Since the early 1990’s, UNCITRAL has undertaken a number of projects aimed at modernization and harmonization of insolvency law, with a focus on facilitating cross-border cases. Several texts designed to assist states in law reform efforts and judges and practitioners in conducting insolvency cases have been published. The UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) was the first of these texts. It was followed in 2004 by the UNCITRAL Legislative Guide on Insolvency Law, which has since been supplemented by additional parts on the treatment of enterprise groups in insolvency (part three, 2010) and the obligations of directors in the period approaching insolvency (part four, 2013). Two additional texts are the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009), which compiles practice on the use of cross-border insolvency agreements or protocols and The Judicial Perspective on the UNCITRAL Model Law on Cross-Border Insolvency (second edition, 2013), which provides information for judges on questions that may arise in the context of an application for recognition under the Model Law, based upon jurisprudence from around the world.

The Model Law has been adopted by some 20 States:

Australia (2008); British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003); Canada (2005); Chile (2013); Colombia (2006); Greece (2010); Great Britain (2006); Japan (2000); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Philippines (2010), Poland (2003); Republic of Korea (2006); Romania (2002); Serbia (2004); Slovenia (2007); South Africa (2000); Uganda (2011); and the United States of America (2005).

A number of States are actively considering enacting the Model Law or have already drafted legislation to enact it, including: OHADA (18 member States), Kenya, Malawi, Vietnam, Brazil, Russian Federation, and the Dominican Republic.

Both the Philippines and the Seychelles have passed legislation apparently enacting the Model Law, but the Secretariat has not yet been able to confirm the details of that legislation.

Revision of the Guide to Enactment of the Model Law

Most recently, work was undertaken to revise the Guide to Enactment of the Model Law to provide additional information and clarify a number of the issues arising from its application and interpretation. The revision was finalised in July 2013 and the resulting text is entitled the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency. These revisions do not change the substance of the Model Law itself.

The revisions relate, firstly, to the elements of article 2, subparagraph (a), which define what is required for a foreign proceeding to be recognized under the Model Law. A “collective proceeding” is one in which substantially all of the assets and liabilities of the debtor are dealt with, subject to local priorities.

1 The views expressed in this paper are those of the author and do not necessarily reflect those of the United Nations.
and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding that does not deal with a certain class of claim, such as those of secured creditors, should not be excluded if it satisfies the other elements of article 2, subparagraph (a). A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of the subparagraph. Control or supervision by an insolvency representative may be sufficient to satisfy the requirements of subparagraph (a), even if it is potential rather than actual; mere supervision of an insolvency representative by a licensing authority however would not be sufficient. Financial adjustment agreements or similar contractual arrangements that do not lead to the commencement of an insolvency proceeding also would not generally satisfy the requirements of subparagraph (a). However, such agreements would clearly be enforceable outside the Model Law without the need for recognition.

Central to the revision of the Guide to Enactment is the concept of “centre of main interests” or COMI, in particular identification of factors that might be relevant to rebutting the presumption under article 16, paragraph 3 that the debtor’s COMI is its place of registration. The revisions note that where the debtor’s COMI coincides with its place of registration, no issue concerning rebuttal of the presumption will arise. In reality, however, the debtor’s COMI may not always coincide with its place of registration. The party alleging that it is not at that place will be required to satisfy the court of the State receiving an application for recognition as to its location. The court will be required to consider independently where the debtor’s COMI is located. Two principal factors have been identified. Considered together, these factors should indicate whether the location in which the foreign proceeding has commenced is the debtor’s COMI, namely that: (a) the location is where the debtor’s central administration takes place, and (b) the location is readily ascertainable by creditors. Where those factors don’t yield a ready answer, additional factors may be considered, with the court giving greater or less weight to a given factor, depending on the circumstances of the individual case.

The final key revision concerns the time by reference to which the debtor’s COMI (or establishment) should be determined. The revised text suggests that the date of commencement of the foreign proceedings provides a test that can be applied with certainty and consistency to all insolvency proceedings, wherever commenced; the date of an application for recognition, in comparison, will vary from jurisdiction to jurisdiction. Moreover, the date of commencement also addresses issues that may arise where the business activity of the debtor has ceased at the time of the application for recognition, and, as may occur in cases of reorganization, it is not the debtor entity that continues to have a COMI, but rather the reorganizing entity.

The Judicial Perspective has been updated to reflect the changes included in the Guide to Enactment and Interpretation, as well as judicial decisions issued after the first edition was completed in 2011. Quite a few cases of importance were decided in that time, not least of which are those relating specifically to the work being done to identify factors relevant to determining COMI. A number of recent cases also address aspects of the relief provisions of the Model Law (articles 19-21), including the enforceability of insolvency-derived judgements under article 21.

Future work

Having completed these aspects of its current work agenda, UNCITRAL’s Working Group V (Insolvency Law) (WG V) held a three-day colloquium and two-day working session at the end of

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3 These include, in no particular order or priority: the location of the debtor’s books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor’s principal assets or operations are found; the location of the debtor’s primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.
December 2013 to consider how work on remaining elements of its current agenda might proceed and which of a number of new topics merited future work and in what order of priority.  

1. **Cross-border treatment of enterprise groups in insolvency**  

WG V is considering developing provisions that would extend the UNCITRAL Model Law and possibly part three of the UNCITRAL Legislative Guide by addressing a number of issues relating to the insolvency of enterprise groups, including: access to foreign courts and standing for foreign representatives and creditors of insolvency proceedings involving different enterprise group members; recognition of foreign proceedings and foreign representatives (as between different proceedings concerning different group members); recognition of one foreign proceeding as the coordinating proceeding or identification of the “parent” and/or “primary group members” of an enterprise group in order, for example, to facilitate development of a reorganization (or liquidation) plan and coordinate proceedings; joint appointment of insolvency representatives to insolvency proceedings concerning different group members; voluntary participation of group members in the insolvency proceedings of the parent group member; use of “synthetic secondary proceedings”; use of protocols to clearly define procedures and roles; joint/coordinated disclosure statements and plans of reorganization; and relief that may be provided to assist the conduct of the proceedings of several group members.

2. **Obligations of directors of enterprise group companies in the period approaching insolvency**  

WG V acknowledges the importance of this topic, noting the difficult problems that are being encountered in practice and that were addressed, at least in the context of individual enterprises, in part four of the Legislative Guide. In the group context the problems are potentially more complex and the solutions more difficult to identify. WG V accepts that those solutions should not hinder business recovery and make it difficult for directors to continue working to facilitate that recovery. The application of part four to enterprise groups is to be studied, together with any additional issues, such as conflicts of interest and governing law, which might need to be addressed, with a view to developing an appropriate text.

3. **Insolvency of large and complex financial institutions**  

WG V has been monitoring the work of international and regional organizations over the last few years, particularly where it touches upon its own work on enterprise groups and cross-border insolvency. In October 2013, the Financial Stability Board (FSB) established a legal experts group (LEG) to address certain gaps in the implementation of Key Attribute 7.5 and ensure that countries develop expedited processes to give effect to foreign resolution actions. Preliminary conclusions and recommendations are to be presented by the LEG in autumn 2014. Developments in the LEG and in other organizations, such as the EU, will continue to be monitored.

4. **An international convention on cross-border insolvency**  

[This topic is be addressed by Gregor Baer]

5. **New topics**  

Among the new topics discussed in December 2013 was the enforcement of insolvency-derived judgements. There was particular interest in this topic and a mandate to develop a model law or model legislative provisions on the recognition and enforcement of insolvency-derived judgements was sought and given by the Commission in July 2014. Work on the topic will start at the forthcoming session of WG V in December 2014.  

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4 Information on the colloquium, including the program and presentations, is posted on the UNCITRAL website at http://www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013.html  

5 Working papers will be available under the 46th session at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html
6. **Insolvency of MSMEs**

UNCITRAL has conducted two colloquia in the area of microfinance and the creation of an enabling legal environment for micro, small and medium-sized enterprise (MSMEs). In 2013, the Commission agreed that work aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle and, in particular, those in developing economies should be added to its work programme, starting with the legal questions surrounding the simplification of incorporation. A new working group to consider that issue held its first meeting in February 2014. On the insolvency of MSMEs, WG V was asked to consider whether the tools included in the UNCITRAL Legislative Guide are appropriate for these types of enterprise and if not, what more might be required. The WG concluded that the tools provided by the Legislative Guide were not sufficient; thorough treatment of the issues would require both a consideration of matters not yet addressed in the Legislative Guide as well as the tailoring of solutions already in the Legislative Guide to specifically address MSMEs. For example, the application of elements of the insolvency law, such as creditor committees, the central role of the courts and extensive involvement of insolvency professionals, might not be appropriate for MSME regimes. Work on MSME insolvency will be taken up at a future date.