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REPORT OF THE WORKING GROUP ON INSOLVENCY LAW ON THE WORK OF ITS NINETEENTH SESSION (New York, 1 - 12 April 1996)

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I. INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995) on the development of a legal instrument relating to cross-border insolvency[1].

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", held in New York in conjunction with the twenty-fifth session of the Commission, from 18 to 22 May 1992 [2]. The Commission decided at its twenty-sixth session to pursue those suggestions further [3]. Subsequently, in order to assess the desirability and feasibility of work in this area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders [4].

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at the current stage, have the limited but useful goal of facilitating judicial cooperation, and court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "judicial cooperation" and "access and recognition"). It was also suggested that an international meeting of judges should take place specifically to elicit their views as to work by the Commission in this area. Those suggestions were received favourably by the Commission at its twenty-seventh session[5].

4. Subsequently, the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency was held at Toronto on 22 and 23 March 1995 [6]. The purpose of the Judicial Colloquium was to obtain for the Commission, as it embarked on work on cross-border insolvency, the views of judges and of government officials concerned with insolvency legislation, on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of access and

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[1] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 382-393.

[2] The proceedings of the Congress are published in document A/CN.9/SER.D/1, United Nations publication Sales No. E.94.V.14.

[3] Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 302-306. The background note on which the Commission based its discussion is contained in document A/CN.9/378/Add.4.

[4] The report on the Colloquium is found in United Nations document A/CN.9/398; the proceedings of the Colloquium are published in International Insolvency Review, 1995, Vol. 4.

[5] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 215-222.

[6] The report of the Judicial Colloquium is found in document A/CN.9/413.

recognition. The consensus view at the Judicial Colloquium was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, and to include in the text to be prepared provisions on access and recognition. In taking note of the views expressed at the Judicial Colloquium, the Commission noted that the Working Group would examine a range of matters raised at the Judicial Colloquium relating to the possible scope, approaches and effects of the legal text to be prepared.

5. The Working Group commenced that examination at its previous session, held at Vienna from 30 October to 10 November 1995 [7], which included consideration of draft provisions on various issues including definitions of certain terms, rules on recognition of foreign proceedings, effects of recognition, modalities of court access for foreign insolvency representatives and judicial cooperation in the context of concurrent proceedings. At the end of that session, the Working Group requested the Secretariat to prepare for the present session of the Working Group draft provisions on judicial cooperation and access and recognition, taking into account the views and suggestions expressed at that session.

6. The Working Group, which was composed of all States members of the Commission, held the present session in New York from 1 to 12 April 1996. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Botswana, Bulgaria, Chile, China, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Poland, Russian Federation, Saudi Arabia, Singapore, Slovak Republic, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

7. The session was attended by observers from the following States: Benin, Burundi, Canada, Colombia, Croatia, Czech Republic, Estonia, Lebanon, Morocco, Myanmar, Namibia, Netherlands, Republic of Korea, South Africa, Swaziland, Sweden, Switzerland and Ukraine.

8. The session was also attended by observers from the following international organizations: Cairo Regional Centre for International Commercial Arbitration, European Insolvency Practitioners Association (EIPA), International Association of Insolvency Practitioners (INSOL), International Bar Association (IBA), International Chamber of Commerce (ICC), International Women's Insolvency and Restructuring Confederation, and Union Internationale des Avocats.

9. The Working Group elected the following officers:

Chairman: Ms. Kathryn Sabo (Canada)

Rapporteur: Mr. Ricardo Sandoval (Chile).

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.V/WP.43); and a note by the Secretariat containing draft legislative provisions on judicial cooperation and access and recognition in cases of cross-border insolvency (A/CN.9/WG.V/WP.44), which served as the basis for the Working Group's deliberations.

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[7] The report of the preceding session of the Working Group is found in document A/CN.9/419.

11. The Working Group adopted the following provisional agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Cross-border insolvency.

4. Other business.

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

12. The Working Group considered a set of draft legislative provisions on judicial cooperation and access and recognition in cases of cross-border insolvency presented in the note prepared by the Secretariat (A/CN.9/WG.V/WP.44).

13. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.44, it established an informal drafting group to revise the draft legislative provisions, reflecting the deliberations and decisions that had taken place. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth in chapter III below.

III. DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

A. General remarks

14. Prior to a detailed consideration of the draft articles, the Working Group exchanged remarks of a general character, commencing with the question of the form of the instrument being prepared.

15. It was noted that the draft text before the Working Group was in the form of model legislative provisions. Such a form had been presented by the Secretariat as a working assumption, and would not preclude an eventual decision to transform the text into a draft convention. Considerations cited in favour of model legislation centred on the desire for flexibility in the text in view of differing approaches in national law and varied forms of cooperation and coordination in cross-border insolvencies. Also cited were the difficulties experienced in efforts to formulate and adopt multilateral conventions in this field.

16. At the same time, the Working Group was urged not to forsake the possibility of in the end adopting the text in the form of a draft convention. It was suggested that such a possibility was enhanced in the case of the text being prepared because it dealt essentially with procedural matters and contained provisions capable of being set forth in a convention. The Working Group agreed to return at a later stage to the question of the form of the instrument.

B. Consideration of draft provisions

Title

17. The Working Group commenced its reading of the draft by considering the title, which was denominated in terms of "model legislative provisions", rather than "model law". This, it was noted, was to foresee that the provisions might be incorporated into existing national insolvency statutes as a sort of "upgrade" to deal with cross-border insolvencies, rather than being enacted as a free-standing law.

Preamble

18. The text of the preamble as considered by the Working Group read as follows:

"WHEREAS the [Government] [Parliament] of the enacting State considers it desirable to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) fair and efficient administration of insolvencies that protects the interests of creditors from the enacting State, as well as the interests of foreign creditors;

(b) maximizing the value of the insolvent debtor's estate in the event of insolvency proceedings;

(c) facilitating the rescue of financially troubled though viable businesses, thereby protecting investment and preserving employment;

(d) encouraging and providing a predictable environment for trade and investment in the enacting State; and

(e) furthering cooperation between the courts and other competent authorities of States affected by cases of cross-border insolvency,

Be it therefore enacted as follows."

19. Support was expressed for including a preamble. It was said that such a recital of the basic purposes of the text would be a useful tool for interpreting and applying the text.

20. It was suggested that subparagraph (a) should refer simply to the protection of the "interests of creditors", rather than referring separately to domestic and to foreign creditors. The concern was that a bifurcated reference might inadvertently suggest discrimination between those two categories of creditors.

21. Beyond that, the view was expressed that subparagraph (a), which referred only to protecting the interests of creditors, might be unduly narrowly drawn, as there might be a variety of other parties interested in the administration of a cross-border insolvency.

22. Suggestions for possible additions to the preamble included references to: "non-discrimination" on the basis of nationality of creditors; in subparagraph (b), the obtaining of information about the debtor's estate; and protection of assets as one of the objectives of the provisions.

23. Subsequently, the drafting group established by the Working Group submitted the following revised version of the preamble for consideration at a later session:

> "WHEREAS the [Government] [Parliament] of the enacting State considers it desirable to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
>
> (a) Fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested parties;
>
> (b) Facilitating the gathering of information about the debtor's assets and affairs, and protecting and maximizing the value of the debtor's assets for the purposes of administering a cross-border insolvency;
>
> (c) Facilitating the rescue of financially troubled though viable businesses, thereby protecting investment and preserving employment;
>
> (d) Encouraging and providing a predictable environment for trade and investment in the enacting State; and
>
> (e) Furthering cooperation between the courts and other competent authorities of States affected by cases of cross-border insolvency,
>
> Be it therefore enacted as follows."

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

24. The Working Group engaged in a discussion of the scope of application of the model legislative provisions based on the following draft article:

> "This [Law] [Section] applies to insolvencies in which:
>
> (a) a foreign proceeding has been commenced and recognition of that proceeding, and [enforcement of an order, or some other form of] assistance or relief, is sought on behalf of that proceeding in the enacting State;
>
> (b) insolvency proceedings are taking place in the enacting State and the court seeks assistance on behalf of those proceedings from a foreign court or competent authority; or
>
> (c) insolvency proceedings with respect to a debtor are taking place concurrently in the enacting State and in one or more other States."

25. The Working Group noted that draft article 1 was intended to bring within the scope of the text three types of cases with a cross-border character: cases in which a proceeding had been opened in a foreign State and assistance was sought in the enacting State; those in which a proceeding had been opened in the enacting State and assistance was sought from a foreign court or competent authority; and those in which concurrent proceedings were taking place in the enacting and in one or more other States.

26. The necessity of including a provision along the lines of subparagraph (b) was questioned. In response, it was pointed out that subparagraph (b) was merely intended to authorize the courts of the enacting State to seek assistance abroad with respect to insolvency proceedings in the enacting State, which was a question not adequately covered in some national laws. After deliberation, there was general agreement in the Working Group that reference to the situations mentioned in draft article 1 should be retained.

27. In addition, the Working Group noted that an additional case with overtones of internationality was alluded to in draft article 17, which referred to the presence of foreign creditors and to the principle of national treatment of creditors, including access of foreign creditors to opening of insolvency proceedings in the enacting State. It was suggested that that case also should be referred to in draft article 1.

28. With regard to the location of draft article 1, the suggestion was made that, from a structural point of view, it would be more appropriate to place it after the provision setting forth definitions. In response, it was stated that there was merit in stating the scope of application in general terms before describing it in more detail in the definitions.

29. It was observed that, while the main aim of the text was the recognition of foreign proceedings, "recognition" was mentioned only in subparagraph (a). It was therefore suggested that the principle of recognition of foreign proceedings should be stressed more explicitly in draft article 1.

30. The use interchangeably of terms such as "insolvency", "insolvencies" and "insolvency proceedings" was questioned. It was observed that such terms were not universally understood and might introduce uncertainty. It was suggested to refer instead to "situations" in which assistance could be sought. Another suggestion was to include a definition of the term "insolvency proceeding" sufficiently broad to encompass all proceedings in respect of which assistance might be sought. The text could then refer to proceedings opened in the enacting State as "domestic", and to proceedings opened in any other State as "foreign". (Concerning the proposal to include a definition of "insolvency proceeding", see also paras. 46 and 47).

31. In response, it was stated that the main aim of the text was to establish a legal regime ensuring recognition of foreign proceedings. In addition, it was stated that, while a definition of "foreign proceeding" would be needed, the term referring to "domestic proceedings" would not need to be defined, since the text would rest in the national insolvency legislation. Moreover, it was pointed out that adding a definition of the term referring to "domestic proceedings" could risk inconsistency with national law or create the misimpression that the text aimed at substantive unification of insolvency cases.

32. With regard to the exact formulation of draft article 1, a number of suggestions were made. One suggestion was that the bracketed words in subparagraph (a) referring to the enforcement of an order were redundant, as this was one form of "assistance or relief". Another suggestion was that subparagraph (a) should be refined so as to refer, instead of to assistance "sought on behalf of" a proceeding, to assistance sought "with respect to" a proceeding, or to assistance sought "by a court or a foreign representative". Yet another suggestion was that subparagraphs (a) and (b) should be aligned so as to refer to "assistance or relief" being sought by a court or a foreign representative. It was noted in response to that suggestion that an allusion to a court seeking "relief" might have to be considered further, as courts might more appropriately be considered to seek "assistance".

33. After deliberation, the Working Group found the substance of draft article 1 to be generally acceptable and referred the suggestions made as to its exact formulation to the drafting group. Subsequently, the drafting group submitted the following revised version of article 1 for consideration by the Working Group at a later session:

"Article 1. Scope of application

This [Law] [Section] applies where:

(a) A foreign proceeding has been commenced and recognition of that proceeding and assistance of the court or a foreign representative in that proceeding is sought in the enacting State; or

(b) A proceeding is taking place in the enacting State under [insert names of applicable laws of the enacting State relating to insolvency] and assistance with respect to that proceeding is sought from a foreign court; or

(c) A foreign proceeding and a proceeding in the enacting State in respect of the same debtor under [insert names of applicable laws of the enacting State relating to insolvency] are taking place concurrently."

Article 2. Definitions and rules of interpretation

34. The Working Group considered a number of definitions and rules of interpretation based on the following draft article:

"For the purposes of this Law,

(a) "Administrator" means a person or body appointed by a court [or by statutory authority] in the enacting State who is authorized to reorganize the debtor's assets or affairs, or to liquidate the debtor's assets, in the context or reorganization of liquidation proceedings initiated under the laws of the enacting State, including the implementation of any measures that may be ordered pursuant to this Law;

(b) [...] "debtor" includes [an insolvent] legal [or natural] person who has the status of an insolvent in a foreign proceeding, [but not including debtors whose debts were [apparently] incurred [predominantly] for personal, family or household use rather than for

commercial purposes];

(c) "Foreign proceeding" means a collective judicial or administrative proceeding[, whether voluntary or compulsory,] pursuant to an insolvency law[, or to another law relating to insolvency,] in a foreign country in which assets and affairs of the debtor are subject to control or supervision by a court, by an official authority or by a competent person under the supervision of a court or official authority, for the purpose of reorganization or liquidation;

(d) "Foreign representative" means a person or body appointed in a foreign proceeding, who is authorized by statute, court or other competent authority to reorganize the debtor's assets or affairs, or to liquidate the debtor's assets;

(e) "Opening of foreign proceedings" refers to the initiation of the proceedings, whether or not an order or judgement opening the proceedings is final;

(f) "Reorganization" refers to proceedings in which rights of creditors and the obligations of debtors are adjusted[, including by way of composition];

(g) "Rights in rem" refers to rights of disposal over assets to obtain satisfaction from the proceeds or income of the assets or to an exclusive right to have a claim met, including by way of liens, mortgages or assignments of claims by way of guarantee, [reservation of title arrangements], rights to the beneficial use of assets [and creditor rights to setoff of mutual claims]."

Subparagraph (a) ("Administrator")

35. It was observed in the first place that this, and the other definitions in draft article 2, should be phrased as much as possible in functional terms rather than by utilizing terms which might have particular and diverging definitions in national laws. To that end, it was suggested that a term other than "administrator" might be used, such as "official person". Another suggestion was that, in order for the definition of "administrator" to be sufficiently broad, reference should be made to insolvency proceedings in general, rather than to reorganization or liquidation proceedings. A suggestion along those lines was that the matter should be left to national law, for example, by leaving in subparagraph (a) a blank space for the enacting State to fill in the term or terms used in the enacting State.

36. It was suggested that the reference to "statutory" authority, which appeared within square brackets, should be deleted, since in many countries there was no need to refer to a statute for the authority of the administrator. The Working Group was urged, however, to add a reference to appointment by a "competent authority".

37. Another suggestion was that subparagraph (a) should state that the administrator was appointed to "facilitate" reorganization and to "undertake" liquidation, rather than, directly by him or herself, to reorganize or to liquidate the debtor's assets or affairs. This was because the administrator acted at the behest of the courts and on behalf of bodies of creditors. It was also suggested that a definition of the term "administrator" should focus on the common characteristics of the relevant proceedings in the context of which the administrator was appointed, namely: the

collective nature of the proceedings; appointment by a court or other competent authority; and powers with respect to reorganization of the debtor's assets or affairs or to liquidation of the debtor's assets. In that regard, it was suggested that the terms "reorganization" and "liquidation" should be defined in the text for the sake of clarity.

38. A consideration cited in several interventions was that the definition of the term "administrator" should parallel the definition of the term "foreign representative", in order to avoid granting to foreign representatives more powers than those given to locally appointed administrators. In that connection, a note of caution was struck in order to ensure that recognition of a foreign representative would not preclude a court in the enacting State from recognizing more than one foreign representative.

39. Having considered the various drafting suggestions and attendant questions raised, the Working Group took the position that it would not be advisable or necessary to include in the text a definition of the term "administrator". This was felt to be so in particular since the main purpose of the model provisions was recognition of foreign proceedings and it would then be sufficient to define the notion of "foreign representative". Such an approach would avoid the risk of unnecessarily contradicting or superimposing new definitions on existing terms and notions of the "administrator" in national laws.

Subparagraph (b) ("debtor")

40. There was general agreement that both legal and natural persons should be envisaged as debtors. The Working Group then considered the question of possible exclusions from the definition.

41. The first such exclusion concerned "consumer insolvencies", an exclusion for which a text was presented in subparagraph (b). The formulation of the exclusion was questioned, as well as the very need to retain the exclusion. Factors cited in favour of deleting an exclusion of consumer insolvencies included: the relatively low economic significance of such insolvencies in the cross-border context; the lack of necessity of excluding that particular type of insolvency in a text merely establishing flexible mechanisms for cooperation; and that the matter of such an exclusion could be left more appropriately to national law. Were an exclusion of consumer insolvencies to be retained, it was proposed to phrase it along the lines of "debts incurred in the normal course of business".

42. Another category of possible exclusions concerned insolvencies of credit, financial or insurance institutions. The Working Group noted that in various States insolvencies of such institutions were administered under special regulatory regimes that might not be fully susceptible to application of the text being prepared (e.g., draft article 9 referring to notification of creditors, application of which might be inappropriate in insolvencies of such institutions in which prompt and discrete action may be required to avoid massive withdrawals of deposits).

43. In response, it was pointed out that the enacting State would wish that insolvency proceedings in such cases, although conducted under a regulatory regime, would nevertheless be accorded recognition. It was pointed out that a possible approach in national law might be to treat the foreign insolvency proceedings involving a credit institution as an ordinary insolvency proceeding for recognition purposes if the branch or activity of the foreign credit institution in the enacting State did not fall under the national regulatory scheme.

44. With regard to exclusions of types of debtors from the scope of the model provisions, the Working Group hesitated to encourage broad resort to a "public policy" exception, in lieu of expressly referring in the text to specific exclusions. It was generally agreed that wide resort to "public policy" exceptions should be discouraged. Exclusions from the notion of "debtor" would best be left, it was agreed, to national law, including, it was noted, the important role in this context of the originating jurisdiction.

45. The prevailing view, however, was that subparagraph (b) was not necessary and should be deleted. It was generally felt that the determination of whether an insolvency proceeding could be recognized on the basis of the nature of the debtor should be left to national law or, to the extent necessary, perhaps dealt with in the definition of the term "foreign proceeding".

Subparagraph (c) ("foreign proceeding")

46. In the discussion at the current session the suggestion was made to define a general notion of "insolvency proceedings" without focusing on foreign proceedings. Reference would then be made, depending upon the context, either to "domestic" or to "foreign proceedings". It was suggested that such an approach would establish a common ground or a "mirror image" among States as to proceedings covered by the model provisions. It was also said to have the advantage of making clear which types of proceedings under its own law the enacting State was subjecting to the model provisions. A further advantage of the "mirror image" approach was that it would limit possible conflicts and inconsistencies between relief awarded upon recognition of a foreign proceeding, and relief available under a local proceeding in the enacting State.

47. The prevailing view was that a definition of "insolvency proceedings" as such was not necessary. Since the main aim of the model provisions was the recognition of foreign proceedings, it was decided to focus on the definition of "foreign proceeding".

48. As to the formulation of the definition of "foreign proceeding", support was expressed for the basic elements of the definition, namely, insolvency in a broad sense covering liquidation and reorganization, a collective character involving representation of the mass of creditors, and official sanction.

49. A number of suggestions of a drafting nature were made, including that: the reference to "voluntary or compulsory" proceedings was superfluous since both those types of proceedings were implicit in the term "collective proceeding", though retention of that reference was supported as providing greater clarity; the words "a law relating to insolvency" were sufficiently broad so as to encompass insolvency rules irrespective of the type of statute in which they might be contained and therefore should be the formulation retained; the term "debtor" should be replaced by a functional, neutral term; the term "competent authority" should replace the term "official authority", or the term "court" could be defined to include various types of competent authorities, though the practicality of the latter approach was questioned; reference could be made to the debtor's "estate" instead of to "assets and affairs" of the debtor, though it was pointed out that such a formulation might unnecessarily restrict the foreign representative from seeking to obtain information with regard to matters outside the "estate" of the debtor; and to add words along the lines of "unless the context otherwise indicates" in order to allow some flexibility in tailoring the meaning of "foreign proceeding" to fit particular circumstances.

50. After deliberation, the Working Group approved the substance of subparagraph (c) and referred the drafting suggestions to the drafting group.

Subparagraph (d) ("foreign representative")

51. The question was raised whether the definition was intended to encompass a "debtor in possession" appearing as the "foreign representative". The view was expressed that encompassing such a notion of "foreign representative" might be problematic for some States. In response, it was recalled that at the previous session the Working Group had agreed to adopt an inclusive approach, thereby not excluding the debtor-in-possession scenario, which represented an important procedure for handling insolvencies in some States. It was also suggested that the matter would be less problematic than it might appear at first sight, since in a broad range of insolvency proceedings the debtor retained some measure of possession or control.

52. It was suggested to ensure that subparagraph (d) encompassed a foreign representative who had an "interim" appointment, rather than encompassing only those with a full appointment for the purposes of reorganization or liquidation. It was agreed that the definition was intended to encompass such "interim" office-holders in foreign collective proceedings.

53. Other refinements suggested included: to address more specifically the question of the powers of the foreign representative, namely, to control and supervise; to take into account that the constituency that the foreign representative represented might vary from case to case (e.g., the debtor; creditor bodies); to clarify the reference to statutory appointment authority by referring to the representative as one whose powers were possibly authorized by statute; and, in line with an earlier suggestion, to refer to the foreign representative as "facilitating" reorganization or "undertaking" litigation (see para. 37).

54. After deliberation, the Working Group approved the substance of subparagraph (d) and referred the drafting suggestions to the drafting group.

Subparagraph (e) ("opening of foreign proceedings")

55. The Working Group noted that the definition was intended to have broad scope, covering not only proceedings commenced compulsorily, but also those initiated voluntarily. It was said that in some cases this might include proceedings for which merely application had been made, and would in any case have to envisage provisional or preliminary relief.

56. The question was raised as to whether the text should be linked to at least some minimal preliminary action of a court in the commencement of the foreign proceedings. In response, it was stated that an early point of reference could on a practical level be crucial to preventing the rapid dissipation of assets against the interests of all creditors.

57. It was suggested that the definition might be made clearer as to its coverage. This clarification could touch on the notion of "initiation", which was said to be uncertain; an alternative formulation, "whether or not the proceedings have been finalized", for the second part of the definition; and use of a phrase along the lines of "when the order opening the proceedings becomes effective, whether final or not".

58. Several interventions questioned the need for a definition of "opening of foreign proceedings". It was suggested that determining a sufficient point of initiation for a proceeding would not engender significant difficulty in practice, and it would not be advisable to attempt a general rule in the face of diversity in national approaches. The Working Group agreed to return, after further review of the model provisions, to the question of the possible deletion of subparagraph (e), meanwhile placing the provision within square brackets.

Subparagraph (f) ("reorganization")

59. The Working Group recalled that, pursuant to the discussion at the previous session, the definition had been added in order to make it clear that the text encompassed proceedings settled by "composition" arrangements.

60. A number of modifications were proposed to the draft text, for example: the use of the notion of "adjustment" was questioned, and one of "settlement" of debts was proposed in its stead; the suggestion to refer, in addition to the elements already in the definition, to the negative criterion of absence of liquidation of assets; and the suggestion of emphasis on the aspect of the stay of creditor action involved in reorganizations.

61. Upon further scrutiny, the Working Group came to the view that it would not be necessary to include a definition along the lines proposed. An alternative solution suggested was to add greater clarity to the expression "reorganization" where it happened to be utilized, in particular in the definition of "foreign proceeding" (subparagraph (c)).

Subparagraph (g) ("rights in rem")

62. Various interventions alluded to the number and diverse treatment in national laws of notions of "rights in rem". The view was expressed that an attempt at a relatively simple, abbreviated general definition along the lines of the draft text was unlikely to be satisfactory or feasible. The view was also expressed that it would be appropriate to include a conflict of laws rule on the question of rights in rem. It was also pointed out that the question of rights in rem raised the question of indefeasible rights, whose applicability was strictly mandatory and fell outside the system of conflict rules.

63. As to the content of the draft definition, in response to the question put to the Working Group in the text, the inclusion of some of the elements, in particular the reference to setoff, was questioned as beyond the rubric of rights in rem.

64. Upon deliberation, the view was generally held that defining "rights in rem" was not necessary and would better be left to the national legislation. To the extent necessary, appropriate reference to rights in rem could be made in the text of the model provisions (e.g., exceptions to stay granted upon recognitions (draft article 7 (1) (a) (i)). In view of the above, the Working Group agreed to the deletion of subparagraph (g).

65. Subsequently, the drafting group submitted the following revised version of article 2 for consideration at a later session:

"Article 2. Definitions

'Foreign proceeding' means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court or other competent authority, for the purpose of reorganization or liquidation.

'Foreign representative' means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

Article 3. International obligations of the enacting State

66. The text of the draft article as considered by the Working Group read as follows:

"To the extent that this Law conflicts with an obligation of the enacting State under or arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail; but in all other respects the provisions of this Law apply."

67. The Working Group considered questions raised as to the need for article 3. Those questions were based on the widespread existence in laws at the national level of rules concerning the hierarchy of treaty and other national legislative enactments. However, despite a possible lack of final decision as to the exact placement of the provision, the Working Group decided to retain article 3 in substance. It was said to be useful because it would draw the attention of enacting States to the need for clarity on the relationship of treaty obligations to the model legislative provisions.

Article 4. Competent [court][authority] for recognition of foreign proceedings

68. The text of the draft article as considered by the Working Group read as follows:

"The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by ... [Each State enacting these model provisions specifies the court, courts or authority competent to perform the functions in the enacting State]".

69. The Working Group found the substance of article 4 to be generally acceptable.

Article 5. Authorization for administrators to act extraterritorially

70. The draft article as considered by the Working Group read as follows:

"An administrator appointed [in insolvency proceedings] in the enacting State is authorized to act [as foreign representative of those proceedings] [to take such steps as are necessary extraterritorially for the purposes of reorganizing the debtor's assets or affairs, or to liquidate the debtor's assets] in accordance with the orders of the court."

71. Some questions were directed as to whether it was necessary or appropriate to include a provision along the lines of article 5. For example, it was suggested that, at least as currently formulated, the provision might be read as attempting to directly confer on locally appointed administrators the power to take action in foreign jurisdictions.

72. In response, the Working Group expressed its general understanding that article 5 was merely intended to give authority to locally appointed administrators to petition foreign courts for assistance in accordance with the law of the foreign court. The scope and exercise of power abroad would depend upon the foreign law and courts. Article 5, it was noted, was not intended to grant powers to the locally appointed administrator to take actions, including actions such as repatriation of assets, without authorization of the local court.

73. As to the utility of a provision along the lines of article 5, it was reported to the Working Group that such a provision would help to fill a gap found in some national laws, and would generally be in line with the aim of facilitating cooperation and coordination.

74. After deliberation, the Working Group was of the view that article 5 should be retained, and referred it to the drafting group for possible clarification of its intended scope and purpose. Subsequently, the drafting group submitted the following revised version of article 2 for consideration at a later session:

"Article 5. Authorization to act as a foreign representative

A [insert title of person or body who may be appointed to administer a liquidation or reorganization under the law of the enacting State] is authorized to seek foreign recognition of the proceeding in which he has been appointed and to exercise such powers as to the foreign assets or affairs of the debtor as the applicable foreign law may permit."

CHAPTER II. RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS

75. The view was expressed that the provisions of articles 12 and 13, contained in chapter IV, could be relocated to precede chapter II. The rationale behind such a rearrangement would be to reflect more appropriately the typical order of events taking place with respect to an application for recognition of a foreign proceeding.

Article 6. Recognition of foreign insolvency proceedings

76. The text of the draft article as considered by the Working Group read as follows:

"(1) For the purposes of this Law, a foreign judgement opening insolvency proceedings shall be recognized [from the time that it becomes effective in the State of the opening of proceedings],

"VARIANT A

unless it is shown that there was no substantial connection between the foreign jurisdiction and the debtor.

"VARIANT B

if the judgement emanates from a competent court or authority. A court or authority shall be deemed competent if that court or authority has jurisdiction based on any of the following criteria:

(a) domicile or habitual residence of the debtor;

(b) seat or place of registered office;

(c) [principal place of business] [centre of debtor's main interests];

(d) location of assets.

"VARIANT C

if the foreign proceeding originates from a court or competent authority in a State [appearing on the following list: ...] [certified for purposes of recognition of insolvency by [name of appropriate entity or officer in enacting State].]

"(2) Notwithstanding paragraph (1), a court [may] [shall] refuse to recognize the opening of foreign insolvency proceedings [, to enforce a judgement emanating from such proceedings]

[, or to grant other forms of relief under this Law,] where the effects of such recognition, enforcement or relief would be manifestly contrary to public policy."

77. The Working Group decided to undertake its consideration of article 6 after completion of the discussion at the current stage of article 7 (see below, paras. 94-119). After having completed that discussion, it returned to article 6.

78. It was noted that the word "insolvency" would be deleted in the title of chapter II, as well as in the title of article 6, in line with the terminology used elsewhere in the text.

Paragraph (1)

79. The Working Group noted that paragraph (1) presented several options as to a rule to be followed by the courts of the enacting State in determining whether to accord recognition to a foreign proceeding. The Working Group paused to consider the necessity of including such a provision, in view of the fact that the model provisions were meant to open as wide a door to cooperation as would be appropriate, while at the same time not prejudicing the rights of local creditors under the insolvency laws of the enacting State. The Working Group affirmed the utility of article 6, which could play an important part in the provisions designed to secure an opportunity for foreign representatives to seek cooperation and assistance in the enacting State.

80. While some support was expressed for variant A, the predominant inclination in the Working Group was to follow an approach based on variant B. At the same time, it was acknowledged that selecting variant B would not preclude the possibility of offering, as an additional option for States, variant C. Inclusion of a variant C style provision by the enacting State would provide automaticity of recognition for foreign proceedings emanating from a jurisdiction in a prescribed list of States determined by the enacting State.

81. As to the content of a provision based on variant B, a number of suggestions were made so as to enable the courts of the enacting State to have a better and more predictable idea of how they should react to an application for recognition.

82. In the first place, and in view of the decision to distinguish in article 7 (relief available upon recognition) between foreign main and foreign non-main proceedings, the Working Group agreed that such a distinction would have to be reflected also in article 6. It was suggested to the Working Group that, aside from linking the rule on recognition to whether the foreign proceeding was a main or a non-main proceeding, it might be useful to predicate the rule on recognition in some way on the range of effects that would flow from recognition. Another suggestion was that possible additional factors might be added to the list set forth in variant B of paragraph (1).

83. It was also noted that consideration might be given to limiting paragraph (1), for the purposes of recognition of a foreign proceeding as a main proceeding, to one or the other of the factors listed. It was said that such a limitation would be necessary to avoid placing the courts in

the enacting State in the position of dealing with multiple claims for recognition as a foreign main proceeding.

Paragraph (2)

84. There was broad agreement as to the advisability of providing for exceptions to the recognition rules that would take into account public policy considerations in the enacting State. However, the Working Group was receptive to a suggestion that the placement of paragraph (2) might inadvertently suggest that the public policy exception referred essentially to the recognition decision itself, rather than also to individual effects of recognition.

85. The Working Group affirmed that the provision on public policy should be applicable to both aspects, and directed the drafting group to reconsider the placement of the rule in paragraph (2).

86. Upon completion of the first round of consideration of article 6, the Working Group referred it to the drafting group with a view to taking into account the above deliberations. The drafting group subsequently submitted the following revised version of article 6 to the Working Group:

"(1) For the purposes of this Law, a foreign proceeding shall be recognized:

(a) as a foreign main proceeding if the court of the foreign proceeding has jurisdiction based on the:

(i) domicile or habitual residence of the debtor;

(ii) seat or place of registered office of the debtor; or

(iii) [principal place of business of the debtor] [centre of the debtor's main interests];

or

(b) as a [non-main] foreign proceeding if the debtor had an establishment [within the meaning of article ___] in the foreign jurisdiction.

[(c) If recognition is sought in respect of more than one foreign proceeding, the court [shall] [may] designate one such proceeding as the foreign main proceeding.]

"(2) The court shall grant or refuse an application for recognition of a foreign main proceeding within ___ days after the application has been filed with the court."

87. It was widely felt that the revised version of article 6 represented an improvement in the direction of the observations made in the earlier round of discussion. The Working Group endorsed the distinction drawn between foreign main and foreign non-main proceedings. Beyond that, several further modifications and improvements were considered.

88. A concern that was emphasized was that the revised version of paragraph (1) raised the spectre of recognition of more than one foreign main proceeding. It was suggested that such a possibility would place courts in an untenable position and would detract from the acceptability of the model provisions. The attempt to equip the court to deal with such a case, by including in subparagraph (c) the authorization to select one of several competing foreign proceedings as the main proceeding, was not regarded as an adequate solution.

89. The Working Group acknowledged the concern about possibly giving rise to recognition of more than one foreign proceeding as "main", and, upon further consideration, agreed that paragraph (1)(a) should be modified to refer to one factor as a competency test for recognition of a foreign main proceeding. It was agreed that that factor should be the "centre of the debtor's main interests".

90. Advantages cited in favour of the selection of that particular factor included that it would encompass as debtors both legal and natural persons, and that it would be in harmony with the approach and terminology utilized in the European Union (EU) Convention. The latter aspect would enable to draft model provisions to contribute to the development of a standardized and widely understood terminology, rather than inadvertently contributing to an undesirable diversification of terminology.

91. It was suggested, in order to add further specificity to the rule, to establish a rebuttable presumption that the registered seat of the debtor was the centre of its main interests.

92. The Working Group then considered whether subparagraph (c), which authorized the designation of one of several foreign proceedings as a foreign main proceeding, should be retained even though there would now only be one factor relevant to the identification of a foreign proceeding as main. It was suggested that retaining the provision would enable the court to deal with cases in which additional information might be received in connection with an application for recognition made subsequently to an earlier recognition of a foreign proceeding as main, and that would cause the court to retract the earlier recognition as one of a main proceeding. It was suggested that such flexibility would be helpful. However, though subparagraph (c) did receive some support, there was wide hesitation with regard to retaining it, as the provision might create more uncertainty than it would possibly dispel.

93. The Working Group also chose not to include in the model provisions a chronological rule to the effect that the first foreign proceeding in time to apply for recognition, or that the first foreign proceeding to have been opened, would have priority to a designation as the "main" proceeding.

Article 7. Relief available upon recognition of foreign proceeding

94. The draft article as considered by the Working Group read as follows:

"(1) For the purposes of providing assistance to a foreign proceeding, recognition of a foreign proceeding by a competent court

(a) operates as a stay,

(i) against the commencement or continuation in the enacting State of judicial, administrative or private actions against the debtor or its assets, except

OPTION I

collective proceedings for liquidation or reorganization in the enacting State

OPTION II

[, subject to paragraph (2),] proceedings for the enforcement of [secured creditor claims] [rights in rem], [seizures of assets that have already been obtained prior to recognition of the foreign proceeding],

OPTION III

proceedings for the purposes of police or regulatory enforcement,

and

(ii) against the transfer of any interests in assets by the debtor, except transfers [made in the ordinary course of business] [or] [for the purposes of completion of open financial market transactions];

(b) authorizes the foreign representative to obtain a court order compelling testimony or the delivery of information in written or other form by the debtor or others concerning the acts, conduct, assets and liabilities of the debtor;

(c) authorizes [the court to issue an order permitting] the foreign representative to take custody and management of assets of the debtor, [subject to] [with the exception of assets encumbered by] rights in rem [and subject to exclusion of [personal][family] property exempt from insolvency administration under the laws of the enacting State];

(d) authorizes the foreign representative to intervene in collective proceedings for liquidation or reorganization in the enacting State;

(e) authorizes the foreign representative to ask the court to grant such other appropriate relief, including continuation of provisional measures granted pursuant to paragraph (2), as may be available to a liquidator under the law of the jurisdiction in which the foreign proceeding was opened, to the extent that such relief is not prohibited by or inconsistent with the laws of [the enacting State] [, including without limitation actions for voidness, voidability or unenforceability of legal acts detrimental to all creditors [that may be available under the law of the enacting State] [or under the law of the jurisdiction in which the foreign proceeding was opened]], [subject in all cases to:

(i) the procedural requirements of the court, and

(ii) the protection of [local] creditors against undue prejudice or inconvenience];

(f) authorizes the courts of the enacting State to cooperate with the foreign court that opened the foreign proceeding, in accordance with article 11.

"(2) Where it is appropriate to protect assets or the interests of creditors, provisional measures may be granted on the application of a foreign representative. Unless the court or authority otherwise orders, an order for provisional measures shall continue until the application for recognition of the foreign proceedings has been decided by the court.

"(3) The judgement opening foreign proceedings emanating from a State [referred to in article 6(1)(variant C)] in which is located the centre of the debtor's main interests ['main proceedings'], produces the same effects as under the law of the State of the opening of the proceedings [, except ... ,] [and as long as no proceedings referred to in article 18(1)(variant B)(option I) are opened in the enacting State.]"

95. The Working Group noted that the text before it reflected the level of discussion and agreement tentatively achieved at the previous session with regard to the question of the "effects" that would flow from recognition.

96. Under the approach developed at the previous session, certain "minimum" effects would result more or less automatically from recognition. Those included in particular: a stay of individual creditor actions and of transfers by the debtor of interests in assets; management and custody of assets for the foreign representative; authorization of information gathering concerning the assets and affairs of the debtor; and the possibility for the foreign representative to seek from the court additional relief appropriate in the circumstances. Various exceptions, ranging from public policy grounds to exceptions of secured claims from the stay provisions, were included.

97. Differing views were exchanged as to the above tentative framework. One view was that such an approach would work to the disadvantage of creditors in the enacting State, by granting broader powers to the foreign representative to act in the enacting State on behalf of foreign creditors than the power that would be left to the local creditors. It was suggested that simply

staying individual creditor actions could have the effect of preventing local creditors from establishing themselves as creditors, in particular as their claims might be in dispute. For these reasons, the Working Group was urged to limit the relief available upon recognition to the authorization to the foreign representative to petition the court for appropriate relief, along the lines of paragraph (1)(e).

98. In response to that view, it was emphasized that the intent of article 7 was not to accord advantages to any one particular category of creditors, in accordance with one of the basic principles of the draft text, equal treatment of creditors. The Working Group agreed that the stay should not be so broad as to disadvantage local creditors. Reference was also made to the advantages that would accrue to all creditors, both foreign and local, by the enhancement of asset value and the prevention of dissipation of assets possibly provided by the stay.

99. It was also noted that, as understood at the previous session, the provisions were not intended to empower the foreign representative to act directly in the enacting State without the authorization and oversight of the local court. Nor was article 7 intended to provide for automatic repatriation of assets in the event of recognition. Rather, what was envisaged was the creation of a breathing space to permit the possibility of coordinated action to deal with a cross-border insolvency, possibly including steps by the foreign representative to preserve and manage assets.

100. It was further noted that, were the model provisions limited to giving the foreign representative the right to petition a court for relief, this would not represent significant progress beyond the currently prevailing situation. The right to petition a court was already available to the foreign representative in many legal systems and alone had not provided the generally desirable degree of predictability or speedy and efficient action needed for dealing with cross-border insolvency.

101. Various interventions suggested that the stronger effects of recognition referred to in article 7 should be reserved for cases in which the foreign proceeding was a "main" proceeding, i.e., one originating from the jurisdiction in which the debtor was, by way of one or another formulation, headquartered. Such an approach was justified on the grounds that an effect such as a stay of individual creditor action or a freeze on the debtor's transfers of assets was tantamount to the opening of a local insolvency proceeding. Granting a similar degree of relief to a foreign proceeding in which the originating court had jurisdiction merely on the basis of presence of assets was said to be inappropriate as a general rule.

102. With the prevailing view for an approach along the lines of article 7 as described above, the Working Group considered adjustments that might be made to the text to better specify the intended content and scope of the relief envisaged, and to address the concerns raised in earlier interventions.

103. In particular, the Working Group agreed that relief in the nature of an automatic stay of individual creditor action and freezing of transfer of assets should be limited to cases in which the recognized foreign proceeding was a "main" proceeding. There also was broad agreement that the draft text should make it clearer that the stay was in fact limited to individual creditor actions and was, in particular if it were granted as an interim measure, of a provisional character, in the sense that it would lapse unless affirmed or prolonged by the court subsequently.

104. It was noted at the same time that the draft text did not disturb the right that local creditors might have under the law of the enacting State to proceed collectively against the debtor, since collective actions were exempt from the stay. Neither did the provision attempt to deal with questions of distribution of assets or priority of claims. It was also noted that under this approach certain other exemptions could be available as regards the stay, including public policy, secured claims and rights in rem as understood according to the law of the enacting State.

105. The Working Group also noted observations to the effect that the relief accorded upon recognition should not exceed the relief that would result from the commencement of insolvency proceedings in the enacting State, or the powers accruing to a locally appointed administrator. An additional point of reference, which it was said should also not be exceeded, was the extent of the relief available to the foreign representative in the originating jurisdiction. Suggestions for facilitating such an alignment included a formulation that recognition would have the same effects as the opening of a local proceeding. It was said that such an approach might help to limit the need to provide various exceptions.

Subparagraph (a)

106. Beyond the limitation of the stay in subparagraph (a) to foreign main proceedings, agreed by the Working Group as described above, several other modifications of the stay provisions were considered.

107. In order to make it clear that the draft provisions were not intended to have the effect of disadvantaging local creditors, it was suggested that the stay of individual creditor actions should be limited to actions of execution against assets. The Working Group agreed that such a limitation of the stay to actions of execution should be offered as an option. It was also suggested to refer specifically to the preservation of the right of local creditors to file their claims in foreign proceedings.

108. The Working Group also agreed that the reference in subparagraph (ii) to freezing of transfers by the debtor of interests in assets could be expanded to include a freezing of payments by the debtor. It was further agreed that exceptions to the freeze on transfer of assets (e.g., transfers in the "ordinary course of business", such as payment of wages) would be left to the local court. In order to give a reference to the court in determining that question, as well as other questions relating to the details of and exceptions to the stay under subparagraph (a), the Working Group agreed to include an option for enacting States. That approach would determine the scope

and extent of the stay, under one option, in accordance with the law of the enacting State governing such stays. Another option would be to make that determination in accordance with the law of the originating jurisdiction. In such an approach, the treatment of rights in rem might fall within exceptions to the stay that might be available under whichever law was deemed to be applicable to the stay by the enacting State.

109. It was generally felt that an approach along the above lines would be a more effective way of instilling in the stay a sufficient degree of flexibility to allow those payments to continue to be made that would be necessary from the standpoint of the administration of the insolvency, while blocking other payments that might result only in the impoverishment of the estate of the debtor's assets.

110. An alternative approach for determining the scope of the stay, one based on the nature of the foreign proceeding (i.e., liquidation, reorganization and other possible categories), did not attract sufficient support. It was felt to be preferable not to impose on the court of the enacting State the task of attempting to classify foreign proceedings into categories that might not be universally applicable.

Subparagraphs (b), (c) and (e)

111. The Working Group noted that the relief available to the foreign representative pursuant to subparagraphs (b), (c) and (e), by contrast to the relief available pursuant to subparagraph (a), was generally of a somewhat less urgent nature than the stay, and was of a non-mandatory nature in the sense that it was dependent upon an order of the competent court in the enacting State.

112. With respect to subparagraph (c), the Working Group affirmed the requirement of a court order to entitle the foreign representative to take custody and management of assets. It was pointed out that that reference would make it clear that the foreign representative would not take custody and management of assets of the debtor upon mere recognition, and without an order of the court.

113. The Working Group noted that subparagraph (e) authorized the foreign representative to request the court of the enacting State to order other additional relief as might be appropriate in a given case. It was suggested that the reference to the procedural law of the enacting State and to the need to protect the local creditors against undue prejudice or inconvenience, which might also be considered as covered by a general public policy exception available to the court, should be an inherent limitation to all effects of recognition of a foreign proceeding pursuant to draft article 7. At the same time, it was observed that it might not be necessary to refer to those limitations in subparagraph (e) since they were implicit in the general reference to public order in draft article 6 (2).

Subparagraphs (d) and (f)

114. Subparagraphs (d) and (f), it was noted, were enabling provisions respectively giving the foreign representative access to courts in the enacting State in case of a local insolvency proceeding, and empowering the courts of the enacting State to cooperate with the courts in the originating State of a recognized foreign proceeding.

115. The placement of subparagraph (d) was questioned, on the grounds that an intervention of a foreign representative in local collective proceedings could be made independently from a request for recognition and thus was a matter of access of the foreign representative to the courts of the enacting State. That matter could be dealt with more appropriately in Chapter IV, or perhaps, according to another suggestion, in the provision on judicial cooperation. The placement of subparagraph (f) was similarly questioned.

Paragraph (2)

116. There was general support in the Working Group for a provision along the lines of paragraph (2) authorizing the courts of the enacting State to grant provisional measures upon the request of the foreign representative. It was noted that such measures could be crucial to preserve the assets of the debtor until the application for recognition had been decided by the competent court in the enacting State.

Paragraph (3)

117. It was noted that paragraph (3) provided for producing in the enacting State, in the case of recognition of a foreign main proceeding, the same effects as would the opening of an insolvency proceeding under the law of the originating State. Paragraph (3) was widely questioned, in particular since exporting directly the effects of the foreign proceeding would not be widely acceptable for the type of text being prepared. However, such an approach, it was suggested, might be included as an option for States willing to offer to a list of prescribed States direct application of the foreign insolvency law. An alternative paradigm was to determine the effects of recognition of the foreign proceeding in the enacting State according to the effects of an insolvency proceeding under the laws of the enacting State.

118. Subsequently, the following revised version of draft article 7 was placed before the Working Group by the drafting group:

> "(1) (a) From the time of the filing of an application for recognition until recognition has been granted or refused, and where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any of the [types of] relief permitted under paragraph (2);

(b) The court shall order the foreign representative to give such notice as would be required for requests for emergency relief in the enacting State;

(c) Such relief may not extend beyond the date that recognition is granted or denied.

(2) (a) Upon recognition of a foreign main proceeding, the commencement or continuation of individual actions by creditors against [the debtor] [or the debtor's assets] and the transfer of any assets of the debtor are stayed. The stay is subject to any exceptions or limitations which would apply under

OPTION I: any law of the enacting State which would apply to proceedings determined by the court to be comparable to the foreign main proceeding;

OPTION II: the law of the foreign main proceeding [if the foreign main proceeding is taking place in one of the States listed in annex X].

(b) Upon recognition of any foreign proceeding, the court may, upon the request of the foreign representative, grant any appropriate relief including:

(i) staying actions that are not stayed or extending the stay of action under paragraph (2) (a);

(ii) extending relief granted under paragraph (1) to protect the assets of the debtor or interests of creditors;

(iii) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;

(iv) permitting the foreign representative to preserve and manage the assets of the debtor;

(v) granting other relief which may be available under the laws of the State of the foreign proceeding or under the laws of the enacting State, including actions to reverse or render unenforceable legal acts detrimental to all creditors.

(c) The foreign representative shall give notice of recognition within ___ days to all known creditors that have an address in the enacting State.

(d) Any relief under this paragraph shall terminate,

(i) unless extended, within ___ days after recognition; or

(ii) if insolvency proceedings under the law of the enacting State have been commenced and to the extent that the court in such proceedings orders the termination of such relief.

(3) The court may, upon request of the foreign representative in a foreign main proceeding made no earlier than ___ days after recognition, grant turnover of assets to the foreign representative for administration, realization or distribution in the foreign proceeding.

(4) In granting or denying relief under this article, the court must be satisfied that creditors collectively are protected against prejudice and will be given a fair opportunity to assert their claims against the debtor.

(5) The court may at any time, upon request of a person or entity affected by relief granted or requested under this article, deny, modify or terminate such relief, including provisional measures, temporary or preliminary relief."

"Article 7 bis

Notwithstanding article 6, a court shall refuse to recognize a foreign proceeding or to grant relief under this Law where the effects of such recognition or relief would be manifestly contrary to public policy."

119. The Working Group did not have sufficient time to consider the revised version of draft article 7. However, there was a preliminary airing of views. The inclusion of specific deadlines in article 7 was questioned. It was observed that such an approach might raise uncertainty and that, therefore, the use of more general language would be preferable. Another observation was that it might be made clearer which aspects of relief in article 7 were "automatic" upon application for recognition. The appropriateness of paragraphs (1) (a) and (2) (a), and of paragraph (3), was also questioned. A further suggestion was that the text should include as an option for States automatic relief upon application for recognition of a foreign proceeding opened in a country on a prescribed list of countries established by the enacting State.

Article 8. Modification and termination of relief

120. The text of the draft article as considered by the Working Group read as follows:

"The relief granted pursuant to article 6 (1) shall continue in place until modified or terminated by the competent court, [or until it lapses in accordance with the laws of [the enacting State]]."

121. The Working Group decided to defer consideration of whether article 8 would be needed, pending the possible revision of article 7 to include the substance of article 8.

Article 9. Notification of creditors

122. The text of the draft article as considered by the Working Group read as follows:

"[In addition to notification requirements under the laws of the enacting States,] the court may order the foreign representative petitioning for recognition of a foreign proceeding and for relief under article 7 to make such notification as it deems appropriate to creditors."

123. The Working Group decided to defer consideration of whether article 9 would be needed, pending the possible revision of article 7 to deal with issues of notification of creditors.

Article 10. Discharge of obligations to debtor

124. The text of the draft article as considered by the Working Group was as follows:

"(1) Where an obligation has been honoured in the enacting State for the benefit of a debtor who is subject to foreign proceedings recognized in accordance with article 6, when it should have been honoured for the benefit of the foreign representative pursuant to relief provided to the foreign representative upon recognition, the person honouring the obligation shall be deemed to have discharged the obligation if the person was unaware of the foreign proceeding.

(2) Where an obligation referred to in paragraph (1) is honoured before notification in accordance with article 9 is made, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been unaware of the foreign proceeding; where the obligation is honoured after such notification, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the foreign proceeding."

125. Differing views were expressed as to whether it would be advisable to include a provision along the lines of draft article 10. In favour of deletion, it was stated that generally third parties should be discharged by paying the debtor, irrespective of whether they were aware of the foreign proceeding, and that that was an approach followed in many legal systems. Including draft article 10 was also questioned as it seemed to assume a system of automatic recognition and did not distinguish between recognition of foreign main and of foreign non-main proceedings.

126. In addition, it was observed that collection and discharge of debts involved a possibly complicated array of issues raising the possibility of conflicts with applicable law. Those issues included, for example, the question of the jurisdiction in which payment might be due, and possible setoff and netting, which were beyond the scope of the text being prepared. It was

suggested that, to the extent necessary, discharge of debts owed to the debtor could be addressed in the context of effects of recognition granted by courts of the enacting State.

127. A countervailing view was that a rule dealing with the discharge of the obligations to the debtor was useful, to the extent that it would protect, along with draft article 19, the interests of third parties affected by the recognition of foreign proceedings. In order to better achieve that goal, a number of suggestions were made, including: that third parties should not be expected to be aware of the opening of foreign secondary proceedings, but rather only of the recognition of main proceedings; that the rule should only apply to obligations "due in the enacting State"; and that paragraph (2) should be supplemented to deal with the question whether payment made to the debtor despite the fact that the payor was aware of the foreign proceedings discharged the payor. As regards the suggestion referred to above to deal with the question of discharge in draft article 7, it was observed that that article would not be the appropriate location since it dealt with relief available to the foreign representative.

128. After deliberation, the Working Group agreed to reserve its position on draft article 10 until it considered further the revised version of draft article 7 and other parts of the text.

CHAPTER III. JUDICIAL COOPERATION

Article 11. Authorization of judicial cooperation

129. The text of the draft article as considered by the Working Group was as follows:

"(1) The courts of the enacting State and administrators appointed in the enacting State shall cooperate to the maximum extent possible with foreign courts or administrative authorities and foreign representatives of foreign proceedings recognized in accordance with article 5, [taking into account in all cases the procedural requirements of the court and the protection of [local] creditors against undue prejudice or inconvenience].

(2) Cooperation may be implemented by any appropriate means including:

(a) appointment of an administrator or representative to act at the direction of the court;

(b) communication [, by any means deemed appropriate by the court,] of information, and coordination of the administration and supervision of the debtor's assets and affairs, including by approval and implementation by the court of arrangements for the coordination of proceedings in the enacting State with foreign proceedings;

(c) [... the enacting State may wish to list additional forms or examples of cooperation]

(3) The courts of the enacting State may request foreign courts or relevant administrative authorities for assistance in any matter relating to insolvency [proceedings] in the enacting State."

Paragraph (1)

130. It was noted that paragraph (1) was intended generally to establish the principle of judicial cooperation, while paragraph (2) was aimed at giving some guidance, in a non-exhaustive way, as to possible forms of judicial cooperation, and allowing the enacting State to list there additional forms or examples of cooperation.

131. There was general agreement in the Working Group that an enabling provision authorizing the courts or other relevant administrative authorities of the enacting State to extend cooperation to foreign courts in insolvency proceedings was a useful provision and should be retained.

132. It was suggested that the reference to "administrators" in paragraph (1) should be deleted since, even if administrators were called upon to cooperate, they would have to do so under the supervision of the competent court, which was a matter sufficiently covered in paragraph (2) (a). It was also suggested that the relevance of the reference to administrators was not universal, since there might be cases in which no administrator would be appointed. Another suggestion was that an independent reference to cooperation of administrators might inadvertently override the premise that cooperation between administrators should be under the supervision of the courts. It was said that an approach directly mandating cooperation between administrators might be too encompassing, possibly conflicting with rules of the enacting State, for example, in the case of requests for information, with rules concerning protection of privacy in data transfers.

133. The suggestion was also made that the provision should refer to administrators cooperating pursuant to court orders, though the concern was raised that such a formulation might inadvertently suggest that specific court authorization would be required for each cooperative act by an administrator, with the effect of stifling cooperative endeavours of administrators. It was pointed out that an appropriate degree of latitude and initiative of administrators were mainstays of cooperation in practical terms, and should be permitted within the broad confines of judicial supervision.

134. The Working Group, while affirming that cooperation envisaged between administrators would be under the overall supervision of the competent court, noted that cooperation of a court with a foreign representative or cooperation between an administrator in the enacting State and a foreign representative was often necessary to ensure prompt coordinated action in cross-border insolvency cases and should be covered in the text.

135. It was observed generally that various concerns among those that had been raised as to the scope and formulation of draft article 11 could be seen as addressed by the exhortation in the article to cooperate "to the maximum extent possible".

136. Another observation was that the permissive verb "may" should replace the verb "shall", since the latter might have the unintended effect of making cooperation mandatory, without regard to other relevant factors. That suggestion was objected to on the ground that it was important to overcome the problem which existed in many countries, namely, the lack of authority of courts to cooperate with foreign courts or foreign representatives. That aim, it was said, could be better achieved by the use of the verb "shall". In addition, it was pointed out that the combination of the verb "shall" with the words "to the maximum extent possible" provided a sufficient degree of flexibility.

137. Yet another suggestion, which was broadly supported, was that the words "recognized in accordance with article [6]" should be deleted or supplemented by words along the lines of "or whose recognition is sought", since the current formulation might inadvertently result in conditioning any judicial cooperation upon recognition of a foreign proceeding in the enacting State. It was said that the preferable policy would be not to limit cooperation to the post-recognition phase.

138. Regarding the reference at the end of paragraph (1) to protection of "local" creditors, it was agreed that, should a reference to creditors be retained, it should not discriminate among creditors as to their residence. The view was expressed that the entire concluding proviso could be made a separate paragraph in article 11, which could usefully be broadened to refer also to the interested parties and to the policy aims of the model provisions.

Paragraph (2)

139. With regard to the list of forms of cooperation set forth in paragraph (2), it was suggested that further forms might need to be listed either in paragraph (2) or in a guide to enactment of the model legislative provisions. An example that was cited involved questions of trade-marks and patent rights, though that particular example drew a response urging caution in going into detail in paragraph (2).

Paragraph (3)

140. It was noted that that particular provision was an outward-looking element in the model provisions, authorizing the courts of an enacting State to seek assistance from foreign courts. The question was raised whether it was appropriate to include this paragraph in the model provisions, which were substantially focused on the receptivity of the enacting State to requests for cooperation on behalf of foreign proceedings. A concern in this regard was that such a provision might be viewed as infringing on the terrain of other jurisdictions by suggesting that the courts of the enacting State were entitled to obtain such cooperation under the model provisions.

141. The prevailing view, however, was that a provision along the lines of paragraph (3) should be retained. It was recalled that evidence had been presented to the Commission at the Judicial Colloquium that courts in some countries felt that they had insufficient legislative authority to seek cooperation. Paragraph (3), it was noted, would help to fill such gaps in national legislation and neither was it intended to have, nor would it have, the effect of infringing on the prerogatives of foreign jurisdictions.

142. After deliberation, the Working Group referred article 11 for review by the drafting group, including the possible listing of additional examples of cooperation.

143. Subsequently, the drafting group presented the following revised version of draft article 11, as well as a modified title of chapter III, to be considered by the Working Group at a later session:

"CHAPTER III. COOPERATION WITH FOREIGN JURISDICTIONS

Article 11. Authorization of cooperation

(1) The courts of the enacting State, and administrators appointed in the enacting State, shall cooperate to the maximum extent possible with foreign courts or competent authorities and with foreign representatives.

(2) The courts of the enacting State may request information or assistance directly from foreign courts or competent authorities in any matter relating to insolvency proceedings in the enacting State.

(3) (a) Cooperation may be implemented by any appropriate means, including:

(i) appointment of a person to act at the direction of the court;

(ii) communication, by any means deemed appropriate by the court, of information, and coordination of the administration and supervision of the debtor's assets and affairs;

(iii) approval or implementation by courts of arrangements concerning the coordination of proceedings;

(iv) [... the enacting State may wish to list additional forms or examples of cooperation].

(b) Cooperation with foreign courts or competent authorities and foreign representatives shall in all cases be subject to the procedural requirements of the court."

* * *

CHAPTER IV. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS

Article 12. Application for recognition of foreign proceeding

144. The text of the draft article as considered by the Working Group read as follows:

> "A foreign representative may apply for recognition of a foreign proceeding and for provisional and other forms of relief directly in the court referred to in article 4."

145. In response to a question as to the purpose of including the word "directly" in regard to the court access afforded to the foreign representative, the Working Group affirmed that the present formulation was intended to make it clear that the foreign representative was being given direct access to the court competent for deciding applications for recognition of foreign proceedings.

146. The underlying benefit of such direct access was to avoid the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communication that might otherwise have to be used. Such traditional avenues, as had been reported to the Commission, were often inadequate for dealing with the urgent circumstances presented in cross-border insolvencies and for taking expedient action to preserve assets from dissipation.

147. Various suggestions were made aimed at expanding the content of article 12 so as to centralize in one place in the model provisions the different aspects of the access of the foreign representative to the courts of the enacting State. Those suggestions would congregate in article 12 the reference in the original text of article 7(1)(d) to the right of the foreign representative to intervene in collective proceedings in the enacting State, reference to access for the purpose of seeking recognition and reference to access for seeking provisional measures.

148. The Working Group agreed with a suggestion that the right to intervene in proceedings in the enacting State should be broadened to include not only collective proceedings but also individual creditor actions. It was noted that this would facilitate speedy action when necessary to preserve assets.

149. Regarding the foreign representative's right to intervene in local proceedings, the view was expressed that such a right should only be available upon recognition, and not before. A differing view was that the right to intervene should be broadened so as not to be conditioned on recognition. The Working Group acknowledged the possibility that on this point it might be necessary to include an option for enacting States, as some States might take a stricter view than others as to whether recognition should be a precondition to intervention by the foreign representative in various types of local proceedings.

150. The question was raised as to whether a reference in the revised version of article 12 to court access for the purposes of seeking provisional relief would be broadened to refer to any appropriate court in the enacting State, rather than only to the court competent for the recognition decision. It was noted in this regard that the court competent to issue a particular provisional measure (e.g., because of its territorial proximity to assets) might not be the court referred to in article 4 as competent to rule on the request for recognition. It was decided that the diverse possible solutions to this question at the national level might be taken account of by including in the reference to court access for provisional relief an option for enacting States phrased along the lines "[in any appropriate court of the enacting State]".

151. After deliberation, the Working Group referred article 12 to the drafting group in order to consider implementation of various suggestions that had been made. Subsequently, the drafting group submitted the following revised text of article 12 for review by the Working Group at a subsequent session:

"Article 12. Access of foreign representatives to courts

A foreign representative may

(a) at any time directly apply for provisional relief in [any appropriate court of the enacting State];

(b) directly apply for recognition of a foreign proceeding, request relief pursuant to article 7, and seek cooperation in accordance with article 11;

(c) [upon recognition,] intervene in collective or any other proceedings in the enacting State affecting the debtor or its assets."

Article 13. Proof concerning foreign proceeding

152. The draft article as considered by the Working Group read as follows:

"(1) A petition for recognition of a foreign insolvency proceeding shall be submitted to the court accompanied by proof of the opening of the proceeding and of the appointment of the foreign representative. Such proof may be in the form of a certified copy of the decision or decisions opening the foreign proceeding and appointing the foreign representative, or, in the absence of such form of proof, in any other manner required by the court. No legalization or other similar formality is required.

(2) A translation of the documents referred to in paragraph (1) into an official language of the enacting State may be required.

[(3) A foreign proceeding shall be presumed to have been properly opened in the foreign jurisdiction, unless it is proved that there was no substantial connection between the debtor and that jurisdiction.]"

Paragraph (1)

153. The Working Group found draft article 13 to be generally acceptable. Beyond that general view, comments were exchanged as to several aspects of the formulation used. For example, it was suggested that the scope of the provision might be usefully broadened in order to encompass not only petitions for recognition of a foreign proceeding, as in its current formulation, but also other types of requests that the foreign representative might address to the courts of the enacting State, in particular, applications for provisional measures. In that connection, the view was expressed that a foreign representative should be required to seek authorization from the court before which it had filed a petition for recognition, before seeking relief from other courts in the enacting State. That suggestion would allow the "recognizing" court to act as a sort of "traffic policeman".

154. With regard to the requirement for a certified copy of "the decision" opening the foreign proceeding, it was suggested that the use of a more general expression along the lines of "document" or "certificate evidencing" might be preferable, in order to cover cases in which the foreign representative might be appointed, or the proceedings were commenced, without an actual decision or order of the court (e.g., by order of an administrative authority, or by right pursuant to statutory authority (e.g., a debtor-initiated voluntary proceeding)).

155. Doubt was expressed, however, as to whether the use of the term "document" was appropriate, since that term was indicative of the form but not of the content of an act by which an insolvency administrator would be appointed. Hesitation was also expressed as to utilizing the term "order", which might in some jurisdictions have a technical meaning implicating a time-consuming procedure. In support of including a reference to "certificates" evidencing appointment of administrators, it was observed that in certain countries courts had broad discretion to issue such certificates, a practice that had proved to be useful.

156. In the discussion, the suggestion was also made that, in order to enable the court in the enacting State before which a petition or petitions for recognition were pending to determine which proceeding was the main proceeding, the foreign representatives should be required to indicate the nature and jurisdictional basis of the foreign proceeding.

157. In the discussion, the question was raised as to the meaning of the term "legalization". The Working Group affirmed that the negation of "legalization" requirements was meant to avoid time-consuming requirements involving notarial or consular procedures, which were not congruent with the required element of speedy treatment of applications by foreign representatives.

Paragraph (2)

158. A question was raised as to the meaning of the rule that a translation of the petition of the foreign representative "may be required". It was pointed out that the source of such a requirement was unclear, i.e., would it emanate from a court order, some other order, or from a statute. In response, it was suggested that the matter could be left to be determined by the court considering the foreign representative's petition for recognition pursuant to the law of the enacting State. It was also suggested that the reference to an "official" language might be usefully supplemented so as to cover situations in which there might be more than one official language. One possible way of doing this, it was said, was to refer to the "official language of the court".

Paragraph (3)

159. In view of the changes made to draft articles 6 and 7, the Working Group agreed that paragraph (3) was superfluous and should be deleted.

Article 14. Limited appearance

160. The draft article as considered by the Working Group read as follows:

> "An appearance before a court in the enacting State by a foreign representative in connection with a petition or request pursuant to the provisions of this Law does not subject the foreign representative to the jurisdiction of the courts of the enacting State for any other purpose, but a court granting relief to the foreign representative may condition any such relief on compliance by the foreign representative with the orders of the court."

161. The Working Group agreed that draft article 14 was a particularly useful provision for facilitating cooperation and access to recognition and should therefore be retained. It was noted that the provision was intended to be a "safe conduct" rule aimed at ensuring that the court in the enacting State would not assume jurisdiction over the entire debtor's estate on the sole ground of the application for recognition filed with the courts in the enacting State.

162. It was observed that the intent of draft article 14 might not be universally understood as currently formulated. It was observed that in some countries the provision might be read as attempting to preclude the courts in the enacting State from asserting jurisdiction on grounds other than the application for recognition, a result that would conflict with national procedural laws.

163. In view of the above, it was suggested that the matter might be usefully clarified in draft article 14 if words along the lines of "without prejudice to other grounds for jurisdiction" were to be included. A similar suggestion referred to use of words along the lines of "notwithstanding other grounds for jurisdiction".

164. It was suggested that the term "appearance", which was used as a technical term in some jurisdictions, might not be universally understood, and should therefore be replaced by a more general expression along the lines of: "participation in a recognition or similar proceedings does not subject the foreign representative to jurisdiction", or "coming to a court in the enacting State does not expose the foreign representative to jurisdiction for any purpose other than the application for recognition". In that connection, it was observed that the terms "petition", "application" and "appearance" were used interchangeably in the text, and it was suggested that instead one term might be defined and used throughout the text for consistency.

165. It was stated that the matter dealt with in the second part of draft article 14, namely, compliance with the orders of the court as a condition for relief sought by the foreign representative, was a different matter conceptually and should be dealt with in a separate paragraph of the draft article, or in the provision dealing with relief available to the foreign representative (article 7). While that suggestion met with some support, an objection was raised on the ground that the text in question made it clearer that the foreign representative was within the jurisdiction of the court for the purposes of the relief sought. Another suggestion was that the latter part of draft article 14 should be deleted altogether since it might appear to create uncertainty.

166. After deliberation, the Working Group decided to retain the substance of article 14. It also agreed that the matter of compliance of the foreign representative as a condition for relief could be dealt with in draft article 7, while other matters raised in the discussion could be further explained in the guide to enactment of the model provisions to be prepared, or perhaps addressed in a revision of article 14 to be prepared by the Secretariat for the next session.

Article 15. Misdirected applications

167. The draft article as considered by the Working Group read as follows:

> "If a court to which an application for recognition has been made is not the competent court, [the application shall be transmitted forthwith to the competent court] [the court shall direct the foreign representative to the competent court]."

168. The view was expressed that a provision along the lines of draft article 15 might usefully complement draft article 4 specifying the competent court to consider applications for recognition of foreign proceedings, in order to avoid unnecessary delays that might jeopardize the ability of the foreign representative to preserve assets for the benefit of the mass of creditors.

169. However, the prevailing view was that the courts should not be burdened with the obligation to redirect applications that might be addressed to courts lacking jurisdiction to consider them and that courts would likely handle cases of misdirected applications in an appropriate

manner under the circumstances. It was felt that the matter was adequately dealt with in draft article 4, and that it would be appropriate to delete draft article 15.

Article 16. Commencement of insolvency proceedings by foreign representative

170. The draft article as considered by the Working Group read as follows:

> "A foreign representative is entitled to initiate an insolvency proceeding in the enacting State [if the conditions for opening such a proceeding under the laws of the enacting State are met]."

171. It was noted that draft article 16 was intended to supplement the remedies available to the foreign representative pursuant to draft article 12, by granting the foreign representative the right to request the opening of an insolvency proceeding in the enacting State.

172. The Working Group considered the question whether the mere opening of an insolvency proceeding in the originating State should entitle the foreign representative to seek the opening of a local proceeding in the enacting State, without the conditions set by the law of the enacting State for a local insolvency to be opened having necessarily to be met.

173. One view was that an approach based on the principle that the mere opening of an insolvency proceeding in one country should be a sufficient condition for the opening of an insolvency proceeding in another country would be in line with the broad aims of the model provisions to facilitate judicial cooperation in cross-border insolvency cases with a view to preserving the assets of the debtor's estate and maximizing their value for the benefit of the mass of creditors.

174. In the same vein, it was suggested that the foreign representative should be entitled to request the opening of a local proceeding in the enacting State, even before being recognized in the enacting State as a representative of a foreign insolvency proceeding.

175. In that connection, it was observed that in practice foreign representatives seeking to obtain one type of relief would often submit alternative requests. For example, a foreign representative could seek recognition of a foreign proceeding in the enacting State and, in case recognition was not granted, request the opening of a local proceeding.

176. Another view was that draft article 16 was acceptable in its current formulation without further elaboration. In support of that view, it was pointed out that there was no need to accord the foreign representative any special status that would vest in the foreign representative powers additional to those granted to any creditor. In that light, the purpose of the article was to accord the foreign representative the right to petition for commencement of insolvency proceedings in the enacting State, and not to override the local requirements for such a proceeding to take place. The

Working Group agreed with regard to this matter to leave the text along its current lines, including the words within square brackets referring to fulfilment of the local requirements. The Working Group also did not incorporate the view that the right accorded in article 16 should be linked to recognition of the foreign representative.

177. In the discussion, it was observed that the term "initiate" was not sufficiently clear and should be replaced by the term "request" in order to ensure that the thrust of draft article 16 was the right of the foreign representative to petition the opening of local proceedings, which was dependent upon a decision of the competent court or other authority of the enacting State. In addition, it was suggested that, while it might be implicit in the text that the proof requirements set forth in draft article 13 applied to provisional measures as well as requests for the opening of local proceedings, the matter might be usefully clarified in draft article 16.

Article 17. Access of foreign creditors to insolvency proceedings in the enacting State

178. The text of the draft article as considered by the Working Group read as follows:

"(1) Any creditor, whether or not [habitually] resident, domiciled or with a registered office in the enacting State[, including foreign tax authorities and social security authorities,] has the right to commence and file claims in insolvency proceedings in the enacting State, [to the same extent and in the same manner as other creditors of the same priority,] in accordance with the laws of the enacting State.

(2) As soon as insolvency proceedings are opened in the enacting State, the [court][administrator] shall immediately cause notification of the opening of the proceedings to be made to known creditors not [habitually] resident, domiciled or with a registered office in the enacting State. The notification shall provide [a reasonable minimum time] within which such a creditor can file a claim.

(3) The contents of the notification shall [conform to the requirements for such notifications under the laws of the enacting State] [include:

(a) an indication of the time limits and the place for filing of claims, and the sanctions that result from failure to comply with those requirements;

(b) an indication whether secured creditors need to file their secured claims; and

(c) any other information required to be included in notifications to creditors pursuant to the laws of the enacting State and the orders of the court.]"

Paragraph (1)

179. The Working Group noted that the intent of paragraph (1) was to establish a non-discrimination rule as regards treatment afforded in the enacting State to foreign creditors. The view was expressed that the present formulation might perhaps be replaced by a simple statement of that principle, without necessarily delving into the other aspects addressed in the provision.

180. A central question in the discussion was whether paragraph (1) should venture into the question of recognition of claims of foreign tax and social security authorities. Difficulties cited with respect to such an extension of the provision included the resistance that might be encountered in enacting States that would not wish to accord to foreign tax and other authorities status equal to that accorded to local tax and other fiscal authorities. It was suggested that venturing into this area would diminish acceptability of the model legislative provisions.

181. As regards the formulation "foreign tax authorities and social security authorities", it was observed that the use of such specific terms might inadvertently suggest a narrowing of the scope of non-discrimination among creditors, as there might be a host of other types of public authorities with the potential of presenting claims in a cross-border context, but which technically were not tax or social security authorities. It was proposed that a drafting solution to that problem might be to refer in a more general way to "public creditors", to "public claims" or "government claims", or to "claims covered by public law, such as foreign tax claims and social security claims".

182. While some support was expressed for recommending elimination of discrimination against claims of such public authorities, there was a general hesitation in the Working Group to address the matter by way of a general rule in the model provisions. It was noted that the matter might be dealt with to the extent of referring to "any creditor", thus avoiding in the text the preclusion of any particular type of creditor, but leaving it to the enacting State to determine, in accordance with its laws and traditions, which types of foreign creditors would be admitted. Some guidance, it was suggested, might be provided to enacting States in a guide to enactment.

183. An alternative approach aimed at clarifying the limited ambition of the text was expressly to exclude from the ambit of paragraph (1) public claims of the type referred to above, in particular foreign tax and social security claims. However, it was suggested that such an express exclusion might be too broad and unnecessarily handcuff a court that might in one or the other case wish to admit, perhaps on public policy grounds, a public claim deemed essential for the administration of an insolvency.

184. Hesitation was also widely felt with regard to paragraph (1) to the extent that it might be read as attempting to override traditional forms of discrimination found in some national legislation as to the recognition, or lack thereof, of privileges or priorities of foreign creditors. The view was expressed that an attempt to harmonize that aspect would be beyond the border of what would be feasible or desirable as an aim for an instrument in the form of model legislative

provisions rather than a convention. In view of those concerns, the Working Group felt that this also was an area into which the text should not venture.

185. Observations were also made to the effect that the proviso at the end of paragraph (1) ("in accordance with the laws of the enacting State") created a degree of uncertainty with respect to the other aspects and principles embodied in paragraph (1). It was suggested that, in view in particular of the general discussion of paragraph (1) that had taken place, that proviso should be limited to referring clearly to the procedural aspects of commencing proceedings or filing claims.

186. Another question was whether the applicability or effect of paragraph (1) should depend on whether or not insolvency proceedings were taking place in the jurisdictions from which the foreign creditors emanated. More particularly, the question was raised as to the compatibility of granting recognition to a foreign proceeding, with at the same time still allowing creditors from that foreign jurisdiction individually to commence and file claims in insolvency proceedings in the enacting State.

187. The view was expressed that it was not advisable to refer to the "habitual" residence of creditors.

Paragraph (2)

188. Various interventions spoke in favour of somewhat limiting the notification requirement in paragraph (2), which required administrators appointed in the enacting State to notify known foreign creditors of the commencement of insolvency proceedings in the enacting State.

189. It was suggested that the better approach would be, rather than simply to require such notice in every case, to require notice to foreign creditors in cases in which notice would have to be given to local creditors. It was said that such an approach would be in line with the principle of non-discriminatory or "national" treatment of creditors, and would avoid imposing unnecessary notice requirements (e.g., when there were no assets in the estate). Under such an approach the applicability of a notice requirement for foreign creditors would be comparable to that regarding creditors in the enacting State.

Paragraph (3)

190. Paragraph (3) did not elicit specific comments or objections at the current session.

191. Upon completion of its deliberations on article 17, the Working Group requested the Secretariat to prepare a revised version of the article reflecting the discussion that had taken place.

CHAPTER V. CONCURRENT PROCEEDINGS

Article 18. Concurrent proceedings

192. The text of the draft article as considered by the Working Group read as follows:

"VARIANT A

(1) Subject to article 5(1)(e), recognition of a foreign insolvency proceeding does not affect the commencement or continuation of insolvency proceedings under the laws of the enacting State.

VARIANT B

(1) Where an insolvency proceeding has been opened in a foreign jurisdiction in which the debtor has its [main centre of interests] [domicile], the courts of the enacting State

OPTION I

shall have jurisdiction to open insolvency proceedings against the debtor only if the debtor has [an establishment] [or] [assets] in the enacting State[, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of the enacting State.

OPTION II

[may] [shall] limit the scope of authority of an administrator appointed pursuant to proceedings initiated in the enacting State to the assets [and establishment] of the debtor in the territory of the enacting State.

(2) [Recognition of a foreign insolvency proceeding] [A certified copy of a judgement opening a foreign insolvency proceeding] is, for the purposes of initiating proceedings in the enacting State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent.

(3) The administrator and the foreign representative shall cooperate in accordance with the orders of the court and shall promptly communicate to each other any information which might be relevant to the other proceeding, in particular all measures aimed at terminating a proceeding."

Paragraph (1)

193. The initial round of consideration by the Working Group suggested a wide preference for an approach based on variant B and its option I as regards a rule on the effect of recognition of a foreign proceeding on the jurisdiction to open insolvency proceedings in the enacting State. According to that combination, recognition of a foreign main proceeding would restrict the commencement of insolvency proceedings in the enacting State to those cases in which the debtor had an establishment in the enacting State. It was felt that such an approach represented a meaningful and not overly ambitious approach susceptible to acceptance by States.

194. The question was raised whether, within the basic approach favoured by the Working Group, there would be included a reference to recognition as triggering the effect of the rule, rather than the mere opening of foreign proceedings. The view was expressed that reference should not be made to a prerequisite of recognition of a foreign proceeding as a triggering event, but that approach was not favoured by the Working Group. It was felt that a system based on recognition would provide greater certainty and predictability.

195. The widely held view in the Working Group was that recognition of foreign main proceedings would not, under the model provisions, interrupt the continuation of existing proceedings. Mention was made, however, of the possibility of authorizing the court in such a case to terminate or suspend the proceeding. It was suggested that such a provision might be included in article 11 (judicial cooperation).

Paragraph (2)

196. Paragraph (2) was found to be acceptable in substance, subject to its being limited to cases of recognition of a foreign main proceeding.

Paragraph (3)

197. The Working Group found paragraph (3) to be generally acceptable. It asked the Secretariat to consider a suggestion that the provision be moved to article 11.

Article 19. Rate of payment of creditors

198. The text of the draft article as considered by the Working Group read as follows:

> "Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding opened in another State may not participate in a dividend for the same claim in an insolvency proceeding opened with regard to the same debtor in the enacting State, so long as the dividend received by the other

creditors in the proceeding opened in the enacting State is less than the dividend the creditor has already received."

199. The Working Group generally agreed that an attempt should be made to include a provision along the lines of article 19. However, it was agreed that the draft provision needed to be developed further so as to make it clear that the intent was to avoid the situation in which creditors would be paid twice or out of proportion to the rate of payment given to other creditors of the same class.

FUTURE WORK

200. Upon completion of its deliberations at the present session, the Working Group requested the Secretariat to prepare a revised version of the draft model provisions for the next session, which, subject to confirmation by the Commission, was scheduled to take place at Vienna from 7 to 18 October 1996. The Working Group also requested the Secretariat to prepare for that session a first draft of a guide to enactment of the model provisions.