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Report of Working Group V (Insolvency Law) on the work of its sixty-third session (Vienna, 11–15 December 2023)

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I. Introduction

1. At its sixty-third session, the Working Group continued deliberations on the two topics referred to it by the Commission (civil asset tracing and recovery in insolvency proceedings (ATR) and applicable law in insolvency proceedings (APL)). Background information on the topics considered at the session may be found in the annotated provisional agenda of the session (A/CN.9/WG.V/WP.188).

II. Organization of the session

2. Working Group V, which was composed of all States members of the Commission, held its sixty-third session in Vienna, from 11 to 15 December 2023. In accordance with the decision taken by the Commission at its fifty-sixth session,[1] 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, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Malaysia, Mauritius, Mexico, Morocco, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

4. The session was attended by observers from the following States: Angola, Bolivia (Plurinational State of), Cambodia, Egypt, El Salvador, Guatemala, Libya, Malta, Netherlands (Kingdom of the), Oman, Paraguay, Philippines, Portugal, Romania, Slovakia, Slovenia and Sri Lanka.

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

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

(a) Organizations of the United Nations system: the World Bank Group;

(b) *Invited international governmental organizations*: Association of Southeast Asian Nations (ASEAN), Hague Conference on Private International Law (HCCH), International Association of Insolvency Regulators (IAIR) and Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Centre for International Legal Studies (CILS), China Council for the Promotion of International Trade (CCPIT), Conference on European Restructuring and Insolvency Law (CERIL), Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires (CNAJMJ), European Law Institute (ELI), Fondation pour le Droit Continental, Groupe de Réflexion sur l'Insolvabilité et sa Prévention (GRIP 21), INSO Section, INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), Inter-American Bar Association (IABA), 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), National Association of Bankruptcy Trustees (NABT), New York City Bar (NYCBAR) and P.R.I.M.E. Finance Foundation.

[1] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 17* (A/78/17), paras. 217–218.

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.188);

(b) Note by the Secretariat: civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.189); and

(c) Note by the Secretariat: applicable law in insolvency proceedings (A/CN.9/WG.V/WP.190).

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. Other business.
6. Adoption of the report.

III. Deliberations

10. Under agenda item 4, the Working Group continued deliberations of legal issues arising from ATR and APL on the basis of working papers A/CN.9/WG.V/WP.189 and A/CN.9/WG.V/WP.190, respectively. The summary of deliberations of the Working Group on the ATR topic may be found in chapter IV below. The summary of deliberations of the Working Group on the APL topic may be found in chapter V below.

IV. Consideration of legal issues arising from civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.189)

A. General

11. The Working Group had before it the second draft of a descriptive, informational and educational draft text on civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.189) (the draft text). The Working Group took note of: (a) support expressed for its work on the topic; (b) views about the relevance and importance of that work for an effective and efficient insolvency framework and harmonization and improvement of ATR-related frameworks and practices; (c) suggestions for ways of transposing the results of that work in the domestic systems, including safeguards against, for example, “fishing expeditions”, which was not allowed in some jurisdictions; (d) a reminder that the Commission requested the Working Group to treat both topics equally and to ensure coordination and cooperation with other institutions to avoid unnecessary duplication of efforts and inconsistent results; and (e) requests for enhanced technical assistance and capacity-building by the UNCITRAL secretariat in the area of insolvency law at the country and regional levels.

12. It was noted that the draft text consisted of: (a) a survey of ATR-related legislative provisions and practices across the world; and (b) ideas for a toolkit that would aim at expediting ATR across borders. While both parts were considered useful and relevant to States and practitioners, it was queried whether the focus of deliberations should be shifted to the toolkit and whether that shift could affect the structure of the draft text. A different view was that the draft text should continue addressing domestic ATR tools in the first place since without an effective and efficient domestic ATR framework one might not expect expedited ATR across borders. It was noted that the draft text was expected to explain how those domestic ATR tools should be made more readily and easily available for expedited ATR across borders. A request was made to reflect a greater variety of legal systems and ATR tools in the draft text. In the light of the length of the draft text, the secretariat was also requested to include a table of contents and other features that would make the draft text more user-friendly.

13. It was considered necessary to highlight distinct aspects arising from ATR in liquidation and reorganization. By way of an example, it was noted that in some jurisdictions a single creditor may petition for ATR in liquidation but not in reorganization.

B. Comments on the draft text

14. The Working Group agreed:

(a) To amend the fourth sentence of paragraph 3 to read: “Appendix I contains a toolkit of measures that could expedite ATR, which is essential in the digital age that brings new changes for ATR, in particular across borders due to …” (as a result of that change, it was considered necessary to expand the scope and focus of appendix I from the current expedited ATR across borders to expedited ATR generally, including domestic ATR);

(b) To replace in paragraph 5 the phrase “realize value on assets” with the phrase “recover assets and their value,” so as to capture the ATR purposes in both liquidation and reorganization;

(c) To align the scope of the draft text with the scope of other UNCITRAL insolvency texts, by excluding banking, financial, insurance and other institutions subject to separate regulatory regimes;

(d) To replace the phrase “that are often used to obfuscate” with “can be used to obfuscate” in paragraph 10;

(e) To amend the title of section C to read “Specifics of asset tracing and recovery in insolvency proceedings” (a related suggestion was to define ATR not in paragraph 1 but in paragraph 12 of the draft text);

(f) To add in paragraph 20 that, in some jurisdictions, an obligation to notify the creditors before assigning claims to third parties would arise;

(g) To delete the word “convenient” from the title of section II.B.3 and convey in that title that ATR might target assets that would ultimately not become part of the insolvency estate;

(h) To replace the word “Incentives” with “Obligations” in the title of section II.B.4 and in that section;

(i) To replace the word “potentially” with the phrase “upon commencement of insolvency proceeding” in paragraph 56;

(j) To replace the term “a judicial overseer” with the phrase “a court or administrative officer” in paragraph 58;

(k) To replace the opening part of the first sentence of paragraph 59 with “In certain jurisdictions, upon receipt of an application for commencement of insolvency proceedings, courts can request production of information …”;

(l) To add “an application for commencement is withdrawn” as an additional item in the second sentence of paragraph 63;

(m) To delete the last sentence from paragraph 70;

(n) To redraft the last part of the first sentence in paragraph 72 to convey more clearly the intended meaning that an asset, including a cause of action, was known to exist but was missing or not disclosed;

(o) To delete “generally” in paragraph 82;

(p) To replace the phrase “at the disposal of the court” with the phrase “available to assist or to respond to requests from the court” in paragraph 84 and to replace the word “escape” with the word “avoid” and the word “collaboration” with the word “cooperation” in paragraph 85;

(q) To add reference to the creditor committee or creditors in the second sentence of paragraph 92 (f);

(r) To delete the word “personally” in the first sentence of paragraph 96 and, instead of deleting paragraph 96 as was suggested by some delegations at the session, to redraft paragraphs 95 and 96 by grouping related provisions, removing repetitions and adding cross-references to the relevant parts of the UNCITRAL Legislative Guide on Insolvency Law[2] (the Guide). It was considered necessary to explain in the draft text the liability that the insolvency representative might face specifically for its ATR actions or the lack thereof;

(s) To add “elements to be proved and burden of proof” in paragraph 98;

(t) To ensure consistency with the Guide in the terminology used in paragraphs 102, 103 and 118;

(u) To expand on the last sentence of paragraph 105 to capture other possible starting points, such as the date on public records;

(v) To reflect in paragraphs 106 and 117 that in some jurisdictions, creditors could pursue the referred actions without authorization of the insolvency representative or the court;

(w) To delete “one or more” from the last sentence of paragraph 106;

(x) To replace the opening part of the last sentence in paragraph 110 with “Others allow the burden of proof to be shifted to the counterparty to establish that the debtor’s actual intent was not to defraud creditors, or with regard to those elements …”;

(y) To expand paragraph 114 with examples of transactions that would be exempted from avoidance in some jurisdictions, such as those reasonably required to save the business from insolvency (e.g. pre- or post-commencement finance), as well as reasonable costs incurred, for example by a micro- or small enterprise (MSE), for engaging professional advice and support in debt restructuring negotiations;

(z) To stress in paragraph 122 the exceptional nature of the ATR tool discussed in that paragraph, like it was done in the first sentence of paragraph 126 of the draft text with respect to substantive consolidation;

(aa) To reflect in paragraph 123 and elsewhere where UNCITRAL’s recommended enterprise group insolvency framework was mentioned that some jurisdictions did not enact that framework and might not have any enterprise group insolvency framework at all;

(bb) To align paragraph 125 with the wording of recommendation 225 (a) of the Guide.

[2] Available at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.

15. On the understanding that section I.B of the draft text would continue introducing a reader to asset tracing and recovery generally and section I.C would introduce a reader to ATR, the following suggestions did not gain sufficient support: (a) to reflect the content of paragraph 13 in paragraph 7; (b) to replace the phrase "legitimate claimant(s)" with the phrase "insolvency estate" or "interested parties" in paragraph 7; (c) to delete items (a) to (d) from paragraph 8; (d) to merge sections I.B and I.C; or (e) to reconsider the need for section I.B. Other drafting suggestions with respect to paragraphs 7, 8 and 13 were not taken up.

16. The Working Group deferred consideration of paragraph 11 until it had discussed digital aspects (see paragraphs 22–24 below). It deferred consideration of section I.D until it had considered the entire draft text (see paragraphs 34–39 below for the discussion by the Working Group of issues related to section I.D).

17. The Working Group did not take up points raised with respect to the treatment of bona fide acquirers in avoidance proceedings as well as the limitation period for bringing actions for criminal offences, such as fraudulent transactions. Suggestions to replace the phrase "illegal and inappropriate activities" with the phrase "illegal activities and transactions that are not in the ordinary course of business" in the last sentence of paragraph 78, or to refer in that context only to illegal activities, were eventually withdrawn.

18. With respect to suggestions to add some points in chapter II (e.g. protection against compelled self-incrimination, obligations of the debtor and contempt-of-court charges), it was clarified that, as a result of the envisaged streamlining of the draft text, the need to repeat those points in chapter II in addition to chapter III might not arise.

19. The Working Group noted that the agreed amendments to paragraph 3 of the draft text (see paragraph 14 (a) above) would require introducing changes to other parts of the draft text affected by those amendments.

20. The secretariat was requested to explain the meaning of Latin terms used throughout the text clearer to ensure that their intended meaning was accurately conveyed in all the six languages of the United Nations. It was also requested to clarify in the text that the term "evidence-gathering" encompassed the storage and preservation of evidence.

21. With respect to other parts of the draft text, the Working Group agreed:

(a) To replace the phrase "restoration of the integrity of the insolvency estate" with the phrase "restoration of the assets of the insolvency estate or their value" in paragraph 116;

(b) To replace the word "may" with the word "shall" in the penultimate sentence of that paragraph;

(c) To delete the word "usual" in paragraph 136;

(d) To consider replacing references to the region in the European Union context with references to the European Union member States throughout the text;

(e) To add to the ATR tools in the enterprise group insolvency context that an insolvency representative from one jurisdiction could coordinate the work of insolvency representatives from other jurisdictions involved in concurrent enterprise group insolvency proceedings;

(f) To emphasize the role of bilateral and multilateral mutual legal assistance treaties for ATR and the need for States to adhere to coordination and cooperation provisions of those treaties to ensure in particular smooth transmission of information from a requested State to a requesting State;

(g) To add the cost-benefit analysis in paragraph 178;

(h) To add a cross-reference to paragraph 212 of the draft text in paragraph 179;

(i) To encourage the use of means of communication alternative to diplomatic channels in paragraph 210 and to mention electronic means in that paragraph specifically;

(j) To highlight the role of third parties in ATR in the section addressing criminal proceedings.

22. While no substantive comments were made with respect to **the last chapter** of the draft text, support was expressed for the approach suggested by the secretariat in paragraph 4 of the Introduction to the draft text to addressing digital aspects in the draft text. While agreeing with other delegations that it was not necessary to seek an additional mandate from the Commission for the Working Group to address those aspects in the draft text, some delegations were of the view that the Working Group should request the Commission to give it the mandate to address the treatment of digital assets in insolvency proceedings comprehensively.

23. The need to monitor developments in legislation, jurisprudence and work of other international institutions related to digital assets and digital aspects of ATR was considered important to make the final text more responsive to novel practices and challenges, although doubts were expressed that the final text could be made future proof on all ATR aspects. The view was reiterated that the completion of the ATR project in UNCITRAL should not be delayed because of those developments.[3] The need to continue taking a functional and pragmatic approach was stressed.

24. The Working Group was informed about the progress of work on digital aspects in the UNIDROIT Working Group on Best Practices for Effective Enforcement[4] and that the results of that work as of April 2024 could likely be shared with the Working Group at its sixty-fourth session, in May 2024.

25. No sufficient support was expressed for expanding the last chapter with discussion of specifics arising from ATR of some other assets, such as archaeological and art objects.

26. The Working Group recalled that it agreed at the current session to expand the scope and focus of **appendix I** so that it would cover both cross-border and domestic contexts (see paragraph 14 (a) above). Support was expressed for a suggestion to move the appendix up front and rename it. Other delegations, while agreeing that appendix I should be renamed, preferred keeping it at the end or integrating it into the preceding part of the draft text. Other delegations preferred to keep it as a separate text, noting its distinct purpose and difficulties that the secretariat might face with integrating the toolkit found in that appendix in the preceding part of the draft text.

27. It was expected that, while remaining non-prescriptive, informational and educational, the toolkit would become an important part of the text, distilling essential points from the preceding part and presenting them in a clearer and more user-friendly way for reference by all concerned, in particular by States that did not adopt UNCITRAL insolvency texts and did not have sophisticated ATR tools and frameworks. It was acknowledged that delays, gaps and uncertainties in ATR frameworks were frustrating the objectives of an efficient and effective insolvency law. At the same time, a point was made that policy and legislative choices made by States in devising ATR tools and frameworks should not be overlooked, including as regards the differentiated treatment of local and foreign insolvency proceedings and local and foreign representatives. Feasibility of implementing measures suggested in the toolkit across all jurisdictions was therefore questioned.

28. It was considered necessary: (a) to clarify some entries in the toolkit, such as those related to priority; (b) to add recovery tools in table III; and (c) to cite UNCITRAL insolvency texts as the sources of many provisions found in the toolkit. With respect to references to planning proceedings, it was suggested that they should be grouped and moved to the bottom of the list in each table and read along the

[3] A/CN.9/1133, para. 14.

[4] www.unidroit.org/work-in-progress/enforcement-best-practices/#1644493658788-9cb71890-334f.

following or similar lines: “where there are group planning proceedings, the insolvency representative can request information from the in-bound court or seek recognition of a court order made in the planning proceeding.” It was also suggested that the wording used throughout the toolkit “upon recognition of the foreign proceeding” should be expanded to read “upon recognition of the foreign proceeding or commencement of the insolvency proceeding” and the phrase “without notice” should read “without prior notice”. Some views expressed at the previous sessions were reiterated, such as that terms known only to some legal systems, such as gag and seal orders, should not be used in the text.

29. It was suggested that, to enhance understanding of the toolkit, each table in the toolkit should be preceded by explanation of its content and purpose, and each tool in the tables should be explained with reference to its objectives, key features, general safeguards and safeguards specific to the cross-border use of the tool. At the same time, it was considered essential for the toolkit to stay neutral, not differentiating between common law and civil law tools, focusing instead on features familiar to most jurisdictions. That approach was considered essential if a toolkit were to expedite ATR domestically and across borders, the goal considered even more important in the digital world where assets could be transferred instantaneously.

Table I

30. Suggestions were made:

(a) To include reference to examination of witnesses and examination under oath;

(b) To reflect that the request might be directed at any party deemed capable of providing information or that had had connections with the debtor;

(c) In the fifth bullet point under “Features of ATR expedited proceedings in the receiving State”, to add the word “essentially” and delete the word “unhindered”, explaining that access of a foreign representative to registers and files may be legitimately hindered due to privacy considerations or concerns over feasibility of bringing the foreign representative to liability for its actions in the receiving State; and

(d) To redraft the eighth bullet point under “Features of ATR expedited proceedings in the receiving State” as follows: “An insolvency representative can request an injunction on disclosing the ex parte measure until it is executed”.

Table II

31. Suggestions were made:

(a) To add that the objective of the tools mentioned in the table was preserving the status quo;

(b) To elaborate on the hierarchy of requests originating from the main proceeding, the non-main proceeding and the local proceeding in accordance with the UNCITRAL cross-border insolvency framework; and

(c) To redraft the third bullet point under “Features of ATR expedited proceedings in the receiving State” to clarify that grounds for ex parte stays and suspensions were not exhaustive and cumulative and to add a reference to informal and electronic means of communications.

Table III

32. A suggestion was made to add an explanation to table III as follows: “Measures to recover assets inappropriately disposed of or transferred to persons involved in the transactions, subject to some evidential requirements and defences”. Other suggestions were to add the words “if possible” or “if necessary” in the third safeguard, recognizing that the hearing in absentia might not be possible in all jurisdictions in

all cases and the need for the hearing might not arise at all, as envisaged, for example, in article 21 of the UNCITRAL Model Law on Cross-Border Insolvency[5] (MLCBI).

33. As regards **appendix II**, suggestions were made to specify that prompt access to registries might mean the 24/7 access and that registries possibly identified actual owners.

C. Scope, focus, nature and organization of a future text

34. In discussing changes to the organization of the draft text so as to make the final text more user-friendly, the Working Group took into account the following considerations: (a) preserving inputs provided by States and experts to the project (the Working Group was informed that a contribution from an additional State to the 2022 survey of ATR tools should be expected); (b) ensuring consistency of a future text on the topic with the existing UNCITRAL insolvency framework; (c) avoiding giving impression that that framework would be revised by that text; and (d) at the same time supplementing, complementing and augmenting that framework, in particular in the light of digital developments and needs of MSEs.

35. The Working Group confirmed its agreement reached earlier during the session that the text should continue addressing ATR in both domestic and cross-border contexts, recognizing the link between the two. It was explained, for example, that relief granted to the foreign representative and foreign proceeding rarely exceeded the relief available domestically to locally appointed insolvency representatives and locally commenced insolvency proceedings. Encouraging putting in place and providing ways to obtain expedited disclosure orders, including ex parte orders where necessary, freezing and preservation orders and other asset recovery mechanisms was therefore considered essential for achieving objectives of not only domestic but also cross-border ATR.

36. It was also confirmed that the text would continue highlighting distinct aspects arising from ATR in reorganization as compared to liquidation.

37. Several delegations recalled the agreement reached at the previous sessions of the Working Group that the preparation of a model law, legislative guide or recommendations on the topic would not be feasible for many reasons, including because the text covered many areas of law and reflected different national approaches to ATR that would be impossible to harmonize at the international level. It was reiterated that the preference of those delegations for a descriptive text on the topic did not indicate the lack of their recognition that ATR frameworks and practices across the world should be improved.

38. In considering the form of a final text, including as an online and interactive tool, the Working Group considered constraints that the secretariat faced with implementing ambitious projects, including online products. The Working Group deferred consideration of the final form and title of the text to a later stage.

39. Recalling different views expressed about the placement of appendix I (see paragraph 26 above), the Working Group agreed that the content of that appendix, as amended at the session, should be included in a separate paper for consideration by the Working Group at its next session. The expectation was that that content would remain descriptive. Another suggestion was to put both appendixes in a separate paper.

[5] United Nations publication, Sales No. E.14.V.2. Available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

V. Consideration of the topic of applicable law in insolvency proceedings (A/CN.9/WG.V/WP.190)

A. General

40. The Working Group had before it a note by the Secretariat containing a revised draft of legislative provisions and accompanying commentary on the topic (A/CN.9/WG.V/WP.190).

41. It was recalled that the Working Group had not yet agreed on the final form of the text on the topic. Pros and cons of different approaches were noted. Some delegations considered that private international law issues should be dealt with in an international treaty and questioned that the objectives of the project could be achieved by a soft law instrument.

B. Comments made on the draft legislative provisions with accompanying commentary

1. Purpose and objectives

42. The Working Group agreed to revise the draft preamble as follows:

> "The purpose of these legislative provisions is to provide clear guiding rules for determining the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects (the 'governing law'), including in recognition and relief proceedings and in proceedings concerning enterprise groups, so as to achieve the key objectives of effective and efficient insolvency proceedings, including legal certainty and predictability."

43. In subsequent discussions, support was expressed for replacing references to the governing law with references to the applicable law throughout the text.

44. No sufficient support was expressed for suggestions to retain references to forum shopping (with or without qualifiers suggested at the previous sessions) and to "acts detrimental to creditors and other parties in interest" in the draft preamble. Views expressed at the previous sessions of the Working Group with respect to those deleted parts were reiterated, including that forum shopping, unlike the choice of law, was always considered abusive in some jurisdictions while in other jurisdictions some forms of forum shopping were legitimate.[6] Some delegations preferred one qualifier over the other because of their more known or clearer meaning. Other delegations considered both qualifiers unclear and contentious.

45. Although views differed on the relevance of the project to risks of ("abusive" or "prejudicial") forum shopping, most delegations agreed that the issue was not fundamental to reflect it in the preamble or accompanying commentary. A suggestion was made to mention it elsewhere, perhaps in a draft commentary on safeguards.

46. As a result of the introduced amendments to the draft preamble, the Working Group agreed to delete paragraph 7 of the draft commentary and requested the secretariat to make consequential changes in paragraphs 3 and 5 of the draft commentary, in particular by refocusing them on recognition and relief proceedings and proceedings concerning enterprise groups broadly, not necessarily involving concurrent proceedings. The expected contribution of the project to coordination of applicable laws in concurrent proceedings and to the reduction of instances of concurrent proceedings was also noted.

47. The Working Group agreed to refer to UNCITRAL insolvency model laws in the opening part of paragraph 4 of the draft commentary. Proposals to add in the draft

[6] See e.g. A/CN.9/1126, para. 58.

preamble the word “international” before “insolvency proceedings” and a reference to “issues of conflict of law” did not receive support.

2. Scope of application of the legislative provisions

48. In the draft legislative provision, the Working Group agreed to: (a) replace the words “at the time of” with the words “before” in the first and second sentences of paragraph 2 and to streamline the drafting of those sentences, possibly by merging them or retaining only the second sentence; (b) delete the words “other relevant forum State” in the second sentence of paragraph 2, with the consequential amendments in paragraph 8 of the draft commentary; and (c) align paragraph 3 with article 1 (2) of MLCBI. Alternative suggestions for drafting paragraph 3 of the draft legislative provision, including retaining it as drafted, did not receive sufficient support.

49. The Working Group agreed to include pre-packs in the scope of application of the text by adding the following phrase at the end of paragraph 2 of the draft commentary “and the business sale procedure prepared during the amicable phase and subsequently approved by the court during the reorganization or liquidation phase”, with the consequential deletion of the words “under UNCITRAL insolvency texts” in the opening part of that paragraph. The view was expressed that a separate legislative provision should be drafted on the basis of paragraph 2 of the draft commentary. A suggestion to delete paragraph 9 of the draft commentary or a footnote in that paragraph did not receive support.

3. Definitions

50. Views differed on the need to have definitions of some Latin terms in the definitions section, in particular the definition of *lex fori concursus* that was considered confusing and unnecessary in the light of a separate legislative provision on the *lex fori concursus*. The other view was that definitions were necessary to convey essential points, not to resolve all possible issues arising from the use of the defined terms. Suggestions were made to add in the definitions section definitions of rights in rem and, if and as necessary, *lex loci arbitri* (the law of the place (or seat) of arbitration) and *lex arbitri* (the law of the arbitration) as well as some other terms repetitively used throughout the text. It was noted that some other terms might be explained or defined in the parts of the text where they were used.

51. It was considered important to ensure that all definitions were comprehensive, comprehensible, unambiguous and used consistently throughout the text. Nevertheless, it was suggested that full explanations of Latin terms when they were used subsequently might still be needed, or the specific context might require such explanation. For example, when addressing immovable property, a specific reference might need to be made to the law of the place where the immovable property was situated rather than *lex rei sitae* that referred more broadly to the law where the property was situated.

52. It was suggested to replace the words “internal affairs” with “internal governance issues” in the definition of *lex societatis* or to use the first sentence of paragraph 4 of the draft commentary as the basis for the definition of that term. Generally, some delegations considered that the draft commentary more accurately described the terms and should be used for drafting longer definitions.

53. The Working Group agreed to keep draft definitions in square brackets for further consideration. It took note of a view that *lex fori concursus*, instead of *lex causae*, would apply if *lex rei sitae* and *lex societatis* could not.

54. As regards the draft commentary, a suggestion was made to add reference to laws providing for special treatment of some assets, such as cultural heritage, in paragraph 1.

4. Public policy exception

55. Different views were expressed about the content of the draft legislative provision, in particular whether it should be kept as drafted or with the deletion of

words “only” or “manifestly” or both. The prevailing view was to delete the word “only” (see however para. 58 below). The other suggestion was to replace the current wording with the wording of article 6 of MLCBI.

56. The plans to provide for two public policy exceptions in the draft text were noted: the first exception, which could be placed at the end of chapter II of the draft text, would apply in situations when the court in charge of an insolvency proceeding would choose not to apply a foreign law that would need to be applied under the envisaged exceptions to the *lex fori concursus* (e.g. for labour contracts or for payment and settlements systems and regulated financial markets); and the second public policy exception, which could be placed in chapter III, would apply in the context of recognition and relief proceedings. With respect to the first exception, provisions of article 93 (3) of the UNCITRAL Model Law on Secured Transactions (2016),[7] which influenced the drafting of the draft legislative provision, were recalled. It was noted that those provisions included both words “only” and “manifestly”. With respect to the second exception, it was suggested that its wording might be the same as in article 6 of MLCBI and in similar provisions of the other UNCITRAL insolvency model laws but the need for that exception might not arise if the legislative provisions became an integral part of MLCBI.

57. The need to respect different scopes of a public policy exception for domestic and international contexts was emphasized. It was considered appropriate to broaden the scope of the draft legislative provision in the light of the context in which it was expected to apply and the nature of the text to be prepared on the topic. Another view was that the Working Group should encourage a very narrow application and interpretation of the exception, which would be consistent with other UNCITRAL and other international texts. Yet another view was that, regardless of the content of that exception and even in the absence of any public policy exception in the text, domestic courts would in any event apply a public policy exception in accordance with their domestic law and policies. Efforts towards achieving clarity as regards the scope of application of the provision were welcomed.

58. In the light of those divergent views, suggestions were made to provide for two options in the text – more restrictive and more flexible. Pending its discussion of issues identified for a proposed chapter III of the draft text (see paragraphs 75–80 below), the Working Group agreed to keep the wording of the draft legislative provision in square brackets for further consideration and possibly to place it at the end of chapter II.

5. Chapter II generally

59. A suggestion was made to change the title of chapter II to convey its intended scope better, i.e. that it would not be limited to a single domestic insolvency proceeding. Questions were raised on whether the provisions in that chapter would apply across all types of insolvency proceedings (main, non-main and ancillary).

60. The Working Group confirmed that references to the *lex fori concursus* throughout the text, including in chapter II, as well as other provisions of chapter II were intended to apply to main, non-main and ancillary insolvency proceeding. The presence of a foreign element for application of the legislative provisions was emphasized.

6. The draft commentary to the lex fori concursus list

61. The Working Group requested the secretariat to: (a) replace throughout the draft commentary references to “non-insolvency law” with clearer references, for example “the law other than the insolvency law that might apply as part of the *lex fori concursus*”; (b) add the word “necessarily” before the words “mean” in the third sentence of paragraph 10; (c) add the word “may” before “entail” in the fourth sentence

[7] United Nations publication, Sales No. E.17.V.1. Available https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions.

of paragraph 10; and (d) remove the last sentence from paragraph 20 (the Working Group agreed to consider issues raised in that sentence at a later stage). The need for proposed additional words "of the foreign State" at the end of the second sentence in paragraph 11 was questioned. The Working Group deferred consideration of a proposal to add reference to digital assets and electronic securities in paragraph 20, noting its relevance to an exception to the *lex fori concursus* for payment and settlements systems and regulated financial markets that the Working Group had not yet considered during the session (see paragraph 71 below).

62. In subsequent discussion, the Working Group agreed to add "or related obligations" after the word "contracts" in item (ii) of paragraph 24. It requested the secretariat to clarify the last sentence of paragraph 52. The Working Group took note of a concern that reference to "continued contracts" in paragraph 21 could create confusion because in some jurisdictions "continued contracts" referred only to contracts that the insolvency representative had decided to continue, and not to contracts under which both the debtor and its counterparty had not yet fully performed their respective obligations between the time when the insolvency proceeding was commenced and the time when the decision of the insolvency representative to continue or reject such contracts was taken. It was explained that, for the latter type of contract, the term "ongoing contracts" would be more appropriate.

63. Support was expressed for moving the draft commentary in square brackets that referred to difficulties with cross-border recognition and enforcement of effects of the *lex fori concursus* to chapter III (see section 10 below).

7. Lex fori concursus list

64. Proposed additions of the word "manifestly" before "prejudicial" and of a reference to "voidness" or "nullity" of acts in item (g) on the *lex fori concursus* list did not receive support.

65. Views differed on whether item (j) on the treatment of secured creditors should stay on the list. Positions on that matter expressed at the previous sessions were reiterated.[8]

66. Some delegations welcomed a proposal received at the session that secured creditors, upon commencement of insolvency proceedings against the debtor, should be made subject to the insolvency law of the *lex rei sitae*. Other delegations were of the view that the proposal would not resolve main concerns since it was not conducive to restructuring and reorganization of businesses in financial distress.

67. The Working Group agreed that holding inter-sessional informal consultations would be desirable and that the proposal and items (b), (c) and (d) listed after new paragraph 2 of the draft legislative provision could be used as the basis for discussion during those consultations. In addition, the following issues that arose during the discussion of the proposal at the session were considered important to take into account in those consultations: (a) the type of asset (e.g. moveable or immovable), lender (e.g. large or small) and insolvency proceeding (e.g. reorganization or liquidation, main, non-main or ancillary); (b) difficulties with the localization of many assets (e.g. receivables, bank accounts, intellectual property rights); (c) concerns arising from shifts of the centre of the debtor's main interests (COMI) immediately before the commencement of insolvency proceedings; (d) appropriate safeguards; (e) the need for alignment of regimes for applicable law in insolvency proceedings in originating and receiving States; (f) principles and objectives of non-discrimination, equitable treatment of similarly situated creditors, legal certainty, predictability, protection of legitimate expectations of all parties in interest and effective and efficient administration of insolvency proceedings; and (g) the need to ensure consistency with other UNCITRAL texts and international instruments and to facilitate access to finance, including across borders and by MSEs.

[8] See e.g. A/CN.9/1126, paras. 45–48.

8. New paragraph 2

68. It was agreed that the paragraph should be redrafted to convey its exceptional nature and narrow scope. Relevance of the provision to articles 28–32 of the UNCITRAL Model Law on Enterprise Group Insolvency[9] (MLEGI) was emphasized.

69. Although some support was expressed for retaining, either in the legislative provision or commentary, an illustrative list that followed the new paragraph 2, the prevailing view was to delete it.

9. Exceptions to the lex fori concursus rule

(a) Labour contracts and relationships

70. In response to a suggestion to delete the exception, the Working Group recalled its earlier deliberations and decision on the topic.[10] It was noted that the public policy exception and other provisions of the draft text sufficiently addressed the concern expressed at the session.

(b) Payment, clearing and settlement systems, regulated financial markets and other multilateral trading facilities

71. The Working Group agreed to retain provisions added in square brackets without square brackets. The need to discuss the draft legislative provision further so as to achieve more precision as regards its scope was noted. A view was expressed that unregulated multilateral trading facilities should not be covered by the exception. (For other deferred issues related to that exception, see paragraph 61 above).

(c) Close-out netting outside payment, clearing and settlement systems and regulated financial markets

72. The Working Group requested the secretariat to draft an exception to the *lex fori concursus* for those close-out netting arrangements that were not covered by the preceding exception but were susceptible to market risks. It was explained that such arrangements were found not only in financial markets. Issues raised in paragraphs 22 and 23 of the working paper as well as relevant provisions of the UNIDROIT Principles on the Operation of Close-Out Netting Provisions[11] and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes[12] were considered relevant for further consideration of that exception by the Working Group.

(d) Ongoing arbitral proceedings

73. A proposal to deal with the law governing effects of insolvency proceedings on both ongoing litigation and arbitral proceedings holistically received broad support. The Working Group agreed to discuss further which elements related to ongoing arbitral proceedings would fall under *lex fori concursus* (e.g. stay, suspension, relief from stay or suspension, capacity of the debtor to continue participating in arbitral proceedings that were not stayed, the right of creditors to commence arbitral proceedings after the commencement of insolvency proceedings) and which elements would fall under *lex arbitri* (e.g. the procedure for substituting parties in arbitral proceedings). The relevance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”),[13] the UNCITRAL Model Law on International Commercial Arbitration[14] and public policy

[9] United Nations publication, Sales No. E.20.V.3. Available at https://uncitral.un.org/en/MLEGI.

[10] A/CN.9/1126, paras. 75–79; A/CN.9/1094, paras. 88–93; and A/CN.9/1088, paras. 73–76.

[11] Available at www.unidroit.org/instruments/capital-markets/netting/.

[12] Available at https://openknowledge.worldbank.org/entities/publication/de2cc5c4-c1ec-55eb-ad20-d27e916d000f.

[13] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. Also available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.

[14] United Nations publication, Sales No. E.08.V.4. Also available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

exceptions was highlighted. The suggestion that UNCITRAL Working Group II should get involved in the discussion of aspects of the topic related to ongoing arbitral proceedings was not taken up. Doubts were expressed about the proposition that arbitral tribunals enjoyed full independence from any legal system. It was recalled that not all legal systems imposed a stay of arbitral proceedings upon commencement of insolvency proceedings.

(e) Avoidance and set-off

74. Recalling its earlier decision to delete a suggested illustrative list after new paragraph 2 (see paragraph 69 above), the Working Group confirmed that items (b), (c) and (d) from that list would be used as the basis for discussion at the inter-sessional informal consultations (see paragraph 67 above and paragraph 82 below). The understanding was that items (a) and (e) from that deleted list dealing with avoidance and set-off would be discussed at the next session.

10. Chapter III

75. The Working Group considered possible amendments to the title of the chapter, for example that it could read "Giving effect to the *lex fori concursus* in cross-border insolvencies".

76. The Working Group agreed to use the following draft at its next session as the starting point for discussion of issues identified in chapter III of the working paper: "Receiving/recognizing States [may/shall] [provide relief/give effect] to the foreign main proceeding in the form of the [relief/effect] under the *lex fori concursus* of that proceeding, subject to the following safeguards and exceptions: …".

77. It was agreed that safeguards and exceptions would include the public policy exception (see paragraph 56 above), adequate protection of creditors, exceptions to the *lex fori concursus* envisaged in chapter II (e.g. for labour contracts) and specific safeguards for secured creditors listed in paragraph 40 of the working paper.

78. Questions were raised on how the provision would operate: for example, would commencement of recognition proceedings be required and would the measure be automatic or discretionary upon recognition of the foreign main proceeding?

79. Some delegations expressed preference for retaining the word "may" in the draft provision so as not to preclude giving effect to the *lex fori concursus* of a foreign proceeding by other means, for example by opening local insolvency proceedings. Practices with giving effect to the *lex fori concursus* of the recognized foreign proceeding, primarily as regards powers of the foreign representative, were noted.

80. It was agreed that a similar provision would be drafted for: (a) non-main proceedings taking into account their narrower scope and their subordination to the main proceeding under MLCBI; and (b) for planning proceedings subject to additional safeguards under MLEGI. Issues highlighted in paragraph 42 of the working paper were considered pertinent.

11. Chapter IV

81. The Working Group agreed to prioritize chapters I to III. It also agreed that issues highlighted in chapter IV would be addressed as they would arise during the project. It was recalled that some of them had been discussed during the current session in the context of the draft preamble, new paragraph 2 and relief provisions (see paras. 42–47, 68–69 and 75–80 above).

VI. Other business

82. Recalling its agreement on desirability of holding inter-sessional informal consultations on matters related to item (j) on the *lex fori concursus* list (see paragraph 67 above), the Working Group requested the secretariat to organize such

consultations. Suggestions that the same or separate inter-sessional informal consultations before the next session of the Working Group could cover the topics of ongoing arbitral proceedings, avoidance and set-off did not receive support.

83. In response to a query, it was clarified that pre-session meetings of the Working Group hosted by non-governmental organizations on Sunday immediately before the session were not inter-sessional informal consultations organized by the secretariat and hence did not fall under paragraphs 220–221 of the report of the fifty-sixth session of the Commission.[15]

84. With reference to paragraph 24 of document A/CN.9/WG.V/WP.188, while the idea of organizing events throughout 2024 to increase awareness about MLEGI on the occasion of the fifth anniversary of its adoption in 2019 was welcomed, it was agreed that a conference should not take place during the sixty-fourth session of the Working Group in May 2024 because of the expected heavy workload at that session.

[15] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 17* (A/78/17).