of its solvency, but held that upon insolvency, a company's creditors can take derivative claims on behalf of the company against the directors for breach of fiduciary duty.[59] Unfortunately, the decision did not address whether creditors have a similar right to bring derivative claims for breaches of fiduciary duty in the period approaching insolvency, nor has any case to date set out any guidelines for when a company is entering into the "vicinity of insolvency". In addition, some states still grant creditors standing to sue for breaches of fiduciary duties when the subsidiary company is in the "zone" or "vicinity" of insolvency,[60] and do not limit such standing to derivative claims on behalf of the subsidiary.

38. In the context of an enterprise group, it has been held that the directors of solvent wholly owned subsidiaries[61] are obligated to manage the affairs of the

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[51] See, e.g. *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, 930 A.2d 92, 99 (Del. 2007).

[52] J. Haskell Murray, "'Latchkey corporations': Fiduciary duties in wholly owned, financially troubled subsidiaries" (2011) 36 Delaware Journal of Corporate Law, p. 584; *Geyer v Ingersoll Publications Co.*, 621 A.2d 784, 787 (Del.Ch. 1992); and In re Netzel, 442 B.R. 896, 899 (Bankr. N.D. Ill. 2011).

[53] *Geyer v Ingersoll*, ibid at 787 and In re Netzel, ibid at 899.

[54] Murray, "Latchkey corporations", supra note 52 at 587.

[55] Ibid at 588 and *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, supra note 51 at 101.

[56] See, generally, INSOL, Directors in the Twilight Zone III, supra note 1 at pp. 704-706.

[57] *Geyer v Ingersoll Publications Co.*, supra note 52 at 787.

[58] *Credit Lyonnais Bank Nederland, N.V. v Pathé Communications Corp.* 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

[59] *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, supra note 51 at 101 and In re Netzel, supra note 52 at 901.

[60] Murray, "Latchkey corporations", supra note 52 at 588-591 and 608; *Carrieri v Jobs.com Inc.*, 393 F.3d 508, 534 n.24; In re James River Coal Co., 360 B.R. 139, 170 (Bankr. E.D. Va. 2007).

[61] Outside of the context of the wholly owned subsidiary, it has been said that the conflict between duties owed to the controlled company and to the parent is of little practical importance, since directorial decisions are usually protected by the business judgment rule and exculpatory charter provisions. See Murray, "Latchkey corporations", supra note 52 at p. 580 and *Orman v Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (noting that the business judgment rule presumption greatly

subsidiary only in the best interests of the parent company and its shareholders.[62] Other case law, some more recent, has limited the application of that case, and has held that directors of a solvent wholly owned subsidiary owe fiduciary duties to both the subsidiary company and to its sole shareholder, the parent company.[63]

39. However, the current state of the law in terms of directors' duties within enterprise groups in the period approaching insolvency is quite uncertain. As noted above in para. 37, creditors can bring derivative actions on behalf of an insolvent company for injuries caused to it by its directors or its controlling shareholder.[64] In addition, as noted above in footnote 61, directors of subsidiaries may be exposed to duty of loyalty claims or to "interested director" claims which can be brought derivatively by creditors of the subsidiary. In the period approaching insolvency, directors of wholly owned subsidiaries that simply follow the wishes of the parent company and approve deals that result in the insolvency of the subsidiary could be liable for breach of the duty of loyalty or to "interested director" claims.[65] Thus the current state of the law may encourage directors of wholly owned subsidiaries in the period approaching insolvency to focus on the interests of the creditors of the subsidiary rather than to manage the subsidiary with a view to the best interests of the parent company and of the subsidiary, even though there is no specific fiduciary duty owed to the creditors of the subsidiary because the subsidiary is not yet insolvent. In the period approaching insolvency, then, directors of wholly owned subsidiaries appear to be required to act in the best interests of the subsidiary, which may include the interests of the sole shareholder parent, and may also include the interests of the creditors of the subsidiary.[66]

III. Issues for consideration

40. From the above analysis, it may be observed that the issue of directors' duties in the zone of insolvency in the context of enterprise groups does not appear to be clearly or widely addressed within national legislation. The concept of enterprise groups has been considered and developed in many jurisdictions, but issues remain somewhat confused in terms of the obligations of directors in such situations.

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protects directorial decisions, but can be rebutted in certain circumstances, such as if the directors were "interested" in the outcome of the challenged transaction) and Del. Code Ann tit. 8 § 102(b)(7) (allowing corporations to eliminate liability for damages for breaches of duty of care except for breaches of "the director's duty of loyalty to the corporation or its stockholders").

[62] *Anadarko Petroleum Corp. v Panhalde Eastern Corp.* 545 A.2d 1171 (Supreme Court of Delaware, 1988) and *Trenwick Am. Litigation Trust v Ernst & Young*, L.L.P., 906 A.2d 168, 196 n.75 (Del. Ch. 2006).

[63] *First American Corporation v Al-Nahyan*, 17 F Supp. 2d 26 (DC, 1998) and In re Touch American Holdings, Inc., 401 BR 107, 129 (US Bankruptcy Court for the District of Delaware, 2009) As a practical reality, however, when a wholly owned subsidiary is solvent, only the parent has standing to bring a typical claim for breach of fiduciary duties: Murray, "Latchkey corporations", supra note 52 at 597.

[64] Murray, "Latchkey corporations", supra note 52 at 603.

[65] Ibid at 605.

[66] Ibid at 607-608.

41. In light of the increasing importance of enterprise groups in the conduct of modern global commerce, the Working Group may wish to consider whether it can offer some guidance in this area by including the issue of the obligations of directors of enterprise group members within the period approaching insolvency in its current work. If so, the Working Group may wish to consider how best to include this topic. In its deliberations, the Working Group may also wish to consider whether it would be of assistance to recall the approach taken in respect of avoidance provisions among enterprise group members in recommendation 217 of Part three of the UNCITRAL Legislative Guide on Insolvency Law (Treatment of enterprise groups in insolvency).

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I. 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 (Insolvency Law) (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 three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. At its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The Working Group continued its discussion of topics (a) and (b) at its fortieth session in 2011 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.99, 100 and 101), at its forty-first session in 2012 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.103 and Add.1, 104 and 105), and at its forty-second session in 2012 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.107 and 108).

4. At its forty-third session in June 2010, the Commission discussed a proposal to study the feasibility of developing an international instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, para. 5). It was agreed that the Secretariat should prepare a comprehensive report on all or any number of the issues set forth in the proposal. At its forty-second session in 2012, the Working Group first considered this topic on the basis of a note prepared by the Secretariat (A/CN.9/WG.V/WP.109). The deliberations and conclusions of the Working Group on this topic are included in the report of that session (A/CN.9/763, paras. 95-96).

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its forty-third session in New York from 15-19 April 2013. The session was attended by representatives of the following States members of the Working Group: Argentina, Brazil, Canada, Chile, China, Colombia, Croatia, Czech Republic, El Salvador, France, Germany, India, Israel, Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Spain,

Thailand, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America.

6. The session was attended by observers from the following States: Denmark, Dominican Republic, Guatemala, Hungary, Indonesia, Kuwait, Lithuania, Nicaragua, Oman, Poland, Qatar and Switzerland.

7. The session was attended by the following non-member States: Holy See.

8. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: World Bank;

(b) *Invited inter-governmental organizations*: Islamic Development Bank (IDB);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), Inter-American Bar Association (IABA), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Sra. Maria del Pilar Escobar Pacas (El Salvador)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.111);

(b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.112);

(c) A note by the Secretariat on directors' obligations in the period approaching insolvency (A/CN.9/WG.V/WP.113);

(d) A note by the Secretariat on the centre of main interests in the context of an enterprise group (A/CN.9/WG.V/WP.114); and

(e) A note by the Secretariat on directors' obligations in the period approaching insolvency in the context of enterprise groups (A/CN.9/WG.V/WP.115).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda, noting that there was no report on insolvency of large and complex financial institutions.

4. Consideration of (a) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; (c) the centre of main interests in the context of an enterprise group; and (d) directors' obligations in the period approaching insolvency in the context of enterprise groups.

5. Noting of the updates to the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

6. Other business, including future work.

7. Adoption of the report.

III. Deliberations and decisions

12. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; (c) the centre of main interests in the context of an enterprise group; and (d) directors' obligations in the period approaching insolvency in the context of enterprise groups, on the basis of documents A/CN.9/WG.V/WP.112, A/CN.9/WG.V/WP.113, A/CN.9/WG.V/WP.114 and A/CN.9/WG.V/WP.115. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests

13. The Working Group started its discussion of the draft revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency as contained in document A/CN.9/WG.V/WP.112.

A. Purpose and origin of the Model Law

14. The Working Group agreed that the words "('enacting States')" in the second sentence should be deleted on the basis that the footnote in paragraph 3(a) explained the use of the words "enacting State". It was also agreed that the last sentence of paragraph 2 should be revised as follows: "By adopting legislation based upon the Model Law, States recognize that certain laws relating to insolvency may have to be or might have been amended in order to meet internationally recognized standards."

15. It was further agreed that with respect to the closing words of the second sentence of the chapeau of paragraph 3, the phrase "a certain level of harmonization" should be replaced with the phrase "and promote a uniform approach to cross-border insolvency."

16. With those amendments, the Working Group adopted the substance of paragraphs 1, 2, 3, 3A, 18, 4, 5, 6 and 7 as drafted.

B. Purpose of the Guide to Enactment and Interpretation

17. The Working Group adopted the substance of paragraphs 9 and 10 as drafted.

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

18. The Working Group adopted the substance of paragraphs 20 and 21 as drafted.

D. Main features of the Model Law

19. It was suggested that under the heading "Cooperation and coordination", reference should be made to cooperation in and coordination of insolvency proceedings in the context of enterprise groups. Noting paragraph 9 of the introduction to A/CN.9/WG.V/WP.112, the Working Group agreed to revert to this issue when it had completed its consideration of the draft text (see para. 52 below).

20. The Working Group adopted the substance of paragraphs 49A to 49D, 37A to 37H, 32, and 33A to 33G as drafted.

E. Article-by-article remarks

Preamble

21. The Working Group adopted the substance of paragraph 54 as drafted.

Use of the term "insolvency"

22. The Working Group considered a proposal to insert the following sentence at the end of paragraph 51: "Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a), of the Model Law only if the debtor is insolvent or in severe financial distress." In association with that proposal it was noted that the footnote to paragraph 23B provided an explanation of the term "winding up". After discussion, the Working Group approved that proposal. In the course of its discussion, the Working Group noted the need to ensure consistent use of the phrase "insolvency or severe financial distress" throughout the text. With that amendment, the Working Group adopted the substance of paragraph 51.

23. A related proposal, which did not receive sufficient support, was to revise the last sentence of paragraph 24B to delete the words "that does not seek to restructure the financial affairs of the entity, but rather" to ensure consistency with paragraph 51 as revised.

24. The Working Group adopted the substance of paragraph 51A as drafted.

"State"

25. The Working Group adopted the substance of paragraph 56 as drafted.

Chapter I. General provisions — articles 1-8

Article 1. Scope of application

26. The Working Group adopted the substance of paragraphs 59 and 65 as drafted.

Article 2. Definitions

Subparagraphs (a) to (f)

27. The Working Group agreed that the phrase "or possessed" should be inserted after the phrase "a foreign proceeding possesses" in the final sentence of paragraph 23.

28. With that amendment, the Working Group adopted the substance of paragraphs 68, 68A, 71, 72, 23 to 23C, 24 to 24G, 70, 31 to 31C, and 73 to 75B as drafted.

Article 3

29. The Working Group adopted the substance of paragraph 78 as drafted.

Articles 5 and 8

30. The Working Group adopted the substance of paragraphs 84 and 91 as drafted.

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

Articles 9 to 12

31. The Working Group adopted the substance of paragraphs 93, 96, 98, and 101 to 102 as drafted.

Chapter III. Recognition of a foreign proceeding and relief

Article 15

32. The Working Group agreed to replace the word "fast" in the second sentence of paragraph 112 with the word "expedited". With that amendment, the Working Group adopted the substance of paragraphs 112, 119 and 120 as drafted.

Article 16. Presumptions concerning recognition

Paragraph 1

33. The Working Group adopted the substance of paragraphs 122 to 122B as drafted.

Paragraph 3

34. In respect of paragraph 123B, the Working Group agreed to replace the words "is likely to be" with the words "may be at" in the second sentence.

35. The Working Group considered several proposals to revise paragraph 123C to clarify that the court continued to have an obligation to determine independently the location of the debtor's centre of main interests irrespective of whether or not there was a challenge to it being located at the place of registration. After discussion, there was insufficient support in the Working Group to adopt any of the proposals.

36. The Working Group adopted the substance of paragraph 123A to 123C as drafted.

Centre of main interests

37. The Working Group agreed to delete the word "always" in the fifth sentence of paragraph 123D. It was further agreed to delete in the penultimate sentence the words "Where it is uncertain that the debtor's place of registration is its centre of main interests" and replace them with the words "In those circumstances". With those amendments, the Working Group adopted the substance of paragraph 123D.

Factors relevant to the determination of centre of main interests

38. The Working Group agreed that the second sentence of paragraph 123F should be redrafted as follows: "The factors are the location: (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors." It was also agreed to add the words "as readily ascertainable by creditors" to the end of the final sentence of paragraph 123G.

39. With those amendments, the Working Group adopted the substance of paragraphs 123F, 123G and 123I as drafted.

Movement of centre of main interests

40. Having considered a proposal to delete paragraphs 123K and M, the Working Group agreed that they should be retained and adopted the substance of those paragraphs as drafted. The Working Group further considered footnote 22 to paragraph 123K and agreed that the second sentence should end after the words "third parties", deleting both the words "or undertaken as the result of insider exploitation or biased motivation" and the square brackets around the footnote.

Article 17. Decision to recognize a foreign proceeding

Paragraph 1

41. The Working Group adopted the substance of paragraphs 124 to 124C as drafted.

Paragraph 2

Date at which to determine centre of main interests and establishment

42. The Working Group adopted the substance of paragraphs 128A to D as drafted.

Abuse of process

43. The Working Group adopted the substance of paragraphs 123J and 123L as drafted.

Paragraphs 3 to 4

44. The Working Group adopted the substance of paragraphs 125 to 131 as drafted.

Article 18. Subsequent information

Subparagraphs (a) and (b)

45. The Working Group adopted the substance of paragraphs 133 and 134 as drafted.

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

Paragraphs 1 to 4

46. The substance of paragraphs 135 to 140 was adopted as drafted.

Article 20. Effects of recognition of a foreign main proceeding

47. The Working Group adopted the substance of paragraphs 141, 143, 144 to 146, 149, and 151 to 153 as drafted.

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

48. The Working Group adopted the substance of paragraphs 154, 156, 158 and 160 was adopted as drafted.

Article 22. Protection of creditors and other interested persons

49. The Working Group adopted the substance of paragraphs 162 to 164 as drafted.

Article 23. Actions to avoid acts detrimental to creditors

50. The substance of paragraphs 165 to 167 was adopted as drafted.

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

51. The Working Group adopted the substance of paragraph 170 as drafted.

Chapter IV. Cooperation with foreign courts and foreign representatives

52. The Working Group adopted the substance of paragraphs 173A, 181, 183 and 183A as drafted, with the addition of the following text to the footnote to paragraph 183A: "The Model Law applies to individual debtors whether corporate or natural. Part three of the Legislative Guide on Insolvency Law, however, addresses the treatment of enterprise groups in insolvency and recommendations 240 to 254 focus on cooperation and communication to facilitate the conduct of cross-border insolvency proceedings where they concern members of an enterprise group." In support of that addition, it was noted that notwithstanding that the Model Law does not specifically apply to enterprise groups, the footnote should be included to draw attention to UNCITRAL's work on enterprise groups (see para. 19 above).

Chapter V. Concurrent proceedings

53. The Working Group adopted the substance of paragraphs 184 to 186, 187A, 188 and 197 as drafted.

F. Assistance from the UNCITRAL Secretariat

54. The Working Group adopted the substance of paragraphs 201 and 202 as drafted.

V. Directors' obligations in the period approaching insolvency

55. The Working Group resumed its consideration of the topic of directors' obligations in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.113, focusing in the first instance on the draft recommendations.

A. Draft recommendations

Recommendations 1 and 2 — The obligations

Purpose of legislative provisions

56. The Working Group adopted the substance of the purpose clause for draft recommendations 1 and 2 as drafted.

Contents of legislative provisions

57. It was proposed that the sequence of the recommendations be adjusted by placing recommendation 1 after recommendations 3 and 4 in order to avoid the need for the cross-references in recommendation 1, but that proposal was not taken up. The Working Group adopted the substance of draft recommendation 1 as drafted, with the deletion of the square brackets around the phrase "[accordance with]" and retention of the text.

58. The Working Group agreed to revise the phrase "not committing the company to enter into the types of transaction" to "not committing the company to the types of transaction" in subparagraph (a) of draft recommendation 2.

59. The Working Group agreed to revise the opening words of subparagraph (b) of draft recommendation 2 as follows: "Commencing or requesting the commencement of" in place of "Commencing" and to delete the words "where it is appropriate to do so or where it is required by national law" at the end of the sentence.

60. With those amendments, the Working Group adopted the substance of draft recommendations 1 and 2 as drafted.

Recommendation 3 — The time at which the obligation arises

Purpose of legislative provisions

61. The Working Group agreed to revise "the obligations should arise" to "the obligations arise" at the end of purpose clause and to remove the square brackets.

With those amendments, the Working Group adopted the substance of the purpose clause as drafted.

Contents of legislative provisions

62. The Working Group adopted the substance of draft recommendation 3 as drafted.

Recommendation 4 — Persons that owe the obligations

Purpose of legislative provisions

63. The Working Group agreed to revise the phrase "identify the persons to whom the obligations should apply" to "identify the persons owing the obligations in recommendation 1" at the end of the purpose clause and to remove the square brackets. With those amendments, the Working Group adopted the substance of the purpose clause as drafted.

Contents of legislative provisions

64. The Working Group agreed to revise the phrase "the persons who owes the obligations" to "the persons owing the obligations in recommendation 1". With that amendment, the Working Group adopted the substance of draft recommendation 4 as drafted.

Recommendation 5 and 6 — Liability

Purpose of legislative provisions

65. The Working Group adopted the substance of the purpose clause as drafted, deleting the square brackets around the text.

Contents of legislative provisions

66. The Working Group adopted the substance of draft recommendation 5 as drafted.

67. A proposal to merge draft recommendations 5 and 6 by adding the words "but only to the extent to which the breach caused loss or damage" to the end of draft recommendation 5 and deleting draft recommendation 6 did not receive sufficient support. The Working Group was of the view that the current drafting was clearer and that it was more appropriate to deal with the two issues addressed by the draft recommendations separately. The Working Group agreed to delete the square brackets and the word "for" and to retain the words "arising from" without the square brackets. With those amendments, the Working Group adopted draft recommendation 6 as drafted.

Recommendations 7 to 11

68. A proposal to relocate draft recommendation 7 (together with paragraphs 31 to 47 of the commentary) to section D on liability was supported on the basis that it addressed liability as opposed to the enforcement of the directors' liabilities. As a consequence, it was further agreed that the purpose clause for recommendations 5 and 6 should be adjusted to add a new subparagraph (b) along the following lines:

"to identify defences to an allegation of breach of the obligations" and to renumber the current subparagraph (b) as subparagraph (c). It was also agreed that the heading to section E of the commentary should be renamed "Enforcement of directors' liabilities".

Purpose of legislative provisions

69. The Working Group agreed to revise the opening phrase of the purpose clause from "enforcement of the obligations" to "enforcement of directors' liabilities" and to delete the square brackets. With that amendment, the Working Group adopted the substance of the purpose clause as drafted.

Recommendation 7 — Elements of liability and defences

Contents of legislative provisions

70. The Working Group adopted the substance of draft recommendation 7 as drafted.

Recommendation 8 — Remedies

Contents of legislative provisions

71. The Working Group agreed to delete the phrase "[as compensation for that breach]". Reservations were expressed with respect to the second sentence, particularly as to its potential operation as a disincentive to directors to make loans to companies in the period approaching insolvency in order to stave off insolvency and after commencement of insolvency proceedings to facilitate reorganization and in terms of its relationship to recommendation 100 of the Legislative Guide. After considerable discussion, the Working Group approved draft recommendation 8 with the deletion of the second sentence.

Recommendation 9 — Conduct of actions for breach of the obligation

Contents of legislative provisions

72. The Working Group adopted the substance of draft recommendation 9 as drafted.

Recommendation 10 and 11 — Funding of actions for the breach of obligation

Contents of legislative provisions

73. The Working Group adopted the substance of draft recommendations 10 and 11 as drafted.

Recommendation 12 — Additional measures

Contents of legislative provisions

74. The Working Group recalled its discussion of the draft recommendation at its previous session. Various concerns were expressed as to the appropriateness of including the draft recommendation on the basis that it could not properly be considered part of the law relating to insolvency, but belonged instead in corporate or criminal laws, and that it could operate as a disincentive for directors to remain

on the boards of financially distressed companies to assist with their reorganization. A different view was that draft recommendation 12 sought to extend to the corporate bankruptcy context the sorts of measures that were available in a number of jurisdictions in the context of natural person insolvency regimes and that, in any event, the draft recommendation was merely permissive and intended not to punish but rather to encourage appropriate behaviour. After discussion, the Working Group agreed to retain the word "compensation", deleting the square brackets, and to delete "[damages]". With that amendment, the Working Group adopted the substance of draft recommendation 12 as drafted.

Proposal for an additional recommendation

75. The Working Group heard a proposal concerning the specification of prerequisites for commencing an action against a director for breach of the obligations in draft recommendation 1. The proposal was designed to address the issue arising in some States where actions against directors unnecessarily delayed the closure of insolvency proceedings. The prerequisites proposed were to require the person seeking to commence an action against a director to demonstrate that the director in question possessed sufficient assets to satisfy any eventual judgement and that there be a reasonable probability of success on the merits in order to justify provisional measures to ensure preservation of the director's assets. The Working Group noted that while this was an important issue in some States, in many States the commencement of such actions did not delay the closure of insolvency proceedings and the duty of care of the insolvency representative would in any event require an analysis of the likelihood of success of such an action for the benefit of the estate. Whilst there was insufficient support for including a new recommendation along the lines proposed, the Working Group agreed that the issue could be addressed in the commentary (see para. 99 below).

B. Draft commentary

Introduction and purpose of this [part]

76. The Working Group adopted the following revision of paragraph 1:

> "This [part] focuses on the obligations that might be imposed upon those responsible for making decisions with respect to management of an enterprise when that enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which are enforceable once insolvency proceedings commence, is to protect the legitimate interests of creditors and other stakeholders and provide incentives for timely action to minimize the effects of financial distress experienced by the enterprise. The constitution of a board of directors is an important factor in addressing these issues. Where a company has independent directors, who do not own a significant proportion of the equity and who do not represent equity-owners, such directors may not have access to information to the same extent that it is known or available to inside directors. Liability may vary between independent and inside directors depending on the factual situation."

77. The Working Group agreed to move the final three sentences of the text of paragraph 1 as adopted above to the end of paragraph 35.

78. The Working Group agreed to delete the square brackets around paragraph 2 and adopted the text as drafted.

1. Background

79. The Working Group adopted paragraphs 1 to 15 as drafted, including removing the square brackets around the text in paragraph 2 and retaining the text.

2. Elements of directors' obligations in the period approaching insolvency

The nature of the obligations

80. The Working Group adopted paragraphs 16 to 18 as drafted.

81. With the deletion of the opening phrase, "Except under those laws that require directors to report or make formal declarations," the Working Group adopted paragraph 19 as drafted.

82. The Working Group adopted paragraph 20 with the following changes:

(a) Retention of the text and deletion of the square brackets in subparagraphs (d), (f) and (j);

(b) Replacement of the words "also taking" with "take" in the second sentence of subparagraph (g); and

(c) Replacement of the words "One example" with "Examples" in the second sentence of the footnote to subparagraph (h).

83. The Working Group agreed to delete the square brackets in paragraphs 21 and 21A and to adopt both paragraphs as drafted.

When the obligations arise: the period approaching insolvency

84. The Working Group adopted paragraphs 22, 23 and 24 as drafted.

85. The Working Group agreed to retain the second sentence of paragraph 25, deleting the square brackets, and to revise the fifth sentence as follows: "Essentially, the standard requires a director's judgement to be assessed against the knowledge that a reasonably competent director should or ought to have had in the circumstances." With those amendments, the Working Group adopted paragraphs 25 as drafted.

86. The Working Group adopted a new paragraph 25A as follows: "The recommendations do not preclude States from imposing liabilities on directors that might be enforceable outside insolvency proceedings when, due to the lack of assets to cover the costs of proceedings, the commencement of insolvency proceedings is denied."

Identifying the parties who owe the obligations

87. The Working Group agreed to delete the footnote to paragraph 26. With that amendment, the Working Group adopted the substance of paragraphs 26 to 29 as drafted.

Liability

88. The Working Group adopted the substance of paragraphs 30 and 31 as drafted.

89. The Working Group agreed to delete the last sentence of paragraph 32, and adopted the remainder of paragraph 32 as drafted.

90. The Working Group agreed to retain the second and third sentences, deleting the square brackets, and adopted the substance of paragraph 33 as drafted.

91. The Working Group agreed to delete the first sentence of paragraph 34 and to replace the phrase "Laws adopting this approach" at the beginning of the second sentence with "Other laws". The Working Group further agreed to add the phrase "where directors fail to obtain or to study management accounts;" before the phrase "where directors neglect the proper financial administration of the company", and to revise the following phrases to read "where they neglect to take preventative measures against clearly foreseeable risks; or where bad personnel management by the directors leads to unrest and strikes." With those amendments, the Working Group adopted the substance of paragraph 34 as drafted.

92. The Working Group agreed to remove the square brackets around paragraph 35 and to replace the first sentence with the following: "Determining whether a particular director has breached their obligations involves consideration of the facts regarding the conduct of that director leading up to the commencement of insolvency proceedings with respect to the debtor." The Working Group noted that it had agreed earlier in the session (see para. 77 above) to move the final three sentences of the text of paragraph 1 to the end of paragraph 35.

93. With those amendments, the Working Group adopted the substance of paragraph 35.

94. The Working Group removed the square brackets from paragraph 36 and adopted its substance as drafted.

Enforcement of the directors' liabilities

95. The Working Group agreed to retain the text and delete the square brackets in paragraph 41, and with that amendment adopted the substance of paragraphs 37 to 41 as drafted.

96. The Working Group agreed to retain the words "A number of" without the square brackets and to delete "[Many]" in paragraphs 42 and 47; to delete the last sentence of paragraph 43; and to delete the square brackets around the second sentence of paragraph 48. With those amendments the Working Group adopted the substance of paragraphs 42 to 48.

97. The Working Group agreed to delete the words "in some circumstances" in the second sentence of paragraph 51 and to delete the square brackets around the third sentence in the same paragraph. With those amendments, the Working Group adopted the substance of paragraphs 49 to 51.

98. The Working Group agreed to replace the second sentence of paragraph 52 with: "Depending upon the applicable law relating to insolvency, an action against a director, if authorized, may be brought by the insolvency representative for the benefit of the insolvency estate. If permitted by the law relating to insolvency, an

action against a director may be brought by a creditor for the benefit of the insolvency estate if the action is not brought by the insolvency representative. In some States and subject to the law relating to insolvency, an action against a director may be brought by a creditor for its own benefit. All such actions will be on the basis that the conduct being examined occurred in the vicinity of insolvency." With that amendment, the Working Group adopted the substance of paragraphs 52 to 54.

99. The Working Group agreed to replace paragraph 55 with the following: "An action against the directors for breach of their obligations can be a significant asset of the insolvency estate and increase returns to creditors. However, in many jurisdictions, the pendency of such an action prevents the closure of an insolvency proceeding and the final distribution of proceeds. Therefore, it is desirable that the insolvency representative, before commencing an action against a director, considers the likelihood of success of that proceeding as well as other circumstances such as the ability of the director to respond to an award of damages, the scope of insurance coverage available to the director, and the effect of the litigation on the duration of the insolvency proceedings."

100. The Working Group agreed to delete the brackets around the second sentence of paragraph 57 and to revise the fourth sentence as follows: "Where the cause of action is pursued by a party other than the insolvency representative in the collective interests of creditors, the costs of commencing such a proceeding might be recovered from any compensation paid." With those amendments, the Working Group adopted the substance of paragraphs 56 and 57.

VI. Finalization of the work on centre of main interests and directors' obligations

101. After five sessions (between December 2010 and April 2013) of extensive study, analysis and deliberation, the Working Group advises the Commission that it has completed the substance of its work on those parts of its current mandate relating to: (a) revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency with respect to selected aspects of the centre of main interests and (b) directors' obligations in the period approaching insolvency (as set forth in documents A/CN.9/WG.V/WP.112 and 113, respectively). With respect to the work on topic (b), the Working Group recommends that this text be adopted as Part four of the Legislative Guide on Insolvency Law.

102. The Working Group requested the Secretariat to circulate the two draft texts to States and international organizations for information and comment, noting that, although desirable, it may not be possible to translate for the information of the Commission any comments received.

VII. The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective

103. The Working Group noted the updates prepared by the Secretariat in consultation with experts on The UNCITRAL Model Law on Cross-Border

Insolvency: The Judicial Perspective in conformance with the decision of the Commission in 2011 adopting that text. The Working Group expressed its appreciation and support for the work updating the Judicial Perspective to ensure its continuing currency and noted the usefulness of the text to judges, as well as for the dissemination of information on best practices beyond States that have enacted the Model Law.

VIII. Implementing remaining aspects of the Working Group's current mandate

104. The Working Group recalled the discussion at its forty-second session of two issues raised by the Commission at its forty-fifth session relating to whether the Working Group's mandate on centre of main interests covered issues relating to enterprise groups and if so when the Working Group should handle this topic. In relation to the scope of the mandate on centre of main interests, the Working Group had noted that it was necessary to look at issues of centre of main interests as it related to enterprise groups because most commercial activity was currently conducted through enterprise groups. The Working Group had also noted the description of the mandate contained in paragraph 10 of document A/CN.9/WG.V/WP.107 and that, as originally worded, it was intended to cover centre of main interests in the context of enterprise groups.

105. The Working Group further recalled that it had agreed that that topic should be handled upon completion of the current revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests of individual debtors. With respect to issues relating to directors of enterprise group members, the Working Group recalled it had agreed that although the topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, the possibility of further work should be given serious consideration. The Working Group had agreed that once it had completed its consideration of the recommendations and related commentary on directors' liabilities, it could consider whether to address the issues that might be relevant in the context of enterprise groups. To facilitate those deliberations, the Secretariat had been requested to provide further information, particularly as to different national approaches and solutions that might inform the discussion in the Working Group.

106. Having completed its work on those two topics, the Working Group turned its attention to enterprise groups and documents A/CN.9/WG.V/WP.114 and 115, together with the part of its mandate relating to the possible development of 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]

107. The Working Group had a general discussion of the issues raised with respect to enterprise groups and of the issues relating to the remaining part of the mandate granted by the Commission.

[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.

108. After discussion, the Working Group agreed that it had not yet completed its work on implementing the mandate received from the Commission and that there were pending issues to be addressed before the mandate was exhausted. The Working Group also acknowledged that it was not yet clear how that part of the mandate could best be pursued. The Working Group heard a proposal to hold a colloquium to examine how and by what type of instrument that remaining part of the mandate might be addressed, as well as to identify possible topics for future work. The Working Group agreed that such a colloquium could be useful; however, the suggestion that it should take the place of the Working Group sessions necessary to complete the mandate granted by the Commission did not attract sufficient support. Several delegations suggested that Commission approval should be sought for any future projects but that view did not attract sufficient support.

109. In addition to the topics relating to the remainder of the mandate, the following topics for possible future work were mentioned, acknowledging that a further mandate for such topics would have to be sought from the Commission: private international law rules applicable in insolvency proceedings, especially as they relate to enterprise groups; the effectiveness of current instruments in the light of the global financial crisis, in particular, the provisions of the legislative guide relating to financial contracts; the relevance of the model law on cross-border insolvency to the resolution of financial institutions; and enforcement of substantive rights and claims in a cross-border insolvency context.

IX. Other business

110. The following additions were made with respect to paragraphs 17 and 18 of document A/CN.9/WG.V/WP.115:

(a) At the end of footnote 23, the phrase "which regulates corporations"; and

(b) At the end of paragraph 18, the sentence: "However, different provisions may apply to other companies under civil law."