UNCITRAL Forty-Third Session of Working Group V (Insolvency Law) at United Nations, 15-19 April 2013

For almost 20 years, UNCITRAL has analysed international insolvency laws and practice in an effort to reconcile, enhance and harmonise the laws of international trading companies. The report below describes the most recent meeting in April 2013 of Working Group V of the United Nations Commission on International Trade Law ('UNCITRAL') at the United Nations in New York.

Delegates from trading countries, bar groups and other non-government organisations attended the Session. The Inter-Pacific Bar Association had been invited to the Session and the undersigned received credentials to attend and observe.

The Session was positive because of the extensive preparation and drafting involved before the Session began.

The purpose of the Session was to study further the center of main interests (COMI) of enterprises, factors relevant to its determination, and issues of jurisdiction and recognition; and liability of directors and officers of enterprises in insolvency proceedings or in the 'zone of insolvency.' These subjects also were addressed at the Forty-First Session of Working Group V in April and May 2012.

Historically, domestic and international law failed to keep pace with the increasing number and complexity of cross-border insolvencies, resulting in inadequate and uncoordinated approaches that have (1) hampered the rescue of troubled businesses; (2) bogged down the administration of cross-border insolvencies; (3) impeded the protection and maximsisation of the value of assets of the insolvent debtor; (4) rendered unpredictable the application of the existing laws; (5) created obstacles to

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reaching basic economic and social goals of insolvency proceedings; (6) perpetuated a lack of transparency of the process; and (7) resulted in a paucity of clear rules on recognition of the rights and priorities of treatment of creditors and application of laws to cross-border issues. The problems were exacerbated where reorganisation was the goal of the insolvency proceeding. Unpredictability in law and practice and the associated cost and delay have affected capital flows and cross-border investment.

The seminal Commission insolvency achievement was the Model Law on Cross-Border Insolvency (the 'Model Law') adopted by the United Nations in 1997 and enacted by the United States Congress in 2005 in substantially the form proposed.

The principal features of the Model Law include (a) providing a foreign representative administering an insolvency proceeding to the courts of an enacting state to allow the courts of the enacting state to determine what coordination among jurisdictions is warranted, (b) determining when a foreign insolvency proceeding should be accorded 'recognition' and the consequences of recognition, (c) establishing simplified procedures for recognition, (d) providing a transparent regime for foreign creditors to participate in an insolvency proceeding, (e) permitting courts and insolvency representatives to cooperate more effectively with foreign courts and foreign representatives, and (f) establishing rules for coordination in concurrent insolvency proceedings. In short, the Model Law was designed to assist countries to equip their insolvency laws with a modern, harmonised legislative framework.

The 2013 Session concentrated on interpretation and application of selected concepts of the Model Law and responsibility and liability of directors, officers and other responsible persons in the period approaching insolvency. As to the latter, the focus was not intended to cover areas of criminal liability or to deal with core areas of company law.

The text of the Model Law focuses on four key elements upon which international agreement was possible:

i. access to local courts for representatives of foreign insolvency proceedings and for creditors, and authorisation for representatives of local proceedings to seek assistance elsewhere;
ii. recognition of certain orders issued by foreign courts;
iii. relief to assist foreign proceedings; and
iv. cooperation among the courts of states where the debtor's assets are located and coordination of concurrent proceedings.

One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalisation or other processes and provide certainty with respect to the decision to recognise. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Insolvency proceedings contemplate a collective proceeding for purposes of liquidation or reorganisation under the control or supervision of the court where a foreign representative has been appointed.

A foreign proceeding may be either a main proceeding or a non-main proceeding. A main proceeding arises where the debtor had has its COMI at the date of the commencement of the foreign proceeding. In principle, the main proceeding is expected to have primary responsibility for managing the insolvency of the debtor regardless of the number of states in which the debtor has assets and creditors. COMI is not defined in the Model Law, but is based on a presumption that it is the registered office or, in the case of an individual, the 'habitual residence' of the debtor.

In determining COMI, beyond the presumption of the registered office, additional factors are taken into consideration. Those factors include: the location of the debtor's books and records; the location where financing was organised or authorised, or from where the cash management system was run; the location in which the debtor's principal assets or operations were found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sale policy, staff, accounts payable systems were managed; the location from which supply contracts were organised; the location from which the reorganisation of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

The Model Law also empowers courts to cooperate with each other and to communicate directly with each other.

As with COMI, the Model Law does not define the term 'insolvency.' Yet insolvency refers to various types of collective proceedings commenced with respect to debtors who are in severe financial distress or insolvent.

The Session and the Report of Working Group V also focused on a director's obligation in the period approaching insolvency. The obligations arrive when the enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which would become enforceable once an insolvency proceeding is commenced, is to protect the legitimate interests of creditors or other stakeholders and to encourage timely action to minimise the effects of financial distress experienced by the enterprise. The board of directors has an important role in addressing these issues. Generally the board is comprised of individuals who have an ownership interest in the enterprise and individuals who work for the company, such as managing its business operations, or are connected to its shareholders ('inside directors'), along with individuals who are independent and are often chosen as a result of their experience and business acumen ('independent directors'). As independent directors may not have access to information to the same extent that is known or available to inside directors or third parties, their legal responsibility may vary from that of an inside director.

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