United Nations A/CN.9/WG.V/WP.183/Add.1

General Assembly

Distr.: Limited
7 October 2022

Original: English

United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Sixty-first session
Vienna, 12–16 December 2022

Applicable law in insolvency proceedings

Note by the Secretariat

Addendum

Contents

V.22-22719 (E)

III. Issues deferred for further consideration

A. The list of deferred issues

1. The Working Group deferred for further consideration the following issues with respect to the items on the lex fori concursus list:

(a) In relation to item (c) on constitution and scope of the insolvency estate, whether effects of insolvency proceedings on the treatment of digital assets and IP rights and licences would be governed by the lex fori concursus or another law;[1]

(b) In relation to item (d) on protection and preservation of the insolvency estate and with reference to article 20 of MLCBI (and commentary thereto) and article 18 of the EIR recast, whether effects of insolvency proceedings on enforceability of an arbitration agreement concluded, an arbitral award obtained or an arbitral proceeding commenced before the commencement of insolvency proceedings would be governed by the lex fori concursus or another law;[2]

(c) In relation to item (g) on avoidance and with reference to article 16 of the EIR recast, whether the legislative provisions should exclude the application of the lex fori concursus to avoidance of an act detrimental to all the creditors if that act is subject to the law other than the lex fori concursus and that other law does not allow any means of challenging that act in the relevant case;[3]

(d) In relation to item (h) on treatment of contracts and with reference to article 11.1 of the EIR recast, whether the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property would be governed by the lex fori concursus or the law where the immoveable property is situated (lex rei sitae);[4]

(e) In relation to item (i) on treatment of set-off, clarification of set-off aspects that would fall under the lex fori concursus and those that would fall under other applicable law;[5]

(f) In relation to item (j) on treatment of secured creditors, whether that treatment would be governed by the lex fori concursus or other law;[6]

(g) In relation to items (k) and (l) on rights and obligations of the debtor and on duties and functions of the insolvency representative, respectively, whether it is the lex fori concursus or the law of the recognizing State that would prevail in case of a conflict in addressing powers of the debtor to represent the insolvency estate in the recognizing State. The Working Group agreed to consider the issue in the context of applicable law rules for concurrent insolvency proceedings;[7]

(h) In relation to item (o) on ranking of claims and with reference to paragraph 84 of the commentary to recommendations 30–34 of the Guide, whether and, if so, how to address rules for establishing equivalence between local and foreign claims for the purpose of their treatment in insolvency proceedings. The Working Group found the terms “ordinary claims” and “equivalence” in that commentary unclear and requiring further clarification and agreed to consider those issues in the context of applicable law rules for concurrent insolvency proceedings;[8]

[1] A/CN.9/1094, para. 72.
[2] Ibid., para. 73.
[3] Ibid., paras. 74–76.
[4] Ibid., para. 77.
[5] Ibid., para. 78.
[6] Ibid., para. 79.
[7] Ibid., para. 80.
[8] Ibid., para. 82.

(i) In relation to the proposed additional item (t) on directors' obligations and liabilities as they are addressed in part four of the Guide, whether the item should be included and if so, its scope and formulation;[9]

(j) Whether the lex fori concursus list should be expanded with a reference to related actions (deriving from insolvency law and connected to insolvency proceedings).[10]

2. In addition, the Working Group deferred for further discussion the scope of the exception to the lex fori concursus found in recommendation 32 of the Guide.[11]

3. The secretariat provides the following background information and points for consideration in relation to those matters.

B. Issues deferred with respect to the items on the lex fori concursus list

1. Treatment of IP rights and licences and digital assets in insolvency proceedings

(a) Background information

4. At its fifty-ninth session, the Working Group noted that, while the Guide did not contain any reference to "digital assets" or "licences", it explicitly referred to IP rights and licences when describing "intangible assets" constituting the insolvency estate.[12] The Working Group had been invited to consider whether digital assets and IP rights and licences would fall under the same category and should receive the same treatment. At that session, it was considered useful to reinforce the application of the lex fori concursus to the treatment of digital assets and IP rights and licences in insolvency proceedings as part of the debtor's insolvency estate.[13] Specifics of those assets (in particular, difficulties with their localization and establishing jurisdiction) were recalled.

5. At its sixtieth session, the Working Group agreed that further discussions would be needed before it could reach a firm conclusion on the applicable law for digital assets and IP rights and licences. The issues of localization of digital assets and qualification of licences were recalled.[14] Compiling additional information on the treatment of those assets in insolvency proceedings, in consultation with relevant experts and organizations, such as the International Institute for the Unification of Private Law (UNIDROIT) and the World Intellectual Property Organization (WIPO), was considered necessary.[15]

6. Pursuant to that request, the secretariat held consultations with WIPO on the treatment of IP rights and licences in insolvency proceedings, learning that WIPO had not undertaken work on that issue to date. Consultations with UNIDROIT pointed to the advanced consideration of the topic of digital assets, including the treatment of digital assets in insolvency proceedings and private international law issues related to digital assets.

---

[9] Ibid., para. 83.
[10] Ibid., para. 71.
[11] Ibid., para. 87.
[12] See recommendations 35–38 of the Guide and accompanying commentary.
[13] A/CN.9/1088, para. 91.
[14] See e.g., ECJ, *Comité d'entreprise de Nortel Networks SA and Others v. Cosme Rogeau and Cosme Rogeau v Alan Robert Bloom and Others*, C-649/13, paras. 10, 15, and paras. 47-55 (https://curia.europa.eu/juris/document/document.jsf?text=&docid=164958&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=487075) and Canada, Superior Court of Justice, 12 May 2015 *Re Nortel Networks* Corporation, 2015 ONSC 2987 (https://kmlaw.ca/wp-content/uploads/2015/07/nortel_AllocationDec_12May15.pdf).
[15] A/CN.9/1094, para. 72.

(b) Treatment of IP rights and licences in insolvency proceedings

7. The Working Group also felt that it needed additional information on the treatment of IP rights and licences in insolvency proceedings before it could decide on the law that would govern the effects of insolvency proceedings on IP rights and licences.[16] The Guide was taken as the basis for the analysis below of substantive insolvency law provisions on the treatment of IP rights and licences in insolvency proceedings, noting however that the Guide is not a treaty or a model law and the treatment of IP rights and licences in insolvency proceedings varies greatly across jurisdictions and has evolved significantly since adoption of the Guide. The treatment of IP in insolvency proceedings may depend on many factors, in particular the IP involved (i.e., whether it is protectable). For example, some jurisdictions protect trademarks and trade secrets while others do not. Different regimes may apply also to domestic and foreign IP with protection provided only to the former. In a single jurisdiction and insolvency proceeding, the treatment of IP may depend, for example, on the terms of the IP licence and whether it is the licensor or the licensee that is the debtor.

8. Under the Guide, IP rights and licences are recommended to be made part of the insolvency estate: when the debtor is the IP right owner or the licensor, IP is the property of the estate of the debtor. Where the debtor is the licensee, rights and interests of the debtor in IP are part of the debtor's insolvency estate. Consequently, under the substantive insolvency law framework recommended by the Guide, the stay of proceedings would prevent the counterparty to an IP licence from taking any action with respect to the licence during the insolvency proceedings, including unilaterally modifying or terminating the licence.

9. As was noted in A/CN.9/WG.V/WP.87 that was before the Woking Group at its thirty-sixth session, in 2009, the Working Group's records indicate that IP specific issues were raised on only two occasions when the Guide was prepared, both in the context of the treatment of contracts following commencement of insolvency proceedings, and little discussion of those issues ensued. IP specific issues are addressed in the Guide as follows:

(a) As a factor supporting the observance of automatic termination or acceleration clauses on the basis that creators of IP need to be able to control the use of that property or because of the effect on a counterparty's business of termination of a contract, especially one with respect to an intangible (paragraph 115 of part two, chapter II);

(b) As a factor supporting the override of such automatic termination or acceleration clauses where, in reorganization for example, the contract involves the use of IP embedded in a key product and continued performance of the contract may enhance the earnings potential of the business, capture value and assist in locking all creditors into a reorganization (paragraph 116 of part two, chapter II); and

(c) In the context of the two types of general exception to the power to continue performance, reject or assign contracts that exist in insolvency laws. The first relates to exceptions provided for specific types of contracts and several examples are given – short-term financial contracts, insurance contracts and contracts for the making of a loan. The commentary goes on to note that "Exceptions to the power to reject may also be appropriate in the case of [inter alia] agreements where the debtor is a lessor or franchisor or a licensor of intellectual property and termination of the agreement would end or seriously affect the business of the counterparty, in particular where the advantage to the debtor may be relatively minor." The only two types of contracts discussed in further detail in that section are labour contracts and contracts for irreplaceable and personal services (paragraph 143 of part two, chapter II). The second type of exception is contracts that cannot continue to be performed because they require performance of an irreplaceable personal service. One

[16] Ibid.

example given is a contract that involves particular IP (paragraph 146 of part two, chapter II).

10. The Guide thus discusses the treatment of IP in insolvency proceedings primarily in the context of the treatment of continued contracts (recommendations 69–86 and accompanying commentary). Indeed, in practice, IP licences often fall under the category of continued contracts because some form of continued performance by both sides is expected. For example, a licensee may be expected to continue to pay royalties in order to be able to use the IP while a licensor may be obligated to continue to refrain from suing the licensee for infringement (so long as the agreed upon royalty payments are made). However, this is not necessarily true for all types of IP licence.

11. According to the Guide, special rules apply in the insolvency law to continued contracts. In particular, the insolvency representative would have the choice to decide within a certain period of time to either continue the performance of a contract or to reject the contract ("cherry picking" is not allowed under the Guide). In some jurisdictions, performance of a contract ceases unless the insolvency representative decides to continue performance. Upon continuation, the insolvency representative would be expected to cure any pre-insolvency defaults under the contract. Rejection of the continued contract is considered a breach, which gives rise to an unsecured claim by the counterparty. The insolvency representative can also decide to assign a contract, notwithstanding restrictions in the contract. However, assignment of some contracts such as for irreplaceable or personal services may be impossible. The paramount considerations in the exercise of the choices to assume, reject or assign contracts are maximizing the value and reducing the liabilities of the estate.

12. Where IP licences are considered continued contracts, the insolvency representative of the debtor-licensor would have several options regarding them, as described above. If the licence is rejected, this can substantially impact the business of the licensee and the continued rights to the use of the licensed IP. For example, the copyrighted material in some instances may be impossible to use without the licensed trademark. For that reason, some jurisdictions accord some protection to the licensee, in particular by allowing the licensee to choose either to: (a) treat the rejection of the licence agreement as a termination and file a claim against the debtor-licensor in the insolvency proceeding; or (b) retain its rights under the licence even against the licensor's will. In the latter case, the licensor (and the insolvency representative) may not interfere with the licensee's rights under the licence, even though it has rejected the licence. The retention right may be made subject to certain conditions and limitations. In particular, the licensee's ability to assign rights under the licence without the licensor's consent may be limited. In addition, the licensor may be relieved of any obligations under the licence agreement, such as paying patent maintenance fees or to provide the licensee with any subsequent versions or enhancements to the IP licence, while the licensee would be expected to continue paying royalties. Furthermore, the licensee may be expected to waive any claims against the licensor and any right of set-off in the insolvency proceeding.

13. Where the debtor is the licensee, it may jeopardize important revenue streams on which an IP licensor relies. Where the licence is continued, any post-commencement royalty payments under the licence become an "administrative expense". Under some laws, the insolvency representative of the debtor-licensee may not be afforded the same discretion to continue or reject the contract or assign it to third parties as the insolvency representative of the debtor-licensor. A number of courts have held that patent, trademark and copyright law preclude assignment of an IP licence, without the consent of the licensor. They have concluded that the insolvency representative of the debtor-licensee may thus not be able to assign the licence without the consent of the licensor. Some courts apply the "actual intention" test, allowing the insolvency representative to continue the IP licence where there is no actual intention to subsequently assign it. Some courts follow the "hypothetical" test and do not allow the insolvency representative to continue the IP licence assuming that subsequent assignment of the IP licence might take place. The latter approach

leaves the insolvency representative of the debtor-licensee with no choice but to reject or terminate the IP licence. In jurisdictions where "ride-through" arrangements are permitted, the debtor-licensee may avail itself of that option subject to some conditions and safeguards (similar to those described in paras. 343–344 of part five of the Guide).

14. The above considerations apply with respect to non-exclusive IP licences that are considered giving rise to personal rather than property rights and not assignable over the licensor's objection. In comparison, many courts have found that the licensee of an exclusive licence is entitled to all rights of the licensor, including transfer rights, such that the licensee effectively has an ownership interest in the IP, the acceptance and assignment of which cannot, or should not, be restricted. The result is that a debtor-licensee under the exclusive licence may be able to accept an IP licence agreement and assign it to another entity against the licensor's wishes.

15. As regards the law applicable to the validity and effectiveness of IP rights and claims existing at the time of the commencement of insolvency proceedings, according to recommendation 30 of the Guide, it would be determined by the PIL rules of the State of the opening of insolvency proceedings. The main approach is territorial. The legal framework for the treatment of much IP is harmonized through uniform substantive rules set out in multilateral agreements, such as the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

16. As regards the law applicable to the effects of insolvency proceedings on IP rights, expert consultations held by the secretariat have indicated that an exception to the lex fori concursus would not be required. Localization of IP rights has been identified as the main issue arising from the treatment of IP rights in insolvency proceedings. As was noted in paragraph 10 of document A/CN.9/WG.V/WP.183, that issue may fall outside the scope of this project.

(c) Treatment of digital assets in insolvency proceedings

17. The Working Group also felt that it needed additional information on the treatment of digital assets in insolvency proceedings before it would be in the position to decide on the law that would govern the effects of insolvency proceedings on those assets.[17] The Working Group may wish to note that, although the Guide does not address specifically digital assets, the treatment of digital assets in insolvency proceedings may depend on an asset in question. For example, rights and obligations with respect to some digital assets may arise in payment and settlement systems and financial markets and hence recommendations 32 and 101–107 of the Guide would apply.

18. The Working Group may also wish to recall that, at its fifty-ninth session, the secretariat drew the attention of the Working Group to the ongoing work by UNIDROIT on digital assets and private law.[18] The draft principles and comments on the subject that were before the UNIDROIT Working Group on Digital Assets and Private Law at its sixth session (Rome, 31 August–2 September 2022) are available on the UNIDROIT website.[19] They address, among others: (a) PIL rules (draft principle 5); (b) insolvency of a custodian (draft principle 15); (c) effect of insolvency on proprietary [and security] rights in digital assets (draft principle 21); and (d) enforcement (draft principle 20, which is linked to the UNIDROIT project on effective enforcement[20]). The Working Group may wish to postpone its decision on whether any exception to the lex fori concursus in relation to the digital assets should be included in the legislative provisions until after it considers the results of that work

[17] Ibid.

[18] A/CN.9/WG.V/WP.176, para. 33 (h).

[19] Study LXXXII – W.G.6 – Doc.2 available at https://unidroit.org/work-in-progress/digital-assets-and-private-law/#1622753957479-e442fd67-036d.

[20] For more information, see https://unidroit.org/work-in-progress/enforcement-best-practices/.

by UNIDROIT. The UNCITRAL secretariat will bring those results to the attention of the Working Group in due course.

2. Arbitration agreements and arbitral proceedings

19. At its fifty-ninth session, the Working Group heard views on desirability of confirming the effects of the lex fori concursus on arbitral proceedings.[21] It was noted that the UNCITRAL insolvency texts did not address that issue explicitly. In the light of the role of arbitration in international trade, it was considered important to fill in that gap, building on the relevant commentary already found in the UNCITRAL insolvency texts, such as the commentary to article 20 of the MLCBI.[22] Support was expressed for that suggestion.[23] At the same time, addressing practical difficulties arising from the imposition and enforcement of a stay of proceedings on arbitral proceedings taking place abroad was also considered necessary.[24]

20. At its sixtieth session, the Working Group discussed effects of the opening of insolvency proceedings on: (a) enforceability of arbitration agreements and results of arbitral proceedings completed before the commencement of insolvency proceedings, noting that those issues might be covered by recommendation 30 of the Guide; and (b) ongoing arbitral proceedings, which under UNCITRAL insolvency texts were to be stayed. Suggestions to include explicit applicable law rules on those aspects in the legislative provisions were reiterated. In that context, a view was expressed that the approach taken in article 18 of the EIR recast was outdated and inadequate since the seat of arbitration might have a very remote connection to the debtor and the insolvency estate. The opposite view was that the approach in the EIR recast was workable in the light of complications arising from application of article 20 of MLCBI in the context of reorganization, in particular when the debtor-in-possession was in place.[25]

21. The Working Group may wish to recall that the commentary to article 20 of MLCBI on the effects of a stay of proceeding on arbitral proceedings was included in the narrow context of effects of recognition of a foreign main proceeding on commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, which are to be stayed upon such recognition. In comparison, the Guide raises the same considerations more broadly in the context of recommendations on measures applicable on commencement of insolvency proceedings and relief from those measures.[26] Those provisions should be read together with recommendations 47 (the last sentence) of the Guide as well as article 20(3) of MLCBI that provide that individual actions or proceedings to the extent necessary to preserve a claim against the debtor are excluded from the application of the stay. In addition, the commentary to article 20 of MLCBI acknowledges that the interests of the parties may be a reason for allowing an arbitral proceeding to continue, a possibility that is envisaged in paragraph 2 of that article and left to the law of the enacting State.

---

[21] Ibid., para. 79.

[22] GEI, para. 180 stating that subparagraph 1 (a) of article 20 of MLCBI covers actions before an arbitral tribunal, establishing a mandatory limitation to the effectiveness of an arbitration agreement. That limitation is added to other possible limitations restricting the freedom of the parties to agree to arbitration that may exist under national law (e.g., limits as to arbitrability or as to the capacity to conclude an arbitration agreement) and is not contrary to the New York Convention.

[23] A/CN.9/1088, para. 81.

[24] Ibid., para. 86. GEI, para. 180 acknowledges that, bearing in mind the particularities of international arbitration, in particular its relative independence from the legal system of the State where the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in either the enacting State or the State of the main proceeding, it may be difficult to enforce the stay of the arbitral proceedings.

[25] A/CN.9/1094, para. 73.

[26] See e.g., footnote 20 to recommendation 46 of the Guide, cross-referring to article 20 of MLCBI, and rec. 49 of the Guide.

22. According to article 18 of the EIR recast, the effects of insolvency proceedings on pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate are to be governed solely by the law of the State in which the arbitral tribunal has its seat. Recital 73 of the EIR recast notes that article 18 should not affect national rules on recognition and enforcement of arbitral awards. With 170 States parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 [27] (the New York Convention), international commercial arbitration-related matters in the majority of States will be addressed by that Convention.

23. The Working Group may wish to consider the matter further in conjunction with the related draft legislative provisions (including on commencement, protection and preservation of the insolvency estate, avoidance and treatment of contracts) and various possible scenarios that may raise different issues (e.g., a valid arbitration agreement may exist but no arbitral proceeding has yet been commenced; either party files for commencement of insolvency proceedings bypassing the arbitration agreement, including doing so inappropriately; arbitral proceedings were commenced before the commencement of insolvency proceedings; and the arbitral award was obtained shortly before the commencement of insolvency proceedings).

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

(a) Background information

24. At its fifty-ninth and sixtieth sessions, the Working Group took note of different approaches to the law governing effects of insolvency proceedings on a set-off, rights in rem [28] (the treatment of secured creditors in particular) and exceptions to the application of the lex fori concursus to avoidance. [29] Reference in that context was made to recommendations 30–34 of the Guide, their commentary and drafting history, the Colloquium report, working papers (A/CN.9/WG.V/WP.176 and A/CN.9/WG.V/WP.179), the EIR recast and the Global Rules. A view was expressed that, although the commentary to recommendations 30–34 of the Guide noted different approaches to determining the law governing avoidance, set-off and security interests in insolvency proceedings and policies underlying those approaches, the commentary did not explain clearly why exceptions to the lex fori concursus failed to encompass those matters. [30]

25. During the discussion, the Working Group considered whether protection of legitimate expectations of parties to transactions should prevail over other considerations in all instances. It was noted that approaches taken in the EIR recast to those matters were subject to debate. Some questioned that they would be workable at the global level and were necessary in the light of the UNCITRAL insolvency framework that ensured adequate protection of creditors and other interested persons. Some argued that which expectations of parties to transactions would be considered legitimate was also subject to debate. A view was expressed that the Working Group should proceed cautiously when considering any deviations from policy choices made by UNCITRAL when it adopted recommendations 30–34; any such deviations would need to be justified with reference to real needs and the objective of simplifying applicable law rules in insolvency proceedings. [31]

---

[27] United Nations, *Treaty Series*, vol. 330, No. 4739.

[28] With respect to "rights in rem", the Working Group, at its sixtieth session, noted that UNCITRAL texts did not provide for the definition of that term and an illustrative list of what would be considered rights in rem might be found in article 8 (2) of the EIR recast. With respect to article 32 of MLCBI, where references to both secured claims and rights in rem are found, the Working Group noted the accompanying commentary in para. 241 of the GEI that explains those references and the overlap between them and suggests that enacting States may use another term or terms for expressing those concepts (see A/CN.9/WG.V/WP.179, para. 31).

[29] A/CN.9/1088, para. 83 and its accompanying footnote, and A/CN.9/1094, paras. 74–76 and 78.

[30] Ibid., para. 78.

[31] Ibid., para. 84.

(b) Avoidance

26. With respect to avoidance, the Working Group agreed to consider the matter further using the approach of the Guide as the starting point.[32]

Approach in the Guide

27. In the light of comments made in the Working Group at its sixtieth session in another context,[33] the secretariat would like to clarify that the provisions on avoidance in the Guide are applicable to transactions that took place prior to the commencement of insolvency proceedings (see term (c) in the Glossary). They do not apply to unauthorized transactions that may take place during the proceedings, to which separate rules on the use and disposal of assets apply. Nevertheless, the provisions on avoidance may also be relevant upon conversion of one proceeding to another (e.g., reorganization to liquidation).

28. According to the Guide, the lex fori concursus determines types of transaction that can be avoided and types of transaction exempted from avoidance; avoidance criteria, including elements to be proven and defences;[34] the duration of the suspect period and from which date it runs retroactively; courts competent to hear avoidance actions in the State of the opening of insolvency proceedings; who can commence avoidance and under which conditions; sources of covering expenses of avoidance actions, including permissibility of third-party funding and conditions and safeguards for raising such funding; effects of avoidance; liability of the counterparty to the avoidable transaction and remedies in case of non-compliance; and permissibility of avoidance, extent of avoidance and transactions that may be avoided as well as transactions that are exempted from avoidance in case of conversion of the proceedings. Non-insolvency laws may supplement or limit the avoidance provisions of the insolvency law, including with respect to acts that intend to avoid transactions detrimental to creditors outside the insolvency framework (e.g., actio pauliana), insider dealings, close-out netting and derivative contracts and transactions with matrimonial property.

29. If the Working Group decides to retain the approach in the Guide, it may wish to fill in gaps in the provisions. For example, the Guide does not explicitly identify the law that would govern avoidance of rights and obligations of participants in payment and settlement systems and regulated financial markets (the exception to the lex fori concursus in recommendation 32; see the proposed draft legislative provision below) and avoidance of rejection, continuation and modification of labour contracts (the exception to the lex fori concursus in recommendation 33; see the proposed draft legislative provision in A/CN.9/WG.V/WP.183). In addition, as was noted in the Working Group, the Guide is silent on the reasons for choosing that approach. It would be expected that the legislative provisions would explain those reasons and respond to concerns that the approach does not promote certainty in the market, does not ensure predictability and does not protect legitimate expectations of creditors since the law with no or distant relation to the transaction may avoid it. Responses in the Working Group to those concerns have included so far that, in the light of international insolvency law, parties to commercial dealings should be expected to know that they would most likely be subject to insolvency proceedings in the jurisdiction of their respective COMI[35] and hence the law of the COMI jurisdiction may produce effects on the treatment of their rights, claims and transactions in insolvency proceedings, in particular by displacing the law otherwise applicable to their transactions. In addition, it was considered that the UNCITRAL cross-border

[32] A/CN.9/1094, para. 76.

[33] Ibid., para. 50.

[34] Although not explicitly mentioned in the Guide, those defences may include that the transaction is subject to the law that does not allow any means of challenging it in the relevant case. Some States may choose to disallow that defence if that other law is proven to have no substantial relationship to the parties or the transaction, and there was no other reasonable basis for the selection of that law as the law to govern the transaction in question.

[35] See e.g., para. 29 of GE to MLEGI.

insolvency framework protected creditors and other interested persons against the unacceptable effects of a foreign law[36] and, if necessary, that framework might be strengthened to enable ascertainment of the law that would govern effects of insolvency proceedings and make identification of business and commercial risks more predictable. Addressing those concerns may mitigate difficulties with the cross-border recognition and enforcement of effects of avoidance under the lex fori concursus, including sanctions against non-compliant counterparties.

Alternative approaches

30. The commentary to recommendations 30–34 of the Guide and the Colloquium report refers to some alternative approaches, including that the law applicable to the transaction or the law where the assets are located (lex rei sitae) would govern avoidance actions relating to that transaction or asset. The policy underlying that approach is to protect the counterparties and their reliance on the law governing their transactions with the debtor by providing those counterparties with some degree of certainty and predictability that their transactions with the debtor will not subsequently be subject to attack in insolvency proceedings. Some laws combine the lex fori concursus and the law governing the transaction in one of several ways. One approach provides that a transaction will not be subject to avoidance in insolvency unless it is avoidable both under the lex fori concursus and the law governing the transaction. It is argued that such an approach reduces the cost of credit and commercial transactions because of the diminished risk of avoidance. Another approach provides that a transaction can be avoided if avoidance can be achieved under either the lex fori concursus or the law governing the transaction. One law, for example, provides that the lex fori concursus will apply to avoidance, but recognizes the application of a different law where that different law is stricter than the law of the forum and would lead to avoidance of a wider range of transactions.

31. The Working Group has considered so far the approach taken in article 16 of the EIR recast that provides for protection of an act from avoidance if it is subject to the law other than the lex fori concursus, and that other law does not allow any means of challenging that act in the relevant case. It noted in that context a possible safeguard aimed at preventing the abusive choice of law.[37] Concerns expressed in the Working Group about that approach included that it produced negative impact on: (a) equitable treatment of similarly situated creditors since it provided extra protection to only some creditors; and (b) certainty, simplicity and administrative efficiency of insolvency proceedings since the approach was cumbersome (for example, it required localization of the detrimental act, which may be difficult, especially in the digital world).

32. If the Working Group decides to deviate from the approach in the Guide, it would be expected to consider alternative approaches and implications of each on the achievement of the objectives of an effective and efficient insolvency law listed in recommendation 1 of the Guide. In particular, all alternative approaches listed above would necessitate the assessment by courts of a foreign avoidance regime. While convergence with respect to some fundamental notions of avoidance may be observed across jurisdictions, for example with respect to types of transaction that are usually avoided, there is still much divergence as regards other elements related to avoidance, such as avoidance criteria, what would constitute the ordinary course of business and who would be considered related persons (see the relevant sections in A/CN.9/WG.V/WP.183). Some jurisdictions use objective criteria by avoiding all transactions that took place during the suspect period, gratuitous transactions and transactions with related persons while others use subjective criteria necessitating individualized approach and proving intent, knowledge, etc. Yet others use the combination of both. Within the same jurisdiction, avoidance criteria, presumptions, allocation of burden of proof and duration of the suspect period may vary depending

[36] See e.g., article 6 of MLCBI on public policy exception and articles 21 and 22 of MLCBI on protection of creditors and other interested persons.

[37] See e.g., Global Rule 23.

on parties involved (e.g., directors or other related persons) and the cause for avoidance (e.g., fraud). The effects of avoidance may also be different depending on all those factors: some transactions may become automatically void while others will be voidable. Timing for commencing avoidance proceedings may also differ across jurisdictions. All of this makes avoidance complex, lengthy and unpredictable, especially when intent and knowledge of the parties to the transactions subject to avoidance are to be proven. The need to assess in domestic insolvency or separate avoidance proceedings a foreign avoidance regime, which would not necessarily be regulated only by insolvency law but also by applicable non-insolvency law, would exacerbate those concerns.

(c) Treatment of set-off

33. At its fifty-ninth session, the Working Group noted that set-off might not be an issue solely under insolvency law, as it might be linked to contract law and possibly also to rights in rem.[38] It was noted that including the item on the treatment of set-off in the lex fori concursus list would refine the item to the key issue of whether set-off would be allowed under the lex fori concursus.[39] At its sixtieth session, the Working Group agreed to change item (i) on the lex fori concursus list to read the "treatment of set-off", instead of "set-off" as in recommendation 31. It deferred clarification of other points of relevance to that item to a later stage.[40] The Working Group may wish to consider the following points in relation to that item and whether they may serve as the basis for drafting a commentary to the amended item (i). The secretariat used the approach in the Guide as the starting point.

34. There are different types of set-off (contractual, statutory, equitable, bank, etc.). Item (i) deals only with mandatorily applicable insolvency set-off that would apply irrespective of any contractual arrangements between contracting parties. That regime would be governed by the lex fori concursus. Parties cannot derogate from that regime.

35. The commentary to recommendations 30–34 in the Guide explains why this should be the case. It acknowledges that rights of set-off may be subject to law other than the law of the forum, for reasons related to the parties' expectations, especially if they engage in regular dealings with each other. At the same time, paragraph 91 of the commentary states that the rules of set-off of the forum should be applied to claims on the basis that, in insolvency, rights of set-off are closely related to the proof and quantification of claims and policies governing the equal treatment of creditors. It further states that, since these are questions regulated by the law of the forum, the rights of set-off should be similarly regulated.

36. Under the Guide, the lex fori concursus would determine whether the set-off is permitted in insolvency proceedings. The recommended approach to the treatment of set-off in insolvency is found in recommendation 100 and accompanying commentary of the Guide stating that the insolvency law should protect a general right of set-off existing under law other than the insolvency law that arose prior to the commencement of insolvency proceedings, subject to the application of avoidance provisions. The law applicable to the validity and effectiveness of set-off rights and claims existing at the time of the commencement of insolvency proceedings is to be determined by PIL rules of the State of the opening of insolvency proceedings (rec. 30 of the Guide).

37. If the set-off is permitted, the lex fori concursus defines with respect to which obligations and under which conditions it is permitted, in particular: (a) whether set-off is permitted only with respect to pre-commencement money obligations matured

[38] The Working Group may wish to note that when the MLCBI was prepared it was questioned whether set-off should be included within the scope of rights in rem. Subsequently, the Working Group did not consider it necessary to define the term "rights in rem" and left that matter to national law (A/CN.9/422, paras. 63 and 64).

[39] A/CN.9/1088, para. 65 (b).

[40] A/CN.9/1094, para. 78.

prior to the commencement of insolvency proceedings or also those that would mature after commencement of insolvency proceedings; (b) whether obligations subject to set-off must arise under a single contract or may arise under multiple contracts (i.e., not necessarily be mutual or related); and (c) whether the stay applies to the exercise of set-off rights and, if so, how creditors with set-off claims are treated (e.g., as secured creditors), or whether the stay does not apply and, if so, whether set-off is effectuated automatically upon commencement of insolvency proceedings. The lex fori concursus also addresses the treatment of set-off of claims arising after the commencement of insolvency proceedings, and avoidance of pre-commencement set-offs and related transactions (e.g., purchasing claims at discounts with the intent of building up set-off rights). An exception to the lex fori concursus as regards set-off is for set-off in payment and settlement systems and regulated financial markets (rec. 32 of the Guide).

38. Some jurisdictions may favour set-off and make the law more favourable to set-off applicable to set-off in insolvency proceedings.[41] Concerns were expressed in the Working Group with respect to that approach because ascertaining the applicable foreign set-off regime, which may encompass not only an insolvency set-off regime but also a set-off regime under non-insolvency law, may produce significant implications on the conduct and administration of insolvency proceedings in the State of the opening of insolvency proceedings. It would require in particular ascertaining general permissibility of set-off and permissibility of set-off in a specific case and coordinating the right to exercise set-off with other aspects of the domestic insolvency proceeding, such as the stay, relief from the stay and the timing of the set-off. In addition, the set-off of claims in a single insolvency proceeding may end up being governed by different legal systems, some of which may permit set-off while others may not, impacting the equitable treatment of similarly situated creditors. Some unsecured creditors may end up being paid in full ahead of other creditors through the operation of set-off. Furthermore, while avoidance of the set-off would remain being subject to the lex fori concursus, the latter may not allow avoidance of set-off that has taken place under a foreign law and thus leave possible grievances of other creditors and parties in interest, including employees, with respect to that set-off unaddressed. Those concerns may be mitigated to some extent by the public policy exception and additional safeguards, for example those that might aim at providing sufficient protection to creditors and other parties in interest from unreasonable choice of law and unreasonable consequences of the application of the foreign law to set-off.[42] The public policy exception may also be invoked where the qualification of the domestic and foreign set-off regimes differs with the result that the domestic court would not apply any foreign rule that, in its view, is procedural.

(d) Treatment of secured creditors

39. At the fifty-ninth session of the Working Group, this item was considered in the broader context of pre-commencement rights in rem. The Working Group heard different views as regards approaches to treating those rights in insolvency proceedings, one of which is to subject them to the lex fori concursus, while another is to insulate them from effects of any insolvency proceedings, except for avoidance actions and subject to a possible safeguard against abusive exploitation of "asset havens".[43] Because of pros and cons of those approaches, support was expressed for finding a middle ground, for example subjecting the pre-commencement rights in rem to the effects of the lex rei sitae.[44]

40. At its sixtieth session, the Working Group agreed to defer the consideration of the matter to a later stage. It took note of the views of those delegations that were against deviating from the approaches to the matter taken in the UNCITRAL insolvency and secured transactions texts and views of those delegations that

[41] See e.g., article 9 of the EIR recast.
[42] See e.g., Global Rule 18.
[43] See e.g., Global Rule 16.
[44] A/CN.9/1088, para. 65 (c).

considered that subjecting rights in rem to the effects of the lex rei sitae could serve as the basis for finding a compromise.[45]

41. As was noted in document A/CN.9/WG.V/WP.176, a proposal to include an exception to the lex fori concursus for rights in rem did not receive sufficient support when the Guide was prepared.[46] Nevertheless, paragraph 88 of the commentary to recommendations 30–34 of the Guide acknowledges that such an exception is included in insolvency laws, in particular with respect to security interests, since application of the lex fori concursus to security interests may affect the legal framework for secured lending, introducing a factor of instability that may increase the domestic cost of finance. If foreign proceedings intrude upon local security interests, the value of those security interests may be seriously impaired. Similarly, a transfer of the COMI to a different State can bring about a radical change in the position of the secured party.

42. If item (j) stays on the lex fori concursus list, an accompanying commentary would be expected to explain why this approach was chosen. In such case, under the legislative provisions, the lex fori concursus would govern the treatment of secured creditors in insolvency proceedings, in particular such issues as whether encumbered assets are part of the insolvency estate and whether secured creditors are required to submit their claims (see rec. 172 of the Guide). Under the lex fori concursus of some States, the rights of secured creditors may end up being unaffected by the commencement of insolvency proceedings, and secured creditors would be able to proceed to enforce those rights unimpeded by those proceedings.[47] Under the lex fori concursus of other States, the rights of secured creditors would be affected (the approach recommended in the Guide is to include the debtor's rights in encumbered assets in the insolvency estate (see rec. 35 (a))). Depending on the approach to that issue, other issues related to the treatment of secured creditors in insolvency proceedings may or may not arise (e.g., the application of the stay on enforcement actions by secured creditors; requests for relief from the stay; protection of secured creditors from the diminution of the value of the encumbered asset; the treatment of secured creditors and encumbered assets in the context of the post-commencement finance; and priority of secured claims). Regardless of the approach taken, security interests might be subject to the avoidance provisions of the lex fori concursus on the same grounds as other transactions (see rec. 88 of the Guide).

43. Alternatively, the legislative provisions may state:

> "1. The effects of insolvency proceedings on [rights in rem in assets of the debtor] [the treatment of secured creditors] shall be governed by the lex rei sitae[48] [at the time of the commencement of insolvency proceedings].
>
> 2. Notwithstanding paragraph 1 of this [legislative provision], avoidance actions that may be taken with respect to [rights in rem] [security interests] shall be governed by the lex fori concursus."

4. Contracts relating to immovable property

44. At its fifty-ninth and sixtieth sessions, the Working Group deferred consideration of whether a special regime would need to be established for contracts relating to immoveable property.[49] Reference in that context was made to article 11.1 of the EIR recast that provides that the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the State within the territory of which the immoveable property

[45] A/CN.9/1094, para. 79.
[46] See paras. 9, 10, 22 and 23 of that document.
[47] See e.g., article 8 of the EIR recast.
[48] The definition of the "lex rei sitae" would need to encompass also situations where rights in rem would be subject to registration. In such case, the law of the State where the register is maintained would prevail.
[49] A/CN.9/1088, para. 83 and its accompanying footnote with reference to article 11 of the EIR recast; and A/CN.9/1094, para. 77.

is situated. That provision covers contracts for the use (rent, leasing) of the immovable property and contracts that govern a change in ownership by way of transfer of legal title (e.g., sale of the immovable property). The need to apply the lex rei sitae to this type of contracts is explained by the particularly close connection that exists between legal rights in immoveable property and the legal regime in which that property is situated. That legal regime reflects policy choices made by States in which the immoveable property is to be found for protection of the rights of owners and users of the property (e.g., tenants) as well as State's own interests (e.g., in its own land and immoveable property situated on that land).[50]

45. No special treatment of contracts relating to immoveable property is envisaged in the Guide, neither in the applicable law part, not in the substantive insolvency law part related to the treatment of contracts. The commentary in both parts do refer specifically to contracts related to immoveable property.[51] Preliminary views of some delegations at the sixtieth session of the Working Group were against formulating special rules for contracts relating to immovable property.[52]

46. In the absence of special rules, the draft legislative provisions addressing the treatment of contracts and other items on the lex fori concursus list would apply. Issues with cross-border recognition and enforcement of the effects of the lex fori concursus on contracts relating to immoveable property may arise similar to those arising from the protection and preservation of the insolvency estate and the use or disposal of insolvency estate assets.

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

47. At the fifty-ninth session of the Working Group, support was expressed for adding in the lex fori concursus list reference to directors' obligations and liabilities in line with part four of the Guide. [53] At the sixtieth session of the Working Group, no agreement was reached on adding such a reference. Complexities arising as regards applicable law rules in the cross-border context and the domestic context in which directors' obligations and liabilities were addressed in part four of the Guide were noted. It was considered necessary to clarify which aspects of directors' obligations and liabilities would fall under the law that governs company law relationships (lex societatis) and which would fall under the lex fori concursus. Noting that the latter would not necessarily be the lex fori concursus of the State in which the debtor has its COMI, it was argued that the lex societatis should remain the default law, which would not exclude that some limited aspects of directors' obligations and liabilities could fall under the lex fori concursus.[54]

48. In the light of those views, the Working Group may wish to discuss further the need for inclusion of an explicit reference to directors' obligations and liabilities in the lex fori concursus list and, if it is to be included, the scope of that reference. The item in its current formulation captures directors' obligations and liability during insolvency proceedings and in the period approaching insolvency. Item (k) on the lex fori concursus list that refers to the rights and obligations of the debtor, including the debtor-in-possession, may already encompass directors' obligations and liability during insolvency proceedings. Directors' obligations and liability in the period approaching insolvency are addressed in part four of the Guide that focuses on those director obligations that may be included in the law relating to insolvency (reference

[50] M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996, (the "Virgos-Schmit Report"), paras. 116–119. Available at: https://globalinsolvency.com/resource-article/virgos-schmit-report-convention-insolvency-proceedings-now-regulation-insolvency (accessed on 2 September 2022).

[51] See e.g., paras. 108, 134, 137 and 138 of the commentary to recs. 69-86.

[52] A/CN.9/1094, para. 77.

[53] A/CN.9/1088, para. 65 (e).

[54] A/CN.9/1094, para. 83.

to the "law relating to insolvency" is intended to encompass insolvency and non-insolvency law, such as company law) and that become enforceable once insolvency proceedings commence.[55]

49. The Guide acknowledges that the liability regimes for directors' failure to comply with their obligations in the period approaching insolvency vary greatly across jurisdictions. Separate aspects of such regimes may be found in different laws, including company law, civil law, criminal law and insolvency law. In the same jurisdiction, they may be included in more than one law or split between them. In common law systems, they may be found in common law and legislation. Those separate aspects and laws complement each other at the domestic level to ensure that the resulting directors' liability regime is coherent and comprehensive.

50. In considering the matter further, the Working Group may wish to assess the implications of the application of the lex societatis alone or in combination with the lex fori concursus in the cross-border context, in particular how borderlines as to the specific areas of application of each directors' liability regime would be drawn and the resulting liability regime. In that context, the Working Group may wish to note that there is no uniform understanding of the lex societatis[56] and different considerations may arise depending on whether insolvency proceedings were opened at the location of: (a) COMI that is the same as the debtor's place of registration or incorporation or "real seat"; (b) COMI that is different from the debtor's place of registration or incorporation or "real seat"; (c) the debtor's establishment; or (d) the debtor's assets. In addition, reference to "directors" in part four of the Guide is intended to be broad, encompassing any person exercising factual control over the debtor (e.g., de facto directors, shadow directors, shareholders, lenders, etc.) (rec. 258 and its accompanying commentary). Different public policy considerations, remedies and enforcement mechanisms, including disqualification, may be involved depending on persons found to be in factual control of the debtor's business in the period approaching insolvency. Some of them may not be made subject to the foreign lex fori concursus (e.g., institutional lenders).

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

51. At the sixtieth session of the Working Group, with reference to paragraph 18 of working paper A/CN.9/WG.V/WP.179, a suggestion was made to expand the list in recommendation 31 of the Guide with references to related actions (deriving from insolvency law and connected to insolvency proceedings). The Working Group did not discuss that suggestion.[57]

52. The suggested additional item raises issues of demarcation of insolvency-related actions from non-insolvency related actions,[58] of the scope of application of the

[55] Part four, section one, chapter I, para. 15.

[56] Some jurisdictions follow the "incorporation" approach while other jurisdictions follow the "real seat" approach with the understanding of the latter not being uniform either.

[57] A/CN.9/1094, para. 71.

[58] The following have been considered insolvency-related actions: actions based on insolvency law to hold directors liable for actions causing insolvency in the period approaching insolvency; avoidance; challenges to actions taken by the insolvency representative or the creditor committee in exercise of their powers or discretion; and other actions directly derived from insolvency proceedings, closely linked with them or particular to insolvency law (e.g., insolvency-related adjustments that lead to the special treatment of claims of related persons). Other types of actions were considered not to be insolvency-related, including actions by an insolvency representative seeking to establish the debtor's ownership of property or actions by the insolvency representative based on general contract or commercial law that seek recovery of money allegedly owing to the debtor. Those actions, it has been held, could have been brought by the creditor or the debtor itself before the opening of insolvency proceedings and they would have been governed by the ordinary rules of jurisdiction that applied to civil or commercial matters. The fact that the insolvency representative brought the action did not alter the nature of the claim and the law applicable thereto. See e.g., ECJ cases: *Wiemer & Trachte GMBH, in liquidation v*

legislative provisions (in particular, the reference to "insolvency proceedings") and the definition of the lex fori concursus (in particular, the reference to the "law" or "insolvency law"). In that context, the Working Group may wish to recall that, at the fifty-ninth session of the Working Group, the view was expressed that, in the light of the intended broad interpretation of the lex fori concursus and "insolvency proceedings", the need to further amend the lex fori concursus list should not arise.[59] The Working Group may wish to consider the suggested item.

C. Exception to the lex fori concursus: payment and settlement systems and regulated financial markets

53. At its fifty-ninth session, the Working Group considered that, in the light of developments in financial markets and the digitalization of financial systems, the content of an exception to the lex fori concursus with respect to payment and settlement systems and regulated financial markers found in recommendation 32 of the Guide would need to be updated.[60] At its sixtieth session, the Working Group agreed that the scope of the exception should be properly delineated, noting that the systems and markets intended to be covered by the exception were tightly integrated multilateral systems and markets where the insolvency of one participant could result in a series of defaults in back-to-back transactions, potentially causing financial distress to other system or market participants and in the worst case, the financial collapse of other counterparties, including regulated financial institutions.[61] This domino effect is often referred to as systemic risk.[62]

54. Expert consultations held by the secretariat[63] indicate that the exception should stay and references to systems and markets should not be narrowed down to regulated markets or systematically important or central systems since all types of market and system are interconnected. A failure in one part of the chain may produce unpredictable results, including the failure of the entire chain of such a magnitude that would necessitate intervention of regulatory authorities in otherwise unregulated systems and markets for the protection of public interests.

55. It was also conveyed to the secretariat that separate references to "payment and settlement systems" on the one hand and "financial markets" on the other hand may need to be retained. Although "payment and settlement systems" are part of the financial markets and represent a major component of their infrastructure, "payment and settlement systems" may also operate autonomously, outside any financial market.

56. The systems and markets in question, it was explained, cannot tolerate risks of forum shopping and unpredictability in applicable law which may result if the law other than the law applicable to the market or system is made applicable to them. Such risks will be present if the effects of insolvency proceedings on systems and markets would be governed by the lex fori concursus: insolvency proceedings with respect to a single participant in the system or market may be opened in various jurisdictions

---

Tadzher; *Nickel and Goeldner Spedition GmbH v "Kintra" UAB*; *Tunkers France v Expert France*; *CeDe Group AB*; and *Kornhaas.*

[59] A/CN.9/1088, paras. 63, 64 and 68.

[60] A/CN.9/1088, para. 71. The Working Group was reminded at that time (A/CN.9/WG.V/WP.176, para. 27) that, at its forty-fourth session, in 2013, it had considered necessary to update related recommendations 101 to 107 of the Guide and accompanying commentary addressing financial contracts and netting (A/CN.9/798, paras. 26 and 30). Those recommendations, among other things: (a) provide for exceptions of financial contracts from a stay, including as regards enforcement of contract termination clauses and security interests; (b) exempt routine pre-commencement transfers from avoidance; and (c) recommend recognizing and protecting the finality of the payment and settlement system operations upon insolvency of a participant in the system.

[61] A/CN.9/1094, para. 87.

[62] A/CN.9/WG.V/WP.179, para. 50 cross-referring to the commentary to recs. 101–107 of the Guide (see in particular, para. 213 of that commentary).

[63] The European Central Bank, the Financial Stability Institute and the International Swaps and Derivatives Association.

while there are usually numerous participants in any single system or market. Only the application of one law to all operations in payment and settlement systems and financial markets may guarantee the legal certainty required to ensure their smooth and correct operation.

57. No example has been provided to the secretariat of cases when the law other than the law applicable to the payment or settlement system or the financial market governed the effects of insolvency proceedings on the rights and obligations of the participants in that system or market. To the contrary, it has been confirmed that the sectors to which this exception applies operate under standard rules, guidelines and agreements that reinforce the application of the law of the system or the market to all aspects related to that system or market, including effects of insolvency proceedings. The deviation from those standards may produce negative consequences not only for non-compliant systems or markets but also on the general investment climate in jurisdictions where they operate.

58. The Working Group may wish to consider whether the exception in recommendation 32 should stay without the word "regulated" and with the commentary explaining situations in which the provision is intended to apply. If the exception stays, to enhance legal certainty, a provision may be added that would confirm that the law applicable to the system or market will also apply to any avoidance actions that may be taken with respect to payments or transactions that took place in that system or market. Otherwise, such payments or transactions could become subject to avoidance under the insolvency law of different participants with respect to whom insolvency proceedings may be opened since the lex fori concursus would apply to avoidance by default. The resulting provision may read as follows:

> "The effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a financial market shall be governed solely by the law applicable to that system or market. That law shall also govern avoidance actions that may be taken with respect to payments or transactions that took place in that system or market."

IV. Issues not yet considered by the Working Group

A. Primacy of international obligations and overriding mandatory rules

59. At the sixtieth session of the Working Group, it was considered essential to include other safeguards that would ensure respect for sovereignty of States and protection of other interests. [64] A usual safeguard found in UNCITRAL texts in that context is on primacy of international obligations or, more broadly, on overriding mandatory rules. Those obligations or mandatory rules may be found in international treaties and agreements, both multilateral and bilateral and both with State and non-State entities, that address private international law matters and that may point to another applicable law than the one that would be envisaged in the legislative provisions. They are found, for example, in binding legal rules issued by a regional economic integration organization that are applicable to members of that organization.

60. The Working Group may wish to consider in due course whether such a safeguard should be included in the legislative provisions. An accompanying commentary might note that an unnecessary broad interpretation of international treaties or agreements or rules may result in excessive restriction of the effects of the legislative provisions, which would hinder achieving uniformity, certainty and predictability. For that reason, there should be a sufficient link between the obligation or rule concerned and the matter addressed in the insolvency proceeding for the

[64] A/CN.9/1094, para. 94.

obligation or rule to displace the application of the conflicting provision in the legislative provisions.

B. Interpretation

61. The Working Group may wish to consider in due course desirability of including a provision that, in the interpretation of the legislative provisions, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith. The expected effect of such a provision would be to limit the extent to which the legislative provisions, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law.

62. Inclusion of such a safeguard, usually found in conventions and model laws emanating from the work of UNCITRAL, in the legislative provisions may be considered necessary and important because they envisage application of a foreign law and, consequently, determination and verification of that law by the court in the State of the opening of insolvency proceedings. This would unavoidably lead to the engagement of foreign legal cultures, systems and concepts that may be unfamiliar to the State of opening of insolvency proceedings. In such situations, there could be an elevated tendency towards references to the local concepts and rules. The legislative provision may serve as a reminder that such tendencies should be avoided to achieve a uniform interpretation and application of the legislative provisions. It would also serve as a reminder that, when a question concerning a matter governed by the legislative provisions are not expressly settled therein, it would be expected to be settled in conformity with the general principles on which the legislative provisions are based. Where necessary, analogous legal rules could be applied to produce the effects intended under the legislative provisions.

C. Other issues

63. At its sixtieth session, the Working Group held a preliminary exchange of views on provisions of the UNCITRAL insolvency model laws that raised applicable law issues.[65] Views differed on whether it was time to consider them.[66] The Working Group deferred some issues for consideration in the context of concurrent proceedings (see para. 1 (g) and (h) above).

64. Some of the identified provisions have been addressed in the draft commentary. Others require further clarification or decisions by the Working Group. For example, while no rigid hierarchy between proceedings is established in UNCITRAL insolvency texts, UNCITRAL insolvency texts give a certain pre-eminence to the foreign main proceeding[67] and, in the enterprise group insolvency context, to the planning proceeding.[68] One of the arguments for avoiding establishing the rigid hierarchy among concurrent proceedings was to not unnecessarily hinder the ability of courts and insolvency representatives to cooperate by way of exercising their discretion under relevant provisions on cooperation and coordination.[69] The implicit hierarchy among proceedings is evident in MLCBI provisions on relief,[70] effects of recognition[71] and the limited scope of the local proceedings after recognition of a foreign main proceeding,[72] in article 14 (e) and (h) of MLIJ[73] and throughout MLEGI. At the same time, article 29 of MLCBI gives some precedence to the local proceedings over the foreign proceedings, whether main or non-main, by requiring that relief in

[65] A/CN.9/1094, para. 97.
[66] A/CN.9/1094, para. 97.
[67] See e.g., paras. 1, 21, 31, 44, 132–133, 144, 175, 193 and 202 of GEI.
[68] See e.g., articles 20, 23 and 24 of MLEGI and accompanying commentary.
[69] A/52/17, para. 108.
[70] See e.g., articles 19.4, 21.3, 23.2, 29 (c) and 30 of MLCBI.
[71] Article 20 of MLCBI.
[72] Article 28 of MLCBI.
[73] See GE, paras. 107 and 118.

aid of the foreign proceeding must be consistent with the proceeding in the enacting State.