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Report of Working Group V (Insolvency Law) on the work of its fortieth session

(Vienna, 31 October-4 November 2011)

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I. Introduction

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

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The work on topic (c) was completed by the Working Group at its thirty-ninth session and at its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fortieth session in Vienna from 31 October to 4 November 2011. The session was attended by representatives of the following States members of the Working Group: Austria, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Malaysia, Mexico, Nigeria, Norway, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was also attended by observers from the following States: Belgium, Croatia, Denmark, Dominican Republic, Ecuador, Guatemala, Indonesia, Iraq, Lebanon, Panama, Peru, Slovakia, Slovenia, Sudan, Switzerland and Syrian Arab Republic.

6. The session was also attended by observers from Palestine and the European Union.

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank;

(b) *Invited intergovernmental organizations*: the Caribbean Community (CARICOM);

(c) *Invited international non-governmental organizations*: Alumni Association of The Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), Center For International Legal Studies (CILS), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union des Avocats Européens (UAE).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mr. Pedro Enrique Amato (Bolivarian Republic of Venezuela)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.98);

(b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.99);

(c) A note by the Secretariat on Directors' responsibilities and liabilities in insolvency and pre-insolvency cases (A/CN.9/WG.V/WP.100); and

(d) A proposal for a definition of "centre of main interests" (articles 2 (b) and 16 (3) of the UNCITRAL Model Law on Cross-Border Insolvency) by the delegations of Mexico, Spain and the Union Internationale des Avocats (UIA) (A/CN.9/WG.V/WP.101).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of (a) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; and (b) directors' responsibilities and liabilities in insolvency and pre-insolvency cases.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' responsibilities and liabilities in insolvency and pre-insolvency cases,

on the basis of documents A/CN.9/WG.V/WP.99, A/CN.9/WG.V/WP.100 and A/CN.9/WG.V/WP.101 and other documents referred to therein. The deliberations and decisions of the Working Group on these topics are reflected below.

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

12. The Working Group commenced its session with a general discussion of the form its work on selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") in relation to centre of main interests (COMI) might take by reference to the issues raised in paragraphs 4-5 of document A/CN.9/WG.V/WP.99.

13. The Working Group confirmed that the purpose of the work was not to change the Model Law, but rather to provide more guidance to assist those responsible for its use and application and to facilitate its wider adoption. For that purpose, the Working Group agreed that, as a working assumption, the focus should be upon revising and enriching the guidance provided in the Guide to Enactment.

A. Proceedings qualifying for recognition under the Model Law: article 2

1. Requirement for insolvency of the debtor

14. The relevance of the preamble to the Model Law to this question was emphasized, in particular paragraph (e), as well as the references already included in the Guide to Enactment to the severe financial distress or insolvency of the debtor. It was suggested that those requirements could be given greater emphasis to ensure clarity as to the scope of the Model Law. It was noted that the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) provided commentary on, and a definition of, what constituted insolvency proceedings, including imminent insolvency, and that that material might be helpful to the Guide to Enactment.

15. A different suggestion was that since insolvency law was continually developing and new types of procedures were increasingly being used, a flexible interpretation of the concepts "foreign proceedings" and "a law relating to insolvency" might be required to ensure the Model Law would cover procedures conducted before commencement of formal insolvency proceedings, such as negotiations with some, but not necessarily all, creditors for refinancing of the debtor, where those procedures did not require agreement of all creditors (since some creditors might, for example, be paid in full) and may not involve approval by the court. In response, it was suggested that where such negotiations with creditors were purely contractual and did not lead to commencement of an insolvency proceeding (such as an expedited proceeding as described in the Legislative Guide), any agreement reached would be enforceable as a contract, both domestically and internationally, without the need for recognition under the Model Law and the assistance associated with recognition. Although it was acknowledged that hybrid

types of procedure might increasingly be used to address the financial distress of debtors, it was nevertheless pointed out that the Model Law already contained certain limitations with respect to the type of proceeding to be covered and only a certain degree of flexibility could be provided by the Guide to Enactment without changing the terms of the Model Law itself.

16. After discussion, the Working Group agreed that the Guide to Enactment should focus on the insolvency proceedings covered by the Legislative Guide and involving financial distress of the debtor.

2. Elements of the definition of "foreign proceeding"

17. It was noted that the elements comprising the definition needed to be considered in relation to each other and that a proceeding that was collective might nevertheless fail to satisfy other elements of the definition. As to what constituted a "collective" proceeding, it was agreed, after discussion, that as a general principle all assets and liabilities of the debtor and the claims of all creditors should be addressed by such a proceeding. One exception to the latter requirement would be those proceedings from which secured creditors were excluded where they could nevertheless proceed to enforce their rights outside of the insolvency law or proceedings where secured creditors rights were not affected. Although it was suggested that a proceeding might be considered collective where other classes of claims were excluded on the basis that they were not to be impaired, the Working Group agreed to refer only to the example of secured creditors.

18. The Working Group agreed that the Guide to Enactment might helpfully include a discussion of some of the characteristics of proceedings that might not be covered by the definition, such as procedures that did not require supervision or control by the court or negotiations that were purely contractual in nature.

19. With respect to the element of control or supervision, the Working Group referred to the issues raised in paragraph 31 of document A/CN.9/WG.V/WP.99. It was agreed that it was sufficient if the supervision or control of the court was potential rather than actual and it was noted that in some jurisdictions it might involve supervision or control of the insolvency representative; that expedited proceedings of the kind referred to in the Legislative Guide could be covered; and that a proceeding where the court was no longer involved could nevertheless fall within the definition, provided it was still on foot and had not been closed. It was noted that the discussion in the Legislative Guide indicated various approaches were taken to closure of proceedings following approval of a reorganization plan.

B. Recognition

20. With respect to paragraph 34 of document A/CN.9/WG.V/WP.99, the Working Group was of the view that further explanatory material could be added to paragraphs 73 and 128 of the Guide to Enactment, addressing in particular the requirement for establishment and the reasons why other types of proceeding were not included in the Model Law's recognition regime.

21. With reference to paragraph 37 of A/CN.9/WG.V/WP.99, the Working Group agreed that it would be helpful to provide a cross-reference not only to the

UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective, but also to the Legislative Guide and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. It was suggested that although paragraph 9 of the Guide to Enactment adverted to the relevance of the Guide to users of the Model Law other than legislators, the inclusion of more guidance directed at, for example, judges might require the title "Guide to Enactment" to be revised to include a reference to "interpretation".

1. Factors relevant to determining COMI and rebutting the presumption

22. The Working Group considered the issues raised in paragraph 40 of document A/CN.9/WG.V/WP.99 and the proposal contained in document A/CN.9/WG.V/WP.101 with respect to defining COMI and the factors that might be relevant to rebutting the presumption in article 16 (3) of the Model Law that the debtor's COMI was it's registered place of business (or habitual residence in the case of a natural person).

23. The Working Group considered the standard of the presumption contained in article 16 (3) and, in particular, the manner in which a similar presumption in the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) had been interpreted. It was noted that in the case of the EC Regulation the courts had stated that the presumption was a strong one that would only be rebutted in very limited cases and in the face of exceptional circumstances; reference is made to a recent decision in paragraph 27. The difference between the use of the presumption in the Model Law and the EC Regulation was emphasized, the former being for the purpose of recognition of foreign insolvency proceedings and the provision of assistance to those proceedings, while the latter was relevant to commencement of insolvency proceedings and the automatic recognition of those proceedings by other EU States. After discussion, it was agreed that the standard of the presumption in the Model Law was not the same as in the EC Regulation. It was suggested however, that there was a discrepancy between the importance of the presumption in article 16 (3) and the guidance provided in paragraph 122 of the Guide to Enactment and that there was room for more explanation to be included. That proposal received some support.

24. As to the factors that might be relevant to rebutting that presumption, one view was that in order to provide clarity and certainty it might be appropriate to identify a few key factors, maybe three to four, that should be considered by a court receiving an application for recognition of main proceedings. The key factors might be those noted in paragraph 42 of document A/CN.9/WG.V/WP.99, that is (a) the location of the debtor's headquarters or head office functions or nerve centre, (b) the location of the debtor's management, (c) the location of the debtor's main assets and creditors or the location of the majority of creditors who would be affected by the case, and (m) the location which creditors recognize as being the centre of the debtor's operations. Other factors, such as those set forth in paragraph 20 of A/CN.9/WG.V/WP.95/Add.1, might be relevant to the specific facts of the case, but would not be as important as the key factors. The approach of identifying some key factors received some support.

25. A different view was that because of the fact-specific nature of any inquiry into COMI, it would not be possible or appropriate to identify only a few factors that would be relevant in all cases. What was important, it was stressed, was the

overall analysis of relevant, objective factors. The Guide to Enactment should identify a number of factors that might be relevant to rebutting the presumption and cite them as examples, describing what those factors might involve and the circumstances in which they might be relevant, without determining any priorities or the weight to be accorded to any particular factor. The factors should be presented in narrative form rather than as a list, since the latter form might be misinterpreted as indicating priority or relative importance. That approach also received support.

26. Concern was expressed with respect to interpretation of the language used to describe the factors and as to the scope of ascertainability required in factor (m). There was general support for the idea conveyed by factor (a), although other formulations such as "the place of the debtor's central administration" were proposed. It was observed that factor (b) was too vague and might be satisfied, for example, by reference to the place of residence of management, which was not relevant to the determination of COMI. With respect to factor (c) it was observed that the location of the debtor's assets was often a key question in insolvency and such a factor would be unlikely to assist in providing predictability with respect to COMI. Concerns were also raised with respect to the difficulty of applying those factors in the context of an enterprise group.

27. With respect to factor (m), it was noted that under the EC Regulation, ascertainability was a key component and would operate to qualify other factors, such as factor (a). Reference was made to a case recently decided by the European Court of Justice[1] in which the court had said the Regulation must be interpreted to mean that the debtor company's centre of main interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. The court went on to say that where the bodies responsible for the management and supervision of the company are in the same place as the registered office and the management decisions of the company are taken, in a manner ascertainable by third parties, the presumption cannot be rebutted. Some support was expressed in favour of adopting that approach and language in the Guide to Enactment, although questions were raised as to the precise meaning of the ascertainability requirement, in particular the identity of the third parties referred to and whether the standard was ascertainability by reference to, for example, formal documents of registration or the information that was known generally in the market. A suggestion to treat ascertainability as an additional factor, rather than as a factor qualifying other factors, also received support.

28. With respect to the proposal contained in document A/CN.9/WG.V/WP.101, there was little support for adopting a definition as such. However, the Working Group noted that paragraphs 1 and 2 were based on the EC Regulation and the Model Law respectively and a suggestion that paragraph 1 might be incorporated in some form in the Guide to Enactment received some support. Although concerns were expressed with respect to the specific wording of the factors set forth in paragraph 4 of the proposed definition, it was noted that to a large extent those ideas were reflected in the factors outlined in working papers

[1] Interedil Srl, in liquidation, case No. C-396/09.

A/CN.9/WG.V/WP.95/Add.1 and A/CN.9/WG.V/WP.99 and were subject to similar concerns and considerations with respect to interpretation.

29. A suggestion that the judge commencing the foreign proceeding could be encouraged to include in the commencement decision information as to any evidence they had considered that would be relevant to a subsequent recognition application, as outlined in paragraph 14 of A/CN.9/WG.V/WP.99, received some support.

30. After discussion, the Working Group agreed that the Guide to Enactment should focus on information that would enhance predictability and provide guidance and assistance to judges of a receiving court in making a decision with respect to the location of COMI. It should include information on why the decision as to COMI was so important in the context of the Model Law and describe the factors that might be relevant to rebutting the presumption under article 16 (3). While there was no consensus on whether the factors should be limited or extensive or as to the precise language, the Secretariat was requested to prepare appropriate material, taking into account the considerations raised and conclusions reached by the Working Group, for consideration at a future session.

2. Effect of recognition of the COMI

31. The Working Group considered whether the effects of recognition should be discussed in more detail in the Guide to Enactment. Although there was some support for expanding the commentary and moving some explanations, such as that contained in paragraph 143, closer to the beginning of the Guide, the Working Group concluded that this topic did not require further treatment in the Guide at this stage.

3. Impact of fraud

32. The Working Group considered various examples of behaviour involving deception or possibly fraud, although it was felt that that was probably too strong a term for the behaviour in question. These examples included the use of fictitious entities, Ponzi schemes, deception as to the location of the debtor's COMI, movement of the COMI in close proximity to commencement of proceedings for improper purposes and dishonest or fraudulent behaviour in the insolvency proceedings once commenced. One view with respect to the movement of COMI was that the receiving court should consider only the location presented to it; how COMI was established in that location was not relevant to recognition under the Model Law. It was pointed out that in a number of jurisdictions, the movement of COMI in close proximity to commencement of insolvency proceedings was associated with the freedom of establishment and would not raise concerns, unless it might be characterized as engineered to deliberately avoid the consequences of insolvency. It was also pointed out that movement of COMI in close proximity to commencement may be the result of a deliberate choice of forum, designed for example, to commence proceedings in a jurisdiction with an insolvency regime more favourable to reorganization or to other insolvency solutions appropriate to the debtor and should not therefore raise concern. Where the COMI presented was fictitious or the foreign proceeding was commenced fraudulently, the receiving court could refuse to recognize the proceeding and may invoke the public policy exception in article 6 of the Model Law. Where the dishonest or fraudulent activity

or behaviour was not apparent at the time of recognition, articles 17 and 18 of the Model Law allowed the recognizing court to reconsider its decision. The Working Group agreed that the commentary might mention some of those examples and the possible solutions.

4. Timing relevant to determining COMI

33. The Working Group agreed that the Model Law did not address the relevant date for determining the COMI of the debtor in foreign insolvency proceedings for the purposes of recognition of those proceedings. Several possibilities were identified: the date of application for, or commencement of, the foreign proceedings (noting that in some jurisdictions that date would be the same) or the date of the application for recognition of the foreign proceedings. It was noted that there were advantages and disadvantages with respect to each of those dates. The date of application for commencement was said to be more appropriate than the date of commencement, especially where there was a gap between the two and there was the possibility for creditors and others to take action with respect to assets of the debtor. If the date of the application for recognition was the relevant date, it was observed that there may be cases where the business of the debtor had ceased to operate at that time, especially where recognition was sought at a late stage of the foreign proceedings, and no COMI or establishment of the debtor would be able to be identified. In such cases, the location of the foreign representative may be the only location with a connection to the foreign proceedings. It was suggested that where several concurrent foreign proceedings were seeking recognition in a single State, the receiving court of that State would have to consider the various proceedings and determine which date might be relevant to the COMI issue. In such cases, chapter IV of the Model Law on cooperation and coordination, as well as articles 17 and 18, might be relevant.

34. The issue of the movement of the COMI in close proximity to the application for commencement and its effect on recognition of the foreign proceedings was further raised. One view expressed was that the question of COMI was to be determined by the originating court at the time the foreign proceedings commenced. In response, it was pointed out that courts generally did not consider whether the proceedings they were being asked to open in their own jurisdiction should be classified as main proceedings based on "COMI" or non-main proceedings based on "establishment", but rather whether that court had jurisdiction with respect to the debtor. The question of whether proceedings were classified as either main or non-main was relevant only to the issue of recognition under the Model Law, and therefore had to be considered by the receiving court. As noted above (para. 29), any relevant information as to the COMI or establishment of the debtor the originating court might be able to include in its commencement order could prove very useful to the receiving court, even though not determinative or binding on the receiving court, which would have to satisfy itself that the foreign proceedings met the requirements of the Model Law.

35. After discussion, the Working Group requested the Secretariat to prepare a text which raised the issue, identified the possible dates and discussed the various advantages and disadvantages of each date.

C. Enterprise groups

36. The Working Group considered whether, notwithstanding that the Model Law did not apply to enterprise groups as such, material on enterprise groups and the manner in which those groups had been handled in practice could be added to the Guide to Enactment.

37. The Working Group agreed that the topic was very important, reflecting the current commercial reality of global business and of cross-border insolvency proceedings. As to adding material to the Guide to Enactment, while some reservations were expressed as to the appropriateness of that course of action, it was agreed that reference should be made to part three of the Legislative Guide and the solutions adopted with respect to the treatment of groups in insolvency, particularly in the international context. Beyond that, however, and particularly with respect to the concept of the COMI of an enterprise group, it was suggested that once the Working Group had reached agreement on the factors relevant to identifying the COMI of an individual debtor, it might be possible to consider the group issue further and, in particular, the relevance of those factors in the group context.

V. Directors' responsibilities and liabilities in insolvency and pre-insolvency cases

A. Form of possible principles or guidelines

38. The Working Group commenced its deliberations on that topic with a discussion of the possible form of its work. The Working Group agreed that the goal of the work was to provide guidance on responsibilities and liabilities relevant to the period before the commencement of insolvency proceedings in order to encourage early action with respect to financial distress, thereby facilitating rescue and minimizing harm to creditors and other interested parties. The achievement of that goal would require a balance to be achieved between the desirability of providing incentives to encourage early action in the face of financial distress and the impact the duties imposed might have on the ability of companies to attract qualified persons to take up positions of control and influence and to continue to hold those positions through financial distress and insolvency. It was pointed out that an unintended consequence could be directors taking unnecessary action, such as applying for formal insolvency proceedings at an early stage, simply to escape onerous liability or penalties. The Working Group agreed that the form of a legislative guide would be appropriate to achieving that goal as it could provide commentary on the advantages and disadvantages of different approaches and recommend best practice, as appropriate.

B. Identifying who owes the duty

39. The Working Group recalled the agreement at its thirty-ninth session that, as a starting point, it would be appropriate for formally appointed directors, whether natural or legal persons, to owe the relevant duties. As to other persons who might also owe a duty, the Working Group expressed different views. One view was that it

should extend to administrators and others with responsibility for management and supervision of the company and those who might exercise influence over the company, excluding professional advisors. Another view was that it was difficult to determine who would owe the duty without being certain as to the scope of the duty to be imposed. If, for example, the duty was to respond in a timely manner to financial distress by applying for commencement of insolvency proceedings, it need only apply to formally appointed directors. If something broader was contemplated, such as payment of compensation for harm caused, a wider category of person might be required, although the imposition of duties of that nature was likely to be disruptive and contrary to the incentives outlined as the goal of the work.

40. A further view was that it might be desirable not to refer to directors at all, since States may have different definitions and understandings of what the term might mean. It was also suggested that it might be more desirable to adopt a broader, more purposive description, such as those persons responsible for running the company or, alternatively, that the issue could be left to be determined in accordance with national law.

41. After discussion, the Working Group agreed that the guidance should refer to formally appointed directors, with the commentary to address the scope of the meaning of the term "director" and give example of the types of officer and other parties that might be covered by it.

C. Defining the time at which the duties arise

42. The Working Group recalled that at its previous session it had agreed that the duties would arise when the debtor was or would imminently become insolvent, although they would only become enforceable once insolvency proceedings had commenced (A/CN.9/715, para. 81).

43. As a preliminary point, it was suggested that the work should focus on the obligations of directors in the pre-insolvency phase, rather than upon duties and, recalling the discussion on the form of the work, on stimulating and incentivising correct behaviour. That proposal received some support, although it was also suggested that in order to stimulate correct behaviour, it would be necessary to include some real possibility of liability.

44. It was widely observed that defining the time at which any obligation might arise by reference to a bright line test would be very difficult to achieve. Various possible indicators were suggested, including the point at which the directors should have been aware there was no reasonable prospect of avoiding insolvency; when the directors were or ought to have been aware that insolvency could not be avoided; when factual insolvency, however defined, occurred; and the moment when the continuity of the business was threatened. In discussing those indicators, one view expressed was that some might occur too late or too close to the commencement of insolvency proceedings — such as factual insolvency or imminent insolvency — and that the obligations should arise before an irreversible situation of financial distress was reached or insolvency became inevitable.

45. It was emphasized that the discussion should focus on obligations that could be enforced under the insolvency law only when insolvency proceedings had

commenced, not on the types of obligation that might be applicable under company law. Once insolvency proceedings commenced, the insolvency representative might be able to take various actions, such as clawing back assets transferred at an undervalue prior to commencement, in order to mitigate the harm done to the debtor company. Any fruits of those actions would accrue for the benefit of the insolvency estate. It was further emphasized that the obligations in question would be complementary to those applicable under company law.

46. After discussion, it was agreed that although there was some general support in favour of focusing on a period of time before the commencement of insolvency proceedings, consensus on how that might be described could not be reached at the current session. The Secretariat was requested to prepare material that would provide information on the various different approaches taken in existing laws dealing with the topic and consider the advantages and disadvantages of those approaches.

D. Identifying to whom the duties are owed

47. The Working Group recalled that at its previous session various questions with respect to that issue had been discussed, including whether the obligation would be owed to the general body of creditors or the insolvency estate per se (an approach said to be consistent with the Legislative Guide and one that would involve a practical approach based on identifying the potential beneficiaries of any recovery action).

48. Although noting that that issue was dependent on the time at which the obligations might arise, on which there was no consensus, the Working Group expressed various views as to the parties to whom the obligations might be owed. Those included the company itself (which would encompass protection of the assets and the interests of shareholders and other relevant parties), the creditors as a whole or shareholders. It was observed that it might not be possible to draw a bright line between pre- and post-insolvency phases so that before insolvency the obligations were owed, for example, to the company under applicable company law and that after the commencement of insolvency proceedings the focus shifted solely to creditors. Rather, it was suggested that a range of interests were implicated at both stages, even if some change of emphasis might occur as the company moved from between those phases.

E. The nature of the duties or the types of misconduct to be covered

49. Although there was no consensus as to the time at which additional obligations enforceable under the law might be imposed upon directors, many suggestions were made as to what those obligations might entail, once the relevant point of time had been reached. Those included modifying management practices to focus on a range of interested parties broader than required under company law; preparing a report on the possibility of restructuring; acting reasonably in the circumstances and taking professional advice; taking reasonable steps to minimize losses to the company; informing themselves independently of the financial situation of the company and not relying solely on management advice; taking appropriate preventive action to

avoid the company sliding into insolvency; avoiding taking action that would aggravate the situation, such as transferring assets out of the company at an undervalue; calling for an external audit; ensuring the best interests of all interested parties were taken into account in determining what action might be taken; and avoiding the loss of key employees.

50. After discussion, it was concluded that the types of obligation being referred to might to some extent overlap with those generally applicable under company law and those set forth under insolvency law. There was agreement that any action proposed in this work should not restrict or interfere with the obligations applicable under other law, such as company law, criminal law, tort law or civil law. There was also agreement that when a company was in a pre-insolvency phase, however defined, directors should consider additional measures, and some suggestions had been raised as to what those might be (see para. 49 above). It was also concluded that the Working Group was not considering a duty to apply for commencement of insolvency proceedings and in that regard, reference was made to the Legislative Guide (part two, chapter 1, paras. 35-36), where that issue had previously been addressed.

F. Identifying the remedies available

51. The Working Group heard some brief introductions to the remedies available under various national laws. The Secretariat was requested to examine the different approaches taken under national law in order to find common ground and to present material on that common ground for consideration at a future session.

G. Cross-border issues

52. The Working Group agreed that cross-border issues should be considered at a future session once the issues discussed above had been further clarified.