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Report of Working Group V (Insolvency Law) on the work of its sixty-first session (Vienna, 12–16 December 2022)

Contents

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I. Introduction

1. At its sixty-first session, the Working Group continued deliberations on the two topics referred to it by the Commission (civil asset tracing and recovery and applicable law in insolvency proceedings (henceforth ATR and APL, respectively)). Background information on those topics may be found in document A/CN.9/WG.V/WP.181. During its penultimate meeting, the Working Group held a conference to commemorate the twenty-fifth anniversary of the UNCITRAL Model Law on Cross-Border Insolvency[1] (MLCBI) (the "Conference").

II. Organization of the session

2. Working Group V, which was composed of all States members of the Commission, held its sixty-first session in Vienna, from 12 to 16 December 2022. In accordance with the decision taken by the Commission at its fifty-fifth session,[2] the Secretariat provided a live webcast of meetings in the six languages of the United Nations to allow delegates and observers wishing to follow the session remotely to listen to the deliberations.

3. The session was attended by representatives of the following States members of the Working Group: Afghanistan, Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Greece, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Thailand, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zimbabwe.

4. The session was attended by observers from the following States: Azerbaijan, Burkina Faso, Denmark, Egypt, El Salvador, Jordan, Lebanon, Libya, Lithuania, Malta, Netherlands, Pakistan, Philippines, Portugal, Senegal, Slovakia, Slovenia, Sri Lanka, Sweden and Togo.

5. The session was also attended by observers from the European Union.

6. 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 Group (WBG);

(b) *Invited international governmental organizations*: European Bank for Reconstruction and Development (EBRD), International Association of Insolvency Regulators (IAIR) and International Institute for the Unification of Private Law (UNIDROIT);

(c) *Invited international non-governmental organizations*: Allerhand Institute, American Bar Association (ABA), China Council for the Promotion of International Trade (CCPIT), European Law Institute (ELI), Ibero-American Institute of Bankruptcy Law (IIDC), International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL International), International Bar Association (IBA), International Insolvency Institute (III), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), New

[1] United Nations publication, Sales No. E.14.V.2. Available at: UNCITRAL Model Law on Cross-Border Insolvency (1997) | United Nations Commission On International Trade Law.

[2] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 237.

York City Bar Association (NYCBAR), P.R.I.M.E. Finance, and Union internationale des huissiers de justice et officiers judiciaires (UIHJ).

7. The Working Group elected the following officers:

Chairman: Mr. Xian Yong Harold Foo (Singapore)

Rapporteur: Ms. Jasnica Garašić (Croatia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.181);

(b) Notes by the Secretariat: civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.182 and Add.1);

(c) Notes by the Secretariat: applicable law in insolvency proceedings (A/CN.9/WG.V/WP.183 and Add.1); and

(d) A note by the Secretariat: summary of the panel discussion on "*Sharing experience across regions: insolvency reforms in Latin America, Europe and beyond*", held on 15 July 2022 during the fifty-fifth session of UNCITRAL (A/CN.9/WG.V/WP.184).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of insolvency topics:
   (a) Legal issues arising from civil asset tracing and recovery in insolvency proceedings; and
   (b) Applicable law in insolvency proceedings.
5. Commemoration of the 25th anniversary of the *UNCITRAL Model Law on Cross-Border Insolvency*.
6. Other business.
7. Adoption of the report.

III. Deliberations

10. Under agenda item 4, the Working Group continued its deliberations of legal issues arising from civil asset tracing and recovery in insolvency proceedings and applicable law in insolvency proceedings on the basis of working paper A/CN.9/WG.V/WP.182 and Add.1, and working paper A/CN.9/WG.V/WP.183 and Add.1, respectively. The summary of deliberations and conclusions of the Working Group on the ATR topic may be found in chapter IV below. The summary of deliberations and conclusions of the Working Group on the APL topic may be found in chapter V below.

11. Under agenda item 5, the Working Group took note of document A/CN.9/WG.V/WP.184 and held the Conference, open to the public. The summary of the Conference prepared by the UNCITRAL secretariat is annexed to this report for information by the Commission.

IV. Consideration of legal issues arising from civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.182)

A. General

12. As anticipated at its earlier sessions, the Working Group had before it an inventory of ATR tools used in insolvency proceedings across different jurisdictions (A/CN.9/WG.V/WP.182). The Working Group noted that the inventory reflected submissions by States compiled in working paper A/CN.9/WG.V/WP.182/Add.1. Noting that the inventory supplemented the papers on the topic that had been before the Working Group at its earlier sessions, the Working Group considered how they could all be consolidated in a single document.

13. During the session, the Working Group received a submission by Italy that informed about the most recent developments in that jurisdiction as regards tools that had been made available to the insolvency representative for the telematic search of assets of the debtor. The submission noted that the legal requirement of an enforceable title for the authorization of such search was waived with respect to the insolvency representative in both contexts, insolvency, and individual enforcement proceedings.

14. The Working Group also took note that the secretariat followed deliberations in UNIDROIT with respect to two related projects, digital assets, and best practices on effective enforcement.

15. A suggestion was made that it might be timely for the Working Group to decide on the form of a text to be prepared on the topic. Another view was that it would be useful to consider first a consolidated text to be prepared by the secretariat for the next session of the Working Group, for example along the lines suggested in paragraph 5 of document A/CN.9/WG.V/WP.182 (for further consideration of those issues by the Working Group, see paras. 34–36 below). It was considered necessary to reflect throughout such a text the terminology and relevant provisions from all UNCITRAL insolvency texts, including part five (2021) of the UNCITRAL Legislative Guide on Insolvency Law[3] (the Guide) and the 2019 UNCITRAL Model Law on Enterprise Group Insolvency[4] (MLEGI), and interconnection among them. The relevance of the other topic on the work programme of the Working Group, APL, for addressing the ATR topic comprehensively was also noted. Some delegations suggested that the Working Group might make a meaningful contribution to the improved ATR framework by addressing issues discussed in cross-border sections of the inventory, in particular by devising a means that would encourage identification, tracing and recovery of the insolvency estate assets. The need to focus on ways of ensuring effectiveness of ATR, especially across borders, without attempting to revise domestic substantive insolvency law provisions, was emphasized. A view was expressed that revisions to domestic substantive insolvency law provisions might be necessary under certain circumstances.

16. In response to references made throughout deliberations to criminal law matters, the Working Group recalled the scope of the project, which focused on civil aspects of ATR in insolvency proceedings. It was nevertheless acknowledged that a future text might usefully differentiate ATR scenarios where fraud was not a factor from those where it was, and to further consider the utilization of information obtained from criminal proceedings. (For further consideration of those issues by the Working Group, see paras. 32 and 33 below.)

[3] Available at: UNCITRAL Legislative Guide on Insolvency Law | United Nations Commission On International Trade Law.

[4] United Nations publication, Sales No. E.20.V.3. Available at: UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019) | United Nations Commission On International Trade Law.

17. No comments were made with respect to paragraphs 6, 7, 15–21, 27–29, 35–40, 43–71, 75 and 76 of the inventory and different views were expressed on the desirability of retaining chapter IV of the inventory. The comments made with respect to other paragraphs of the inventory are summarized below.

B. Comments on the inventory

1. Provisional measures

18. It was considered essential to provide for expedited procedures to deal with requests for provisional measures, especially in cases of suspected fraud in insolvency proceedings. Difficulties with identifying such cases were acknowledged.

19. It was noted that, while in certain jurisdictions the court may grant provisional measures ex officio, in other jurisdictions a request by a party is required. It was suggested that different approaches, including the one taken in recommendation 39 of the Guide, with accompanying safeguards, could be reflected in the text.

2. Obligations of the debtor and third parties, including government agencies

20. A view was expressed that the debtor should provide information required under insolvency law (see e.g. rec. 110 (b) of the Guide) under oath or by verification. The Working Group noted that such a requirement was not found in the Guide. A possible impact of such a measure on commencement of insolvency proceedings, and the relevance of administrative and criminal liability, depending on the gravity of the situation, were noted.

3. Powers of the insolvency representative

21. Suggestions were made to address duties and powers of the insolvency representative separately, highlighting their differences in the context of liquidation as compared to reorganization. The Working Group noted divergent approaches in domestic insolvency law to addressing the insolvency representative's powers to secure assets or to compel third parties to provide information. A suggestion was made that, for efficiency, the insolvency representative should be vested with broad powers, subject to appropriate safeguards, such as appeal. It was recalled that some powers and duties, such as to investigate the debtor's business and assets, were inherent to the position of the insolvency representative.

22. Specific issues arising from tracing and recovering digital assets were mentioned, in particular that not all digital platforms were subject to regulation; where they were, platform operators tended to comply with disclosure obligations. It was noted, however, that many jurisdictions lacked standards for operation of digital platforms, and that private wallets raised additional challenges for ATR. While views converged on the importance of those aspects, it was suggested that their consideration in the Working Group should await the results of work in other forums.

4. Avoidance

23. It was suggested that a future text should address extension of statutory limits for bringing avoidance actions where the debtor did not comply with its disclosure obligations under insolvency law.

5. Civil ATR tools of general application

24. It was suggested that a future text should reflect that, upon commencement of insolvency proceedings, not only the court but also the insolvency representative should have access to the list of all debtor's bank accounts, subject to certain safeguards. Examples of centralized systems that collected information on transactions with bank accounts and how access to them was granted, including in the context of mutual legal assistance requests, were provided.

25. A suggestion was made that the Working Group might consider in due course how to enable direct access of insolvency representatives to such systems and similar registries across borders.

6. Pre-litigation evidence gathering

26. It was suggested that the innovative and creative ways that fraudsters used to hide assets (e.g. air tickets, hotel awards, frequent flier programmes) necessitated taking similarly innovative and creative approaches to ATR in insolvency cases where fraud was involved.

7. Litigation evidence gathering

27. The usefulness of gag and seal orders in cases involving fraud was recalled. It was considered relevant for the paper to refer also to provisions of law providing for the joint and several liability of parties who assisted the fraudster.

8. Post-trial discovery

28. It was suggested amending paragraph 83 to reflect that the tools mentioned in that paragraph were found not only in common law jurisdictions.

9. Safeguards with respect to evidence gathering

29. A point was made that some of the safeguards listed in paragraph 84 were applicable to both seizure of evidence and seizure of assets. The existence of a wide range of proof discovery measures in some jurisdictions was noted.

10. Interim measures of protection of assets and preliminary orders

30. A suggestion was made that a future text could refer to the relevant case law that indicated procedures to be followed in ATR. Another suggestion was to emphasize that interim measures of protection might only be granted following recognition or, in order not to undermine the surprise effect, together with recognition. It was questioned whether ex parte recognition without notice to the affected parties was possible. Provisions of UNCITRAL insolvency texts on provisional relief between application and recognition were recalled. A point was made that it was within the sovereign prerogative of each State to refuse recognition and enforcement of a foreign measure.

31. Concerns were expressed with respect to paragraphs 94 (impact of suggested measures on unknown bona fide parties) and 98 (high costs of custody and sources of funds to cover them).

11. Criminal proceedings in aid of ATR in insolvency proceedings

32. With reference to paragraphs 109 and 111, it was considered important to emphasize that records of criminal investigations (e.g. of money-laundering or fraud) were the important source of information for ATR, and that the rights of foreign creditors in the distribution of proceeds should not be jeopardized through the use of criminal proceedings to aid ATR in insolvency proceedings.

33. In response, the views with respect to the narrow scope of the project (see para. 16 above) were reiterated. It was emphasized that criminal law issues, including the possible interference of criminal law measures with the achievement of objectives of insolvency proceedings, were outside the scope of the project. The other view was that the final text should address different scenarios where criminal and insolvency law proceedings interacted, including cases where confiscation of assets was aimed at compensating for damages caused to victims, such as the creditors at large in insolvency proceedings.

C. Next steps

34. In response to a suggestion to prepare a model law on the topic, a strong preference was expressed for continuing work on a toolbox. Some delegations recalled that they had supported UNCITRAL's work on the topic on the condition that a final text would take the form of a descriptive, informational and educational text that would classify tools and identify common features but would not recommend or highlight particular models to follow. In response, it was recalled that, when the Commission referred the ATR topic to the Working Group, it was understood that the form the work might take on the topic would be decided at a later stage.[5]

35. Some delegations, while supporting the preparation of a toolbox, did not exclude that the toolbox might inform further work products by UNCITRAL on the topic, as deliberations on the topic at the current session demonstrated. That understanding was considered to be in line with the mandate given by the Commission to the Working Group.[6]

36. Noting the prevailing view against preparation of a model law, the Working Group requested the secretariat to proceed with the preparation of a paper along the lines suggested in paragraph 5 of document A/CN.9/WG.V/WP.182.

V. Consideration of the topic of applicable law in insolvency proceedings (A/CN.9/WG.V/WP.183 and Add.1)

37. The Working Group commenced the consideration of the topic with document A/CN.9/WG.V/WP.183/Add.1.

A. Consideration of issues related to the items on the lex fori concursus list deferred from the sixtieth session of the Working Group

1. Treatment of intellectual property (IP) rights and licences and digital assets in insolvency proceedings

(a) IP rights and licences

38. The Working Group agreed that no exception to the lex fori concursus with respect to the treatment of IP rights and licences in insolvency proceedings would be required. The importance of drawing a distinction between breach and avoidance and of the multilateral treaty framework referred to in paragraph 15 of A/CN.9/WG.V/WP.183/Add.1 was highlighted.

(b) Digital assets

39. The Working Group took note of domestic, regional and international developments with respect to regulation of digital assets, including in UNIDROIT and the Organisation for Economic Co-operation and Development (OECD). Views differed on whether an exception to the lex fori concursus for the treatment of digital assets in insolvency proceedings might be required. It was noted that inclusion of such an exception would lead to special treatment of creditors with digital assets. The prevailing view was to await the results of the work of UNIDROIT before the final determination on that point could be made.

40. While noting various issues arising from localization of digital assets and relevant case law, many delegations were of the view that those issues were more relevant to the determination of the law applicable to the validity and effectiveness of

[5] *Official Records of the General Assembly, Seventy-sixth session, Supplement No. 17* (A/76/17), para. 217.
[6] Ibid., paras. 215–217.

rights in digital assets rather than the treatment of those rights in insolvency proceedings.

2. Arbitration agreements and arbitral proceedings

41. While there was agreement that the lex fori concursus should be the law governing the effects of commencement of insolvency proceedings on the validity and effectiveness of arbitration agreements and enforcement of arbitral awards, views differed on whether the lex fori concursus should also be the law governing the effects of commencement of insolvency proceedings on arbitral proceedings (pending or ongoing). Some delegations expressed the view that it should be since the lex fori concursus governed related issues, including the scope of the stay of proceedings and costs and expenses relating to the insolvency proceedings, while the law of the chosen seat of arbitration might have a distant connection to the debtor, creditors and other parties in interest in insolvency proceedings. It was also considered undesirable to treat arbitral proceedings differently from litigation that might end up being subject to a stay while arbitral proceedings would not be, and also to treat creditors differently depending on whether their contracts with the debtor included an arbitration clause.

42. The prevailing view was that the lex arbitri (the law of the seat of the arbitral tribunal or the law of the place where an arbitral proceeding was pending) should govern the effects of commencement of insolvency proceedings on arbitral proceedings for many reasons, including legal certainty, promotion of arbitration as a commercial dispute resolution mechanism and for the convenience of the court at the seat of arbitration that would have the power to suspend arbitral proceedings. The Working Group requested the secretariat to revise the draft legislative provisions and the draft commentary accordingly. (For further consideration of that item by the Working Group, see paras. 81 and 82 below.)

3. Avoidance, set-off and treatment of secured creditors

(a) Avoidance

43. The Working Group agreed to retain item (g) on the lex fori concursus list and requested the secretariat to draft legislative provisions and accompanying commentary accordingly. In response to divergent views expressed on the need to provide for defences against avoidance similar to those found in article 16 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the “EIR recast”), the Working Group requested the secretariat to draft a possible variant on the basis of paragraph 31 of document A/CN.9/WG.V/WP.183/Add.1 for consideration by the Working Group at its next session.

(b) Treatment of set-off

44. The Working Group agreed to retain item (i) on the lex fori concursus list, noting that, in its current formulation, the item made it clear that the lex fori concursus would govern the treatment of set-off in insolvency proceedings and not the validity and effectiveness of set-off rights and claims existing at the commencement of insolvency proceedings. The secretariat was requested to draft legislative provisions and accompanying commentary accordingly.

(c) Treatment of secured creditors

45. The Working Group heard different reasons for including and not including an item on the treatment of secured creditors on the lex fori concursus list. Pros and cons of the solution envisaged in article 8 of the EIR recast and its background history were recalled. Among the concerns raised about that solution were that it created a dual regime for the treatment of secured creditors and jeopardized chances of successful reorganization. Noting that those concerns were not as profound in liquidation as in reorganization, some delegations were open to suggestions to consider alternative solutions in particular for reorganization proceedings. While

some support was expressed for finding a suitable solution especially for reorganization proceedings, a uniform approach was preferred in the light of uncertainties that courts might face regarding the type of proceedings to commence and also in the light of possible conversion of one type of proceeding to the other at a later stage of proceedings. Deferring to the insolvency law of the lex rei sitae was considered as an option.

46. Other delegations preferred to retain the solution found in article 8 of the EIR recast since implications of alternative approaches were unknown to them. It was suggested that the final instrument might provide for variants on that matter if a deadlock was unavoidable. While expressing support for flexibility through inclusion of variants in the final text, it was acknowledged that the lex fori concursus might indeed be the simplest and the most appropriate rule on the matter. The other view was that inclusion of variants in the final instrument might become unnecessary if, as a result of UNCITRAL's work on the topic and finding a better solution, the EU would introduce amendments in the relevant provision. At the same time, the Working Group noted that the solution found in article 8 of the EIR recast could co-exist with the lex fori concursus as the default rule applicable to the treatment of secured creditors in insolvency proceedings. The primacy of international obligations and overriding mandatory rules was recalled in that context. It was noted that the EIR recast was an example of such rules in EU member States.

47. In response to some issues of substantive insolvency law raised in discussion (such as the application of a stay of proceedings on secured creditors) and of the law applicable to the validity and effectiveness of security interests, the specific focus of the project was recalled. It was considered important not to overlook in further deliberations the protections available to secured creditors under MLCBI and other UNCITRAL insolvency texts as well as overriding regimes that would be applicable under some international instruments, such as the Cape Town Convention and the Protocols thereto.[7]

48. The Working Group deferred further consideration of that item.

4. Contracts relating to immovable property

49. The Working Group heard different views on whether there should be an exception to the lex fori concursus for contracts relating to immovable property. While some delegations expressed support for the approach taken in article 11 (1) of the EIR recast, other delegations questioned the need for the exception, except maybe for some specific type of immovable property (e.g. fixtures), and emphasized the need to draw a clear distinction between the law governing the validity and effectiveness of rights in the immovable property and the law governing the treatment of those rights in insolvency proceedings, the latter law being the lex fori concursus. The UNCITRAL cross-border insolvency framework that included safeguards for adequate protection of creditors was considered relevant.

5. Liability of directors of the debtor for actions taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability that could be pursued by or on behalf of the debtor's insolvency estate

50. The prevailing view was not to include item (t) on the lex fori concursus list and instead to draft a provision that would stipulate that directors' obligations and liability in the period approaching insolvency remained to be governed by the lex societatis despite the opening of insolvency proceedings, with some exceptions. The exceptions mentioned, as relevant to many jurisdictions but not all, were wrongful trading and violation of the duty to file for commencement of insolvency proceedings. Other than in a few cases that were very closely connected to insolvency law and insolvency proceedings, it was considered inappropriate to subject directors' obligations and

[7] Available at: Security interests – UNIDROIT.

liability in the period approaching insolvency to the retroactive effect of the lex fori concursus at the international level. (For further consideration of that item by the Working Group, see para. 73 below.)

6. Related actions (deriving from insolvency law and connected to insolvency proceedings)

51. Support was expressed for including examples of related actions in the commentary. They were considered helpful for clarifying jurisdictional grounds for judges.

52. Concern was expressed that item (u) was too broad to be retained on the lex fori concursus list. The prevailing view was to retain it but with amendments that would align its formulation with the one used in a similar context in the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments[8] (MLIJ): "related actions (arising as a consequence of or are materially associated with an insolvency proceeding)". It was suggested that the commentary should explain that the lex fori concursus would govern only those actions that were very closely connected to insolvency law and insolvency proceedings.

B. Consideration of issues related to the exceptions to the lex fori concursus deferred from the sixtieth session of the Working Group: payment and settlement systems and regulated financial markets

53. To ensure the appropriate scope of that exception to the lex fori concursus, the Working Group agreed to add the word "regulated" before "financial markets", and to delete the word "solely", in the draft legislative provision found in paragraph 58 of document A/CN.9/WG.V/WP.183/Add.1. It requested the secretariat to reflect in an accompanying commentary: (a) the content of paragraph 50 of document A/CN.9/WG.V/WP.179 that explained the intended scope of the exception; (b) possible exceptions to that exception; and (c) aspects related to digital assets.

C. Consideration of other issues raised in document A/CN.9/WG.V/WP.183/Add.1

54. The Working Group agreed that a provision on the primacy of international obligations would need to be included unless the final text would take the form of a supplement to the UNCITRAL insolvency model laws where such provision was already found. It was agreed that the provision would mirror the content of that model law provision and would not need to be expanded with reference to "overriding mandatory rules". The Working Group requested the secretariat to draft a commentary that would, inter alia, mention relevant treaties, such as the Cape Town Convention and its Protocols (see para. 47 above) as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[9] (the New York Convention).

55. A similar understanding was reached with respect to a provision on interpretation.

56. As regards other issues, a view was expressed that establishing a rigid hierarchy between main and non-main proceedings would not be necessary.

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[8] United Nations publication, Sales No. E.19.V.8. Available at: UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment.

[9] United Nations, *Treaty Series,* vol. 330, No. 4739, p. 3. Also available at: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") | United Nations Commission On International Trade Law.

D. Consideration of document A/CN.9/WG.V/WP.183

1. Purposes and objectives

57. Noting that the drafting of that provision would depend on the final form of an instrument to be prepared but that in any event the provision should list purposes specific to the project additional to those already listed in other UNCITRAL insolvency texts, the Working Group agreed to: (a) explicitly refer in the draft legislative provisions to legal certainty and predictability; and (b) replace "insolvency law" with "insolvency proceedings". No support was expressed for adding other items from the list in paragraph 5 of document A/CN.9/WG.V/WP.183 and the word "the debtor".

58. Divergent views were expressed about the need or desirability of adding the word "abusive" before the phrase "forum shopping". Some delegations considered that including such a qualifier was superfluous in the light of the context in which the term appeared in the draft and because the phrase "forum shopping", unlike the phrase "choice of forum", already had negative connotation. Other delegations questioned the usefulness of including such a subjective qualifier without clarifying its meaning. The alternative view was that adding it would bring clarity. No support was expressed for the suggestion to replace the relevant phrase with the text reading: "reduce the risk of detrimental acts, including abusive forum shopping". The Working Group requested the secretariat to include the word "abusive" in square brackets in a revised draft legislative provision and explain its intended meaning in the draft commentary, which should allow the Working Group to decide at its next session whether the word should be retained.

59. The following drafting suggestions were made for paragraph 6 of the draft commentary: (a) to delete the words "without exceptions" or to convey the intended message better; and (b) to replace "necessitates" with "may necessitate" because the statement that followed did not apply to all jurisdictions. The Working Group requested the secretariat to redraft the commentary reflecting views expressed in the Working Group.

2. Scope of application

60. No support was expressed for retaining the words "also address". It was suggested that the provision should state that it did not determine the law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings. The prevailing view was that paragraph 2 of the draft legislative provision and the draft commentary should be redrafted to reflect that suggestion and also to include the provisions from recommendation 30 of the Guide and the provisions along the lines suggested in paragraph 9 of document A/CN.9/WG.V/WP.183.

61. Broad support was expressed for inclusion of a provision that would exclude credit and insurance institutions from the scope of application of the legislative provisions or that would leave it to States to determine which entities would be excluded. Another view was that including such an exclusion in the legislative provisions might be superfluous since the domestic insolvency law itself already addressed the scope of application of insolvency law. It was considered sufficient to address the point only in the commentary. The prevailing view was to include such an exclusion in the draft legislative provisions.

62. No support was expressed for adding draft legislative provisions on jurisdictional rules or rules for localization of assets since they would be repetitive with other UNCITRAL insolvency texts. However, it was noted that it would be helpful to discuss those issues in the text, especially if the text would remain part of the Guide.

3. Definitions

63. Noting inconsistencies between the scope of the definition and paragraph 1 of the draft commentary, it was suggested to narrow the definition. An alternative view was that the definition should stay broad. Recalling its earlier deliberations and decision on that matter,[10] the prevailing view was to retain the definition as drafted but to replace, in the first sentence of the draft commentary, the phrase "with sufficient connection to insolvency" with the phrase "relating to insolvency" used in UNCITRAL insolvency model laws. It was observed that not all intended users of a future instrument, such as judges, would refer to the explanatory materials. It was therefore considered important to achieve clarity and precision throughout the legislative provisions themselves.

64. Divergent views were expressed about a non-exhaustive list of examples of non-insolvency laws relating to insolvency found in the draft commentary. The prevailing view was to retain it but to redraft item (a) to refer to directors' obligations and liabilities in the context of insolvency proceedings and item (b) to refer to debt restructuring procedures in pre-insolvency proceedings.

65. The Working Group agreed to continue using the Latin terms throughout the project. They were regarded as well-known neutral legal terms, convenient to use and achieve common understanding.

4. Public policy exception

66. In response to the suggestion to delete the word "manifestly" from the draft legislative provision, the prevailing view was to retain it recalling that the corresponding provision in all UNCITRAL insolvency model laws included it.

5. Law applicable in insolvency proceedings by default: the lex fori concursus

67. No comments were made with respect to items (a) to (c), (e), (f), (h) and (k) to (r) and accompanying commentary.

68. With respect to the chapeau and item (d) (reference to a stay of proceedings in square brackets) and their accompanying commentary, a point was made that the provisions should be aligned with article 29 of MLCBI that gave prominence to the lex fori concursus of the local proceedings. Acknowledging the complexities of applicable law issues arising from concurrent proceedings that article 29 of MLCBI addressed, the Working Group deferred those issues. It noted a suggestion to list a stay of proceeding as a separate item.

69. With respect to cross-border recognition of effects of the lex fori concursus, a view was expressed that it would be inappropriate to impose the effects of the lex fori concursus, including as regards a stay of proceedings, extraterritorially at the global level. A suggestion was made to include an exception to the lex fori concursus rule that would defer to the law of the recognizing State with respect to a relief to be granted to foreign proceedings.

70. In response, it was recalled that several provisions of the UNCITRAL insolvency model laws gave prominence to the lex fori concursus of the main proceeding vis-à-vis non-main proceedings. It was suggested that the current project should aim at clarifying, supplementing and amplifying that framework, instead of deviating therefrom, for example by giving discretion to the recognizing court to defer to the lex fori concursus of the main proceeding as some courts had already done.

71. It was noted that the EIR recast envisaged the extraterritorial effect of the lex fori concursus of the main proceeding, except for in some matters. Noting a view that the UNCITRAL insolvency model laws attempted to achieve similar results but differently, it was considered necessary to find a solution that would accommodate different recognition regimes.

[10] A/CN.9/1088, paras. 63 and 68; and A/CN.9/1094, para. 69.

72. The Working Group deferred consideration of those issues, noting that solutions to them would impact not only concurrent insolvency proceedings but also litigation and other proceedings involving the debtor and its assets that might be ongoing or pending after the commencement of insolvency proceedings. The need to address specific issues arising from the insolvency of an individual were also noted.

73. As regards items (g), (i), (j), (t) and (u), the Working Group recalled its decisions related to those items made earlier at the session and its agreement to reflect those decisions in a revised text (see paras. 43–48 and 50–52 above). With specific regard to item (t), after hearing views that some causes of action and liabilities of directors would fall under the lex fori concursus, the Working Group confirmed that the next draft of legislative provisions should bring within the scope of the lex fori concursus only those causes of action and liabilities that were closely related to insolvency proceedings (see para. 50 above). It deferred consideration of how that would be achieved to its next session.

74. As regards item (s), it was queried whether the chapeau provision captured post-closure discharge. Recalling its consideration of post-closure discharge matters when part five of the Guide, on insolvency law for micro- and small enterprises, was prepared, the Working Group confirmed that reference to "their effects" in the chapeau captured those instances. With respect to paragraph 35 in the accompanying draft commentary, the following suggestions were made: (a) to clarify it with examples; (b) to delete it; or (c) to put it in square brackets for further consideration. Noting that other parts of the draft commentary addressed cross-border recognition of effects of the lex fori concursus, the Working Group agreed to retain the paragraph in square brackets for further consideration.

6. Exceptions to the lex fori concursus: labour contracts [and labour relationships]

75. The following drafting suggestions were made with respect to paragraph 1 of the draft legislative provision: (a) to delete "rejection, continuation or modification" and discuss issues raised by the deleted part in the commentary; and (b) to retain that part with the addition of the word "assignability".

76. Some delegations suggested focusing on paragraph 2 and deleting paragraph 1 as a solution that would not prejudice options for States to protect labour rights in the best way possible in insolvency proceedings. The alternative view was that paragraph 2 without paragraph 1 would state the obvious and that, in any event, it was important to keep paragraph 1 for reasons provided earlier.[11] Examples of how paragraph 1 would operate in practice were given. It was recalled that reference to the law of a labour contract in that paragraph was intended to encompass all laws, including insolvency law. It was explained that, although employees might indeed receive better treatment through undertakings that the insolvency representative might give to avoid the opening of parallel proceedings (envisaged in article 28 of MLEGI), those undertakings, addressing insolvency law matters, such as distribution and ranking, were limited in scope. It was considered that they would not cover issues arising from other laws relevant to labour protection, such as employees' dismissals, the treatment of collective redundancies or employees' consultation rights.

77. A view was expressed that paragraph 2 could be deleted and its content could be reflected in the commentary. Another view was that paragraph 2 should be retained. While supporting retention of that paragraph, some delegations preferred keeping reference only to the ranking of labour claims or replacing the reference to "avoidance actions" with "general rules on avoidance" in that paragraph. For other delegations, avoidance was the insolvency law matter belonging to paragraph 2. Several other delegations recalled that protection of labour rights was enshrined in the constitutions of many jurisdictions, and a public policy exception would be invoked if those constitutional norms were not respected.

[11] A/CN.9/1088, paras. 74–76; and A/CN.9/1094, paras. 88–93.

78. A query was raised with respect to the proposed addition of the reference to “labour relationships”. A view was expressed that it was preferable to retain reference only to labour contracts.

79. After discussion, the Working Group agreed to replace the draft legislative provision with the following wording: “The effects of insolvency proceedings on labour contracts and relationships shall be governed by the law applicable to the contract or relationship.” It was agreed to reflect the content of deleted parts in the commentary. The secretariat was requested to make those revisions and to illustrate in the draft commentary how the lex fori concursus could deal with different reorganization situations, while respecting the agreed broad rule.

E. Next steps

80. The Working Group requested the secretariat to revise draft legislative provisions and commentary and consolidate them in a single document for consideration by the Working Group at its next session. The understanding was that, for the time being, a model law would remain a working assumption.

81. The Working Group recalled its deliberations of the law governing the effects of insolvency proceedings on ongoing or pending arbitral proceedings and the prevailing view that emerged at that time that the law of the seat of the arbitration (the lex arbitri) should be that law (see paras. 41 and 42 above). The Working Group further recalled that article 18 of the EIR recast took the same approach and applied it also to ongoing and pending litigations. Noting that the Working Group, at the current session, considered only arbitration aspects of that provision, some delegations expected that the Working Group would take up also litigation aspects of that provision at its next session.

82. It was also recalled that the Working Group did not consider how arbitration-related provisions agreed upon at the session should appear in a revised draft. A suggestion was made to: (a) include a draft legislative provision on the law governing the effects of insolvency proceedings on arbitration agreements (the lex fori concursus) as an exception to what would become the transposition of recommendation 30 in the draft text; and (b) include a draft legislative provision on the law governing the effects of insolvency proceedings on ongoing or pending arbitral proceedings (the lex arbitri) as an exception to the lex fori concursus rule. The Working Group agreed that the secretariat should prepare the next draft on that basis.

VI. Other business

83. The Working Group was informed about a recent change made in the date of observance of Eid-al-Fitr, one of the United Nations official holidays, in New York, in 2023 (falling on 21 April instead of 24 April as had originally been communicated to the UNCITRAL secretariat) and that all intergovernmental meetings scheduled for 21 April were cancelled in the United Nations Headquarters. That change affected the sixty-second session of the Working Group scheduled to be held in the United Nations Headquarters, from 17 to 21 April 2023.

84. The Working Group considered the following options: (a) shortening the session by one day or adjourning it on Thursday, 20 April and continuing it on Monday, 24 April, while holding an event or intersessional informal consultations on Friday, 21 April, outside the United Nations Headquarters; (b) swapping the dates with Working Group VI (8–12 May 2023); and (c) holding a session during a later week in the first half of 2023 to allow sufficient time to prepare for the session (e.g. the Secretariat confirmed availability of conference services for 15–19 May 2023 that would have allowed the Working Group to hold a five-day session).

85. Having carefully considered the implications of each option, including costs for delegations and the secretariat, and changes that would need to be made in the plans for that period, the Working Group expressed preference for holding a four-day session during the originally allocated week and adopting the report of that session through a written procedure.[12] It was not excluded that informal consultations or another event might be held on 21 April 2023 outside the United Nations Headquarters.

86. While expressing appreciation to the Secretariat for its responsiveness to requests in the Working Group to find alternative dates, regrets were expressed that the Working Group had to face yet again the need to adjust the dates of its session and hold a shorter session. The Secretariat was requested to avoid scheduling sessions of Working Group V during weeks that fell on United Nations public or floating holidays.

87. Concern was expressed about the late issuance of working papers for the session in the six official languages of the United Nations and about posting them as advance copies in English on the web page of the Working Group. The secretariat was requested to post advance copies of documents in English only in very exceptional circumstances.

[12] *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 17* (A/77/17), para. 236.

Annex

Summary of the Conference[1]

1. The Conference, organized by the UNCITRAL secretariat jointly with the WBG, III, INSOL International and IBA, brought together legislators, policy makers, judges and insolvency practitioners from across the world, to assess evolution of the enactment, implementation, application and the use of MLCBI and to discuss the future of MLCBI, whether as a stand-alone text or enacted alongside MLIJ and MLEGI and possible future texts. The Conference was attended by more than 100 in-person participants and was broadcasted in the six official languages of the United Nations from the dedicated web page.[2] The Conference was organized around three broad themes: (a) the evolution of enactment of MLCBI across the globe and what was and was not envisaged by the drafters of the text; (b) issues commonly faced by judges when interpreting and applying MLCBI and how they handle them; and (c) the experience of insolvency practitioners with the use of the text.

2. The opening statements[3] conveyed that: (a) since its adoption on 30 May 1997, MLCBI had evolved into a centrepiece of cross-border insolvency practice, contributing to the harmonization of the international cross-border insolvency law framework, influencing substantive domestic insolvency law reform, case law and practice around the globe and shaping the work programme of UNCITRAL in the area of insolvency law; (b) the steadily growing number of enacting States,[4] encompassing both common and civil law jurisdictions from all over the world, was testament to the growing recognition of the importance and impact of cross-border insolvency and enduring relevance of the text; and (c) the significance of the text was explained by the fact that MLCBI provided a clear, consistent and predictable framework for mutual recognition and cooperation in cross-border insolvency proceedings and robust and flexible tools for efficient and cost effective resolution of cross-border insolvencies, which ultimately benefited all stakeholders involved in the insolvency process. It was recalled that the main elements of MLCBI included: (a) direct access by foreign representatives and foreign creditors to courts; (b) simplified procedures for recognition of foreign insolvency proceedings; (c) timely and effective relief to support the orderly and fair conduct of cross-border insolvencies; (d) court-to-court direct communication and cooperation; and (e) coordination of concurrent proceedings.

3. The recurrent themes throughout the three sessions of the Conference were issues arising from: (a) deviations made upon enactment of MLCBI, their reasons and impact on cross-border insolvencies, in particular with respect to the public policy exception (article 6 of MLCBI), automatic relief upon recognition of the foreign main proceeding (article 20 of MLCBI) and introduction of reciprocity requirements; (b) court-to-court communication and cooperation (articles 25-27 of MLCBI); (c) enterprise group insolvencies; (d) recognition and enforcement of insolvency-related judgments, in particular as they relate to avoidance powers (article 23 of MLCBI); (e) the need for increased awareness about the text and capacity to effectively use it; and (f) impact of other factors on the uptake of the text, including inter- and intra-regional developments.

4. Statements during **the first session**[5] highlighted: (a) divergent and convergent approaches to the enactment of MLCBI, noting the growing convergence of approaches in recent years. In particular, it was noted that, while among usual

[1] The summary was prepared by the UNCITRAL secretariat. It was not before the Working Group for adoption as part of the report of the session.

[2] https://uncitral.un.org/en/mlcbi25.

[3] By the Chair of the Working Group, Mr. Xian Yong Harold Foo (Singapore), and by the Principal Legal Officer, Head of the Legislative Branch, UNCITRAL secretariat, Mr. José Angelo Estrella-Faria.

[4] As of the date of the Conference, 53 States encompassing 56 jurisdictions.

[5] By Neil Cooper, Professor, Nottingham Trent University; Line Herman Langkjær, Professor, Aarhus University; Wai Yee Wan, Associate Dean and Professor, City University of Hong Kong; and Fernando Dancausa, Senior Financial Sector Specialist, WBG.

deviations from the provisions of MLCBI in the early years after its adoption had been introduction of the reciprocity requirement, the need for that requirement was reconsidered in some MLCBI enacting States; and (b) that most enacting States, after the usual scrutiny of the text and related materials, tended to preserve many parts of MLCBI upon enactment, introducing minimal deviations. It was argued, however, that the impact of those deviations on cross-border insolvencies should not be underestimated and should be carefully studied. For example, the word "manifestly" in the public policy exception was dropped in some enacting States with the result that the threshold for rejection of recognition on the ground of public policy was lowered in those States.

5. During that session, speakers referred to commonly held misconceptions about the text, including that MLCBI was more suitable for common law jurisdictions. The surveys of enactments of MLCBI presented at the Conference indicated that deviations from MLCBI upon enactment were explained not so much by legal traditions of enacting jurisdictions but by other factors. It was noted that MLCBI-enacting common law jurisdictions also deviated from MLCBI, and the deviations that those jurisdictions introduced were not uniform. It was submitted that different enactments were often explained by domestic insolvency law provisions. For example, the absence of a stay upon commencement of insolvency proceedings in the domestic insolvency framework might explain non-enactment of article 20 of MLCBI in some jurisdictions. Deviations were also explained by approaches of enacting jurisdictions to cross-border insolvency matters generally at the time of enactment of MLCBI: States with a moderately territorial approach to handling insolvency matters were likely to adopt MLCBI in full compared with States that had taken an exclusively territorial approach to insolvency matters. In addition, triggers of MLCBI enactments (e.g. donor-driven processes, urgent reforms in response to an economic crisis) also influenced the extent and nature of deviations from MLCBI.

6. Other misconceptions mentioned about MLCBI included that it negatively impacted the sovereignty of States, eroded the powers and independence of domestic courts and negatively affected interests of the local insolvency profession and local creditors. It was suggested that the experience with the enactment and use of MLCBI, including safeguards found there, had demonstrated the opposite effects of the text.

7. It was recalled that the drafters of the text were guided by the following considerations: (a) the resulting text should be simple and procedural in nature; (b) it should take the form of a soft law text; (c) it should not interfere with domestic insolvency law and try to harmonize it; (d) it should envisage automatic relief upon recognition of the foreign main proceeding and the latter should be defined with reference to the centre of the debtor's main interests (COMI) as the most pragmatic solution; (e) it should provide for direct court-to-court communications and cooperation (before the work on MLCBI commenced, it had been ascertained that achieving such a direct court-to-court communications and cooperation, unknown to many jurisdictions at that time, would be possible, subject to certain safeguards); and (f) it should not deal with reciprocity.

8. At the same time, drafters left out some matters, such as applicable law, enterprise group insolvency, proceedings that were neither main nor non-main and the date with reference to which the COMI was to be determined. In addition, the drafters chose to be deliberately vague on some other matters, leaving them to States, such as the scope of foreign proceedings (e.g. the treatment of schemes of arrangement) and discretionary relief.

9. The drafters did not envisage that: (a) the text would have an unexpectedly slow uptake in some jurisdictions that supported and actively participated in its preparation; (b) there would be resistance from insolvency professionals to its enactment because of the perceived threat to their work; (c) state-owned or controlled entities, interpreted broadly, would be excluded from the scope of MLCBI; (d) COMI would be determined by some courts with reference to the location of the insolvency

representative handing the case; and (e) some other fundamental notions of the text would be rejected or implemented differently as was originally envisaged.

10. The role of international financial institutions (IFIs) in elevating cross-border insolvency reform in the policy agenda of States and promoting MLCBI in that context had proven indispensable and was appreciated. It was noted that the demand for technical assistance with the enactment of MLCBI was steadily growing in the last five years, and that further MLCBI enactments might be expected soon. It was acknowledged that promotion of MLCBI enactment was a resource- and time-intensive process, often necessitating awareness-raising among legislators and policymakers and provision of technical assistance, and that not all those efforts by IFIs led to the enactment of MLCBI. The WBG informed that it was working on establishing a mechanism that would allow: (a) tracking progress with cross-border insolvency reform in jurisdictions that had been interested in enacting MLCBI but did not enact it; and (b) studying the reasons for non-enactment, which should inform IFIs' further steps, including possibly launching revisited promotional and technical assistance programmes in those jurisdictions.

11. It was emphasized that the successful uptake of MLCBI depended not only on the enactment of MLCBI but also on the preparedness of judges and insolvency practitioners to use the enacted text effectively. While there was often an element of urgency in enacting the text, especially if cross-border insolvency reform was triggered by the economic crisis, considerably more time was needed to build local capacity for the use of MLCBI. Examples were given of jurisdictions that enacted MLCBI long time ago but where the text had never or rarely been used for the lack of such capacity. It was suggested that readily available resources allowed building the required local capacity considerably earlier to the enactment of MLCBI. Other reasons for non-use of the text were also given, including the reciprocity requirement (see further below).

12. The first session was concluded with a presentation by the UNCITRAL secretariat of the Consolidated Text of the UNCITRAL Model Laws on Cross-Border Insolvency, Recognition and Enforcement of Insolvency-related Judgments and Enterprise Group Insolvency (2021) and an accompanying Guidance Note [6] that explained how the consolidated text should be read and how specific provisions of each model law could be combined to create a single consolidated enactment. It was stressed that the materials, although they recognized that each of the two more recent UNCITRAL insolvency model laws supplemented MLCBI, did not suggest any mandatory or simultaneous enactment of all three model laws nor any identical enactment or drafting approach. It was noted that the text of each model law was maintained in its original form as much as possible in the consolidated text, which ensured that the purpose of each model law continued to be achieved, and that visuals (different colours for each model law, underlines, strikeouts, drafting notes in square brackets, in bold and in the colour corresponding to the relevant model law) were used to identify clearly the source of provisions and changes made.

13. During **the second session**, the invited judges[7] shared their experience with the use of MLCBI, from both procedural and substantive perspectives. They observed that, while in many MLCBI enacting jurisdictions, general civil and commercial courts handled recognition requests like any other case, and rotation of judges was common, in other jurisdictions, there were courts or judges specializing in cross-border insolvency cases, and those cases were handled under special procedural

[6] Both are found at Consolidated Text of the UNCITRAL Model Laws on Cross-Border Insolvency, Recognition and Enforcement of Insolvency-related Judgments and Enterprise Group Insolvency (2021) | United Nations Commission On International Trade Law.

[7] Moderators: Chief Justice Geoffrey Morawetz (Canada) and Sir Alastair Norris (United Kingdom). Panellists: Judge Olga Borja Cárdenas (Mexico), Judge Marko Radovic (Serbia), Justice Aedit Abdullah (Singapore) and Justice Lydia Mugambe (Uganda).

rules. For the first group of States, the role of the applicant in elevating priority of its recognition application was emphasized.

14. The judges illustrated procedural rules and tools that helped them to deal with requests for recognition of foreign proceedings and for cooperation and coordination with foreign courts, including in the enterprise group insolvency context, expeditiously. Examples included: (a) incorporation of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the JIN Guidelines) [8] in the domestic procedural rules; (b) pretrial conferences conducted by registrars ahead of the actual hearing, which helped identifying issues and possible shortcomings in the applicant's submissions and rectifying them before the hearing; (c) standard forms, which could be mandatory or optional for use and different for liquidation and reorganization and types of requests (e.g. provisional relief, discretionary relief, first day orders); and (d) the role of court officers in preparing the case and in advising the judge on policy issues involved.

15. The judges also noted factors that usually slowed down recognition, such as allegations or suspicion of fraud, corruption, the absence of due process in foreign proceedings or other factors that usually justified application of the public policy exception or MLCBI's provisions on adequate protection. The WBG [9] referred to another stumbling block to speedy recognition – the need to ascertain reciprocity in jurisdictions that introduced that requirement. It was recalled (see para. 7 (f) of this annex) that the drafters of the 1997 text chose not to address reciprocity either in MLCBI or its Guide to Enactment and Interpretation (the GEI) with the result that no guidance was provided by UNCITRAL as regards that issue. It was argued that, while it might be straightforward to ascertain reciprocity in jurisdictions where competent authorities maintained a list of designated countries, it might be difficult to do so in jurisdictions that did not maintain such lists: there the courts often queried which deviations from MLCBI in a requesting jurisdiction were so significant as to justify assertion of the absence of reciprocity and rejection of recognition. The trend to eliminate the reciprocity requirement was recalled (see para. 4 of this annex). The experience of at least one jurisdiction indicated that it might be difficult to reconcile the reciprocity requirement with the requirements of MLCBI for court-to-court direct communication, cooperation and coordination if those requirements were enacted as well.

16. According to the speakers, it was regrettable that the readily available resources that could facilitate the use of MLCBI by judges (e.g. the GEI, *travaux préparatoires* of MLCBI, and explanatory materials specifically designed for judges such as The Judicial Perspective (2022),[10] the Digest (2021)[11] and MLCBI-related collection in CLOUT[12]) were underutilized. It was observed that many judges were not aware of MLCBI and those supplementary resources. The role of international insolvency judicial training and international insolvency judicial networks was highlighted in that respect. At the same time, their limits were also noted. It was considered useful to involve local professionals alongside international experts in the delivery of insolvency judicial training for local judges. That measure allowed reflecting better not only local circumstances and local legal framework, including deviations from MLCBI that might have been introduced in a given jurisdiction, but also the content of international standards and explanatory texts that might not be available in a local language.

[8] Available at: Judicial Insolvency Network (jin-global.org).

[9] Mr. Fernando Dancausa, Senior Financial Sector Specialist, spoke on behalf of the WBG in the second session as well.

[10] Available at: UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective | United Nations Commission On International Trade Law.

[11] Available at: Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency.

[12] Available at: Case Law on UNCITRAL Texts (CLOUT) | United Nations Commission On International Trade Law.

17. During **the third session**, the invited insolvency practitioners [13] shared their experience with the use of MLCBI in cross-border insolvency cases of different sizes and contexts (e.g. complex restructuring, asset tracing and recovery and crypto insolvencies), involving legal and natural persons as well as enterprise groups. According to them, it was undisputed that many MLCBI-related factors influenced practitioners' cross-border insolvency strategies, such as: (a) whether MLCBI was enacted in a particular jurisdiction and, if so, how (i.e. the extent and nature of exemptions from its scope (i.e. excluded entities) and deviations from its provisions (e.g. public policy exception, automatic stay and other relief)); (b) how COMI was determined in a particular jurisdiction; and (c) discretionary elements and how they were used by courts (i.e. less predictability or pragmatic results). As regards non-enacting States, the strategies were informed by the stance of those States towards cross-border insolvencies and the achievement of objectives of insolvency law generally (e.g. the need to maximize the value of the insolvency estate, protect business rescue finance) and to court-to-court communication and cooperation specifically. The role and limits of cross-border protocols were acknowledged in that respect.

18. The utility of MLCBI for the insolvency profession was demonstrated by the steadily increasing number of requests for recognition of foreign proceedings in some major international debt restructuring centres. In addition, real-life examples demonstrated the positive difference in tracing and recovering assets in the same jurisdiction before and after it enacted MLCBI. In comparison, in MLCBI-non-enacting jurisdictions, an urgent relief and other steps had to be requested and were handled using procedures and requirements from the nineteenth century.

19. It was submitted that the continuous work by UNCITRAL on clarifying, amplifying and complementing MLCBI was the proof that the text was being used by practitioners since the experience with its use informed the need for further reform and directions of reform. It was acknowledged that the ongoing work by UNCITRAL on cross-border insolvency aspects, although complex, was needed, including to tackle issues that had been considered not ripe for harmonization when MLCBI was prepared and to address inconsistencies arising from States' divergent practices on cross-border insolvency matters. It was suggested that the relevance and utility of MLCBI and MLEGI and the current work of the Working Group on APL and ATR were expected to be tested especially in crypto insolvencies, while the relevance and utility of MLIJ would be tested especially with reference to its broader scope than that of MLCBI (covering, for example, judgments related to voluntary or out-of-court restructuring agreements), its relevance to the *Gibbs* principle [14] and its article X confirming that MLCBI's relief provisions encompassed the recognition and enforcement of insolvency-related judgments.

20. It was suggested that parties to transactions should be aware of the implications of various factors on their possible future debt and business restructuring options, including laws governing their transactions, other applicable laws, the location of counterparties, jurisdictions involved and the stance of those jurisdictions on cross-border insolvency aspects. It was also suggested that, while awaiting and promoting the enactment of two other UNCITRAL insolvency model laws as well as broader enactment of MLCBI, practitioners might already use mechanisms proved to be effective in complex cross-border insolvency proceedings, such as mediation. In addition, it was considered desirable to explore the possibility of creating an international court for resolution of complex restructuring disputes involving multiple jurisdictions or for cases where connection to any single jurisdiction would be difficult to establish (e.g. in crypto insolvencies).

21. The Conference was concluded with the recognition of MLCBI as the key pillar of cross-border insolvency framework and of the significance and complementarity

[13] Moderators: Annerose Tashiro (Germany) and Evan J. Zucker (United States). Panellists: Scott Atkins (Australia), Diana Rivera Andrade (Colombia), Ashok Kumar (Singapore) and Charlotte Møller (United Kingdom).

[14] *Antony Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

of other UNCITRAL insolvency texts and ongoing work on APL and ATR for establishing effective and efficient cross-border and domestic insolvency frameworks. Looking towards the next decades of MLCBI, everyone was encouraged to join the efforts of various initiatives and stakeholders within and outside the United Nations to facilitate further enactment and stronger uptake of MLCBI.