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Applicable law in insolvency proceedings

Note by the Secretariat

Contents

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I. Introduction

1. The provisional agenda of the sixty-fourth session of the Working Group (A/CN.9/WG.V/WP.191) provides background information about the project on applicable law in insolvency proceedings referred to the Working Group by the Commission at its fifty-fourth session, in 2021.[1] It notes that the Working Group, at its sixty-third session (Vienna, 11–15 December 2023), considered the draft legislative provisions and accompanying commentary contained in document A/CN.9/WG.V/WP.190 and agreed on revisions to some parts of that text and on the need to consider further other parts of the text. It also notes that the Working Group requested the secretariat to draft an exception to the lex fori concursus for close-out netting outside payment, clearing and settlement systems and regulated financial markets as well as provisions for chapter III on cross-border recognition aspects.[2]

2. The secretariat sets out a revised draft of legislative provisions and commentary in chapter II of this note. The status of consideration by the Working Group of a particular draft provision and any additional issues suggested by the secretariat for consideration of that provision by the Working Group are set out before the draft materials. The footnotes in bold accompanying the draft legislative provisions and commentary indicate the source for the most recent revisions. Other footnotes accompanying those materials intend to stay in the final text as appropriate depending on its final form.

3. In addition to the changes specifically noted in the accompanying footnotes, the Secretariat, in line with the agreement reached at the sixty-third session of the Working Group,[3] replaced references to “non-insolvency law” with references to “law other than the insolvency law that might apply as part of the lex fori concursus” throughout the text. Since the Working Group agreed to prioritize issues raised in chapters I to III of the draft text and consider issues arising from enterprise group insolvencies and concurrent proceedings as they might arise,[4] no separate chapter on those issues was included in the current draft.

4. At its sixty-third session, it was recalled that the Working Group had not yet agreed on the final form of the text on the topic.[5] It was also recalled that, at an earlier session, the Working Group had agreed to proceed on a working assumption that the text would take the form of a model law.[6] Provisionally, the secretariat continues referring in this note to the legislative provisions on the understanding that they will be replaced in due course by references appropriate for the agreed form of the instrument. Other revisions would be required throughout the text depending on the final form of the text and on how the text will relate to other UNCITRAL texts in the area of insolvency law.

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 215–217.
[2] A/CN.9/1163, chapter V.
[3] Ibid., para. 61 (a).
[4] Ibid., para. 81.
[5] Ibid., para. 41.
[6] A/CN.9/1126, para. 80.

II. Draft legislative provisions with accompanying commentary

Chapter I. General provisions

A. Purpose and objectives

5. The draft preamble, as revised by the Working Group at its sixty-third session,[7] is reproduced below. Consequential and other amendments suggested in the Working Group[8] were made in the accompanying commentary.

1. Draft legislative provision

Preamble

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, 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.

2. Draft commentary

1. The legislative provisions contain simple and clear guiding rules, which States can incorporate in their domestic law, to determine the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects, both domestically and across borders (e.g. in recognition and relief proceedings), with respect to a single debtor[9] or several debtors members of an enterprise group.[10] The law in some States may be silent on those matters while the law in some other States may address them only partly, with the result that courts are left to determine the law that governs those matters on a case-by-case basis.

2. Those States that address the matters covered by the legislative provisions generally accept that the law of the State where insolvency proceedings are commenced (the lex fori concursus) governs the procedural aspects of insolvency proceedings, such as commencement, conduct, administration and closure of insolvency proceedings. However, they introduce exceptions to the lex fori concursus for the law that governs the effects of insolvency proceedings on certain types of assets (e.g. immovable property), rights (e.g. rights in rem) or claims (e.g. set-off), and they use different connecting factors for determining alternative laws.

3. The law and practice with giving effect to the lex fori concursus across borders is not uniform either. The 1997 UNCITRAL Model Law on Cross-Border Insolvency[11] (MLCBI), the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ)[12] and the 2019 UNCITRAL

[7] A/CN.9/1163, para. 42.
[8] Ibid., paras. 44–47.
[9] "Debtor": the person with respect to whom or which insolvency proceedings have been commenced or initiated (the explanation of the term draws from the Glossary in part five of the UNCITRAL Legislative Guide on Insolvency Law (the "Guide"), term (g)).
[10] "Enterprise group": two or more enterprises that are interconnected by control or significant ownership. "Enterprise": any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law. See the Guide, part three, terms (a) and (b) in the Glossary; and article 2 (a) and (b) of the UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI).
[11] United Nations publication, Sales No. E.14.V.2. Available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.
[12] United Nations publication, Sales No. E.19.V.8. Available at https://uncitral.un.org/en/texts/insolvency/modellaw/mlij.

Model Law on Enterprise Group Insolvency[13] (MLEGI) address those matters only partly and not explicitly.

4. The main purpose of these legislative provisions is to fill in those gaps by: (a) establishing a general rule that the law of the State of the opening of insolvency proceedings (the lex fori concursus) governs all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects on persons, rights, claims and proceedings, with some exceptions; (b) explaining the meaning and scope of that law; (c) providing for a limited number of exceptions to that rule; (d) delineating the scope of each exception and specifying when each of them applies; (e) envisaging the possibility of granting a relief to a foreign proceeding in the form of recognition of effects of the lex fori concursus and other laws applied by the foreign court in that proceeding; (f) reinforcing measures aimed at minimizing the commencement of concurrent proceedings and, where they have been commenced, coordinating the relief granted to them under these legislative provisions.

5. As such, the legislative provisions complement, supplement and expand the earlier UNCITRAL texts in the area of insolvency law in enhancing certainty and predictability for parties affected by insolvency proceedings and increasing efficiency and effectiveness of those proceedings. While doing so, they also balance competing considerations, such as the benefits of applying the lex fori concursus to all issues arising in the insolvency proceedings and the countervailing considerations of, for example, the need for predictability in the protection of workers under labour contracts and relationships or financial stability and protection of financial market infrastructures against systemic risks.

6. The legislative provisions do not deal with rules for determining the law applicable to the validity and effectiveness of rights or claims existing before the commencement of insolvency proceedings. That law remains to be determined by the generally applicable rules of private international law (conflict-of-laws) (henceforth referred to as "PIL rules") of the State in which insolvency proceedings are commenced. The legislative provisions do not displace those rules.

B. Scope of application of the legislative provisions

6. The draft legislative provision and accompanying commentary have been amended to reflect the comments made at the sixty-third session of the Working Group.[14] At its sixty-third session, the Working Group did not consider a suggestion to add a separate legislative provision on the basis of paragraph 2 of the draft commentary[15] and may wish to do so at its sixty-fourth session.

1. Draft legislative provision

Scope of application

1. The legislative provisions provide guiding rules for determining the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects, including in recognition and relief proceedings and in proceedings concerning enterprise groups.

2. The legislative provisions do not displace the general private international law rules of the State where the insolvency proceedings are commenced that determine the law applicable to the validity and effectiveness of the rights and claims existing before the commencement of insolvency proceedings.[16]

[13] United Nations publication, Sales No. E.20.V.3. Available at https://uncitral.un.org/en/MLEGI.
[14] A/CN.9/1163, paras. 48–49.
[15] Ibid., para. 49.
[16] **Ibid., para. 48.**

[3. The legislative provisions do not apply to [*any exclusion from the application of these legislative provisions is to be specified, for example insolvency proceedings concerning financial and other entities that are subject to a special insolvency regime*]].[17]

2. Draft commentary

General

1. The scope of application of the legislative provisions is linked to the notions of "insolvency proceedings"[18] and "commencement of insolvency proceedings".[19] UNCITRAL insolvency texts set out a cumulative list of requisites that a proceeding must meet in order to be considered an "insolvency proceeding": (a) collective proceeding (judicial or administrative);[20] (b) pursuant to a law relating to insolvency (which includes company law);[21] (c) under control or supervision by a court (which includes the debtor-in-possession);[22] (d) with respect to a debtor (natural or legal person) that is in severe financial distress or insolvent;[23] and (e) with the goal of liquidating or reorganizing that debtor as a commercial entity.[24]

2. "Insolvency proceedings" encompass: (a) "liquidation", defined as proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law;[25] (b) "reorganization", defined as the process by which the financial well-being and viability of a debtor's business can be restored and the business can continue to operate, using various means, possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or part of it) as a going concern;[26] (c) "expedited reorganization proceedings" that combine voluntary restructuring negotiations and acceptance of a plan with an expedited procedure conducted under the insolvency law for court confirmation of that plan;[27] (d) simplified insolvency proceedings;[28] and (e) interim, restructuring, the business sale procedure prepared during the amicable phase and subsequently approved by the court during the reorganization or liquidation phase[29] and any other proceeding, that

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[17] **Ibid.**

[18] See the Glossary in the Introduction to the Guide, terms (s) and (u), to be read together and also with the explanation provided in the Guide, part one, para. 2; the Guide to Enactment of the MLIJ (GE), paras. 22, 48 and 49; and the Guide to Enactment and Interpretation of MLCBI (GEI), paras. 48–51 and 65–80.

[19] Recommendations 14–29 and 292–309 of the Guide. "Commencement of [insolvency] proceedings": the effective date of insolvency proceedings whether established by statute or a judicial decision (the Glossary in the Introduction to the Guide, term (h)).

[20] GEI, paras. 69–72.

[21] GEI, para. 73.

[22] Recommendations 112 and 113 of the Guide, and GEI, paras. 71, 74–76, and 86.

[23] GEI, paras. 1, 48, 49, 65 and 67, cross-referring to recommendations 15 and 16 of the Guide that set out standards for commencement of insolvency proceedings. When the debtor applies for commencement of insolvency proceedings, the standards are as follows: the debtor is or will be generally unable to pay its debts as they mature or its liabilities exceed the value of its assets. At the same time, the Guide recommends that, in simplified insolvency proceedings, the eligible debtors should be allowed to apply for commencement of a simplified insolvency proceeding at an early stage of financial distress without the need to prove insolvency (rec. 294). When creditor(s) apply for commencement of insolvency proceedings, the commencement standards are as follows: the debtor is generally unable to pay its debts as they mature or the debtor's liabilities exceed the value of its assets.

[24] GEI, paras. 77–78.

[25] The Glossary in the Introduction to the Guide, term (w).

[26] The Glossary in the Introduction to the Guide, term (kk).

[27] See the text on the Purpose of legislative provisions preceding recommendation 160 of the Guide; and GEI, para. 75.

[28] The Guide, part five.

[29] **A/CN.9/1163, para. 49.**

the court may ascertain on a case-by-case basis as meeting the cumulative list of the requisites set out above.[30]

3. Any other proceedings that do not meet the requisites set out above fall outside the scope of application of the legislative provisions. For example, a debt collection proceeding or receivership initiated by a particular creditor or group of creditors or gathering up assets in winding-up or conservation proceedings that do not also include provision for addressing the claims of other creditors are excluded.[31] A judicial or administrative proceeding for a solvent entity that does not seek to restructure its financial affairs but rather to dissolve its legal status is also excluded.[32] Financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt, where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law, are also outside the scope of the legislative provisions.[33] In addition, proceedings that are designed solely to prevent dissipation and waste of assets, rather than to liquidate or reorganize the insolvency estate, as well as proceedings designed to prevent detriment to investors rather than to all creditors, are also excluded.[34]

Paragraph 1

4. The legislative provisions establish rules for determining the law that governs: (a) jurisdictional, eligibility and procedural aspects of insolvency proceedings; (b) effects of insolvency proceedings on pre-commencement rights and claims (i.e. how each such right and claim would be treated in insolvency proceedings); and (c) post-commencement rights, claims, actions and disputes.

5. Examples of issues covered by (a) include commencement, conduct, administration and closure of insolvency proceedings, such as: applicable commencement standards; requirements and procedures for giving notices of commencement of insolvency proceedings and their content; grounds and procedures for denial of application or dismissal of proceedings and consequences thereof; type of a proceeding to commence; conversion of proceedings; supervision and approval requirements and mechanisms; procedures for submission, verification and admission of claims; procedures for realization of assets and distribution of proceeds; and procedures for closing insolvency proceedings.

6. Examples of issues covered by (b) include: the relative position of claims vis-à-vis each other (i.e. the ranking and priorities); avoidance; and restrictions and modifications to which the pre-commencement rights and claims may become subject in order to fulfil the collective aims of insolvency proceedings (e.g. a stay of proceedings[35] or subordination).

7. Examples of issues covered by (c) include: rights and claims arising from the use and disposal of the insolvency estate assets, post-commencement finance and insolvency representative's actions; challenges to a liquidation schedule, reorganization plan or debt discharge; and determination and authorization of administrative claims and expenses.

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[30] As regards interim proceedings, see GEI, paras. 79–80. As regards restructuring proceedings, see the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency, para. 11, under article 2.

[31] GEI, para. 69.

[32] GE, para. 22; and GEI, paras. 48 and 73.

[33] GEI, para. 78.

[34] GEI, para. 77.

[35] "Stay of proceedings": a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate (the Glossary in the Introduction to the Guide, term (rr)). This encompasses the right to commence an arbitral proceeding and to enforce an arbitral award.

Paragraph 2

8. As stated in paragraph 2 of the legislative provision, the legislative provisions do not displace the PIL rules of the State where the insolvency proceedings have been commenced that determine the law applicable to the validity and effectiveness of the rights and claims existing before the commencement of insolvency proceedings. To determine that law, the court that controls or supervises the insolvency proceeding will apply the generally applicable PIL rules of its State, including any international conventions or other agreements in force for that State. This approach is reflected in recommendation 30 of the UNCITRAL Legislative Guide on Insolvency Law[36] (the "Guide"). For example, typically, the law governing the contract will determine if a contractual claim exists against the debtor and the amount of that claim; and the law of the State where immovable assets are located will determine if, for example, a security interest in those assets has been created. These legislative provisions do not displace the generally applicable PIL rules and the applicable law resulting from the application of those rules. Nevertheless, insolvency proceedings produce effects on pre-commencement rights and claims (for examples of such effects, see para. 6 above).[37] Those effects are governed by the law determined according to these legislative provisions, with the consequence that the generally applicable PIL rules do not apply to those matters.

9. The legislative provisions do not establish rules for localization of assets. Those rules are part of the generally applicable PIL rules and may be found in other international instruments.[38]

10. Likewise, the legislative provisions do not establish jurisdictional rules. Although relevant to the matters covered by these legislative provisions, in particular cross-border aspects, jurisdictional rules are addressed in other texts.[39] For example, the Guide recommends that the insolvency law should specify which debtors have sufficient connection to the State to be subject to its insolvency law, specifically recommending that the grounds upon which a debtor can be subject to the insolvency law should include that the debtor has either the centre of its main interests (COMI)[40] or an establishment[41] in the State.[42]

11. Similarly, the legislative provisions do not establish rules for allocation of assets between or among concurrent proceedings. Other international instruments may address those aspects.

Paragraph 3[43]

12. The legislative provisions were formulated to apply to any insolvency proceeding meeting the requirements listed in paragraph 1 of the commentary above, but paragraph 3 of the legislative provision permits exclusions from the scope of application of the legislative provisions. That paragraph assumes that States might most likely wish to exclude from the scope of application of the legislative provisions

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

[37] For examples of UNCITRAL and other international instruments that recognize effects of insolvency proceedings on pre-commencement rights and claims, see e.g. recommendations 3 and 88 of the Guide; recommendation 223 of the UNCITRAL Legislative Guide on Secured Transactions and the commentary to article 94 of the UNCITRAL Model Law on Secured Transactions; and article 14.2 of the UNIDROIT Convention on Substantive Rules for Intermediated Securities.

[38] E.g. articles 90 and 91 of the UNCITRAL Model Law on Secured Transactions.

[39] E.g. article 14 (g) of MLIJ and paras. 110–115 of GE.

[40] For the explanation of the term, see paras. 144–149 of GEI.

[41] Defined as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services (see e.g. article 2 (f) of MLCBI).

[42] See recommendation 10 and its accompanying commentary. A footnote to that recommendation notes that other grounds, such as presence of assets, are used in some States, but are not recommended in the Guide.

[43] **At its sixty-third session, the Working Group agreed to align paragraph 3 of the draft legislative provision with article 1(2) MLCBI. The draft commentary has been drafted accordingly (A/CN.9/1163, para. 48(c)).**

insolvency proceedings concerning financial and other entities that are subject to a special insolvency regime (e.g. entities operating under public law). As a result of application of such a special insolvency regime, special rules may apply also for determining the law that governs insolvency proceedings commenced with respect to those entities and the effects of those proceedings, including across borders and in group insolvencies.[44]

13. However, this would not necessarily be the case, especially in the light of the envisaged exceptions to the lex fori concursus. Recognizing that States may wish to preserve the ability to apply the same rules in all insolvency proceedings, regardless of sectors where insolvency proceedings take place and regardless of entities with respect to whom insolvency proceedings are opened, paragraph 3 appears in square brackets. This presentation also signals that including excessive exclusions from the application of the legislative provisions is discouraged since they may produce inadvertent and undesirable consequences. For purposes of transparency, States wishing to exclude certain cases from the application of the legislative provisions, are well advised to clearly specify those cases in the legislative provision.

C. Definitions

7. At the sixty-third session of the Working Group, it was suggested that: (a) the definition of lex fori concursus should be deleted;[45] (b) 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 should be added;[46] and (c) the draft commentary should be used as the basis for drafting longer definitions. The secretariat made amendments, adding new definitions and keeping all draft definitions in square brackets for further consideration by the Working Group, as the Working Group agreed at its sixty-third session.[47]

8. The secretariat did not draft a commentary to some added definitions pending the final agreement of the Working Group on substantive provisions related to those terms, for example the need for an exception to the lex fori concursus for ongoing arbitration and, if such an exception was to be included, its scope. Regarding rights in rem, the definition of that term and accompanying commentary draws from the materials that were before the Working Group at its previous sessions.[48]

9. The secretariat did not include in the Definitions section some other technical terms used in the text, for example “close-out netting arrangements” or terms relevant to financial market infrastructures (FMIs), on the understanding that their definition or explanation might be more appropriately included in the parts of the texts where they are used (see the relevant sections below). The same may be true for terms used in other specific contexts, such as avoidance, set-off and cross-border insolvency contexts.

[44] **The UNCITRAL secretariat follows the work of the UNIDROIT working group on bank insolvency, which has not so far addressed those issues. If the final text emanated from that project will address them, a cross reference thereto could be included here.**

[45] A/CN.9/1163, para. 50.

[46] Ibid.

[47] Ibid., para. 53.

[48] See A/CN.9/WG.V/WP.179, paras. 31–32.

1. Draft legislative provision

[Definitions

For the purposes of these legislative provisions:

(a) "Lex arbitri" means the law of the State that governs the arbitration agreement;

(b) "Lex fori concursus" means the law of the State in which the insolvency proceedings are commenced;

(c) "Lex loci arbitri" means the law that governs arbitration matters in the State where the arbitration takes place;

(d) "Lex rei sitae" means the law of the State where the asset is situated;

(e) "Lex societatis" means the law of the State that governs the formation, operation and dissolution of business entities and their internal governance issues;

(f) "Rights in rem" generally refer to rights in a particular property that are enforceable also against third parties.]

2. Draft commentary

[*Lex arbitri and Lex loci arbitri*

[*To be drafted depending on the Working Group's decision as regards an exception to the lex fori concursus for ongoing arbitration*].

Lex fori concursus

1. "Lex fori concursus" is the law of the State in which the insolvency proceedings are commenced. For the purpose of the legislative provisions, it should be interpreted broadly as encompassing the insolvency law of the State of the opening of insolvency proceedings as well as its other laws of relevance to insolvency that might apply as part of the lex fori concursus to a particular insolvency proceeding. Relevance of laws other than insolvency law to insolvency would be assessed on a case-by-case basis but usual examples of insolvency-related laws include: (a) the law that addresses directors' obligations and liabilities in the period approaching insolvency in the context of insolvency proceedings; (b) the law that addresses debt restructuring procedures in pre-insolvency proceedings; (c) secured transactions law that, among other matters of relevance to insolvency, may address the treatment of pre-commencement finance in subsequent insolvency; (d) family law that may address the treatment of jointly owned assets in insolvency proceedings of individual entrepreneurs; (e) other law that may provide for special treatment of certain assets, such as cultural heritage objects,[49] in insolvency; (f) labour law that addresses workers' rights, the treatment and ranking of labour claims and handling of redundancies in case of insolvency; (g) tax and social security legislation that addresses the treatment and ranking of public debts; and (h) foreign investment law that may impose restrictions on foreign ownership of certain assets or operations of foreign investors in certain sectors of economy (which would be relevant, for example, in case of debt-equity conversions or sale of the business (or part thereof) as a going concern).

2. Where the lex fori concursus defers to the law of another State, that deference should be understood as deference only to the substantive internal law of that State, not PIL rules of that State, which means that renvoi is not envisaged. This is in line with the approaches taken in other international texts.[50] The goal of that approach is to promote certainty as regards applicable law. In addition, the reference to the law of

[49] **A/CN.9/1163, para. 54.**

[50] See e.g. references to the "internal law" in articles 5, 6 and 11 of the Hague Convention on the Law Applicable to Agency.

a foreign State would not encompass that State's public law, i.e. the law relating to the exercise of sovereign powers. Nevertheless, the lex fori concursus may address the treatment and ranking of foreign public claims (e.g. tax and social security claims).[51] The reference to the law of a foreign State does not encompass procedural law either, since courts apply their own procedural law and do not apply any foreign rule that they consider procedural. As discussed in these legislative provisions in the relevant contexts, some matters (e.g. a set-off or limitation period) may be qualified as substantive or procedural, depending on the legal systems. The legislative provisions point to the law that will govern those matters in insolvency proceedings.

3. References to the lex fori concursus are found throughout the legislative provisions because, under these legislative provisions, it is the main law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects (see [a *cross reference to the relevant provision is to be inserted at a later stage*] below). Exceptions to the lex fori concursus are limited in number and clearly set forth in these legislative provisions as recommended in the Guide (rec. 34). The lex fori concursus may be applicable also by default if the law of another State deferred to under these legislative provisions (e.g. lex rei sitae, lex societatis) is not made applicable in a given case (e.g. by virtue of application of the public policy exception).[52]

Lex rei sitae

4. "Lex rei sitae" is defined as the law of the State where the asset is situated. [For assets subject to registration, such as ships or aircraft, the lex rei sitae should be understood as referring to the law of the State under whose authority or supervision the register in which the asset has been registered is maintained, i.e. to whose regulation the entity maintaining the register submits its activities, and if the entity maintaining the register is not under supervision, the State where the register has its seat (lex libri siti).][53]

5. References to the "lex rei sitae" appear throughout the legislative provisions and accompanying commentary in the context of a [possible] exception to the lex fori concursus for certain type of property, such as real estate, and rights in rem, such as security rights. (For the definition of the term "rights in rem" and its accompanying commentary, see term [(f)] and the commentary below.)

Lex societatis

6. "Lex societatis" is the law of the State that governs the formation, operation and dissolution of business entities and their internal governance issues, such as rights, obligations, responsibilities and liabilities of founders and owners (e.g. with respect to the charter capital), decision-making and -taking (e.g. governing bodies, shareholder meetings) and mechanisms for resolving internal governance issues (e.g. disputes between shareholders and the management). Those aspects may be regulated differently depending on the type of a business entity (e.g. a partnership, a closed or open joint stock company). Lex societatis may usually be found in company law, corporate law, partnership law or business association law.

7. There is no uniform approach to determining the lex societatis. Some States follow the "incorporation" approach, while other States follow the "real seat" approach with the understanding of the latter not being uniform either. Under the "incorporation" approach, the law of the State in which the company is formed or incorporated applies to all aspects of governance of that company; under the "real seat" approach, the law of the country where the company has its "real" seat (i.e. its

[51] See e.g. article 13(2) of MLCBI and its footnote b, as well as GEI, paras. 119–120.

[52] **At the sixty-third session of the Working Group, a view was expressed that lex fori concursus, instead of lex causae, would apply if lex rei sitae and lex societatis could not (A/CN.9/1163, para. 53).**

[53] **The part in square brackets was added pending the Working Group's consideration of the matter. The Working Group did not consider it at its sixty-third session. See A/CN.9/WG.V/WP.190, para. 6.**

management and control centre) governs those matters. While similar and linked to the factors relevant to the determination of COMI (see the commentary to item (t) on the lex fori concursus below),[54] different connecting factors used for determining the lex societatis are not directly relevant to these legislative provisions. The term is used in the legislative provisions simply to convey the principle that the application of the lex societatis to the debtor's internal governance matters would remain unaffected by the commencement of insolvency proceedings except for very limited aspects of directors' obligations in the period approaching insolvency arising under insolvency law after the commencement of insolvency proceedings.

Rights in rem

8. The term "rights in rem" is used to indicate rights that are enforceable against the world at large, as opposed to "rights in personam". which are rights enforceable only against specific persons. Rights in rem are closely connected to the concept of "secured claims" that refer generally to claims guaranteed by particular assets. A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. States may use another term or terms for expressing those concepts.

9. While leaving characterization of a right as a right in rem to the national law, some texts provide for an illustrative list of rights in rem referring in particular to: (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from proceeds of or income from those assets, in particular by virtue of a lien or mortgage; (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee; (c) the right to demand assets from, or require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; (d) a right in rem to the beneficial use of assets; and (e) the right, recorded in a public register and enforceable against third parties, based on which a right in rem of creditors or third parties may be obtained.[55]]

D. Primacy of international obligations

10. At the Working Group's sixty-third session, no comment was made with respect to the approach suggested by the secretariat to drafting the relevant provision.[56] The secretariat will draft the provision accordingly once the form of the final instrument on the topic and the corresponding need for the provision are confirmed.

E. Interpretation

11. At the Working Group's sixty-third session, no comment was made with respect to the approach suggested by the secretariat to drafting the relevant provision.[57] The secretariat will draft the provision accordingly once the form of the final instrument on the topic and the corresponding need for the provision are confirmed. At that stage, the secretariat may also include the rules of interpretation usually included in UNCITRAL texts, i.e.: "or" is not intended to be exclusive; use of the singular also includes the plural; "include", "including", "such as" and "for example" are not intended to indicate an exhaustive list; "may" indicates permission and "should" indicates instruction; and references to "persons" should be interpreted as including both natural and legal persons.

[54] See e.g. GEI, paras. 145–147.

[55] See article 8 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "EIR recast").

[56] See A/CN.9/WG.V/WP.190, para. 7.

[57] See A/CN.9/WG.V/WP.190, para. 7.

Chapter II. The law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects[58]

12. In response to queries raised at the sixty-third session of the Working Group with respect to the scope of application of chapter II,[59] the secretariat made changes in the title of the chapter. The Working Group may wish to consider the following introductory note to the chapter:

[Chapter II contains guiding rules for determining the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects. It is intended to apply to any type of insolvency proceeding containing a foreign element. Such a foreign element may be in the form of the debtor's asset(s), creditors or other parties in interest[60] located in different States. The proceedings could be: the main proceedings, i.e. commenced in the State where the debtor has COMI; non-main proceedings, i.e. an insolvency proceeding, other than a main proceeding, commenced in a State where the debtor has an establishment; or other proceedings, e.g. commenced in a State where the debtor has assets. Those proceedings, because of the presence of a foreign element, may create uncertainty in determining the law that should govern the insolvency proceedings and their effects. Provisions of chapter II are aimed at eliminating such uncertainties or at least reducing them.

Chapter III supplements this chapter by suggesting mechanisms for giving effect across borders to the law that was determined in the State of commencement of insolvency proceedings to be the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects. That law could be the lex fori concursus or the other law established in accordance with exceptions to the lex fori concursus found in this chapter.]

A. The main law: the lex fori concursus

13. The draft legislative provision and accompanying commentary were revised further to the views expressed at the sixty-third session of the Working Group.[61] In particular, paragraph 2 of the draft legislative provision has been redrafted to convey its exceptional nature and narrow scope, using articles 28–32 of MLEGI for reference.[62] In accordance with the understanding reached in the Working Group,[63] having deleted, as agreed by the Working Group,[64] the illustrative list found after paragraph 2 of the corresponding draft legislative provision in A/CN.9/WG.V/WP.190, the secretariat has retained from that list, for further consideration by the Working Group: item (a) (that envisaged an exception for avoidance cases); and item (e) (that envisaged an exception for the treatment of set-off claims). The secretariat has not drafted the commentary to those additional paragraphs, awaiting the Working Group's decision on whether those paragraphs would be retained in the text and, if so, their location and wording. The Working Group may wish to recall that, at its sixty-third session, it noted that a proposed

[58] A/CN.9/1163, para. 59.
[59] Ibid., paras. 59–60.
[60] "Parties in interest": any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest (the Glossary in the Introduction to the Guide, term (dd)).
[61] A/CN.9/1163, paras. 61–69.
[62] Ibid., para. 68.
[63] Ibid., para. 74.
[64] Ibid., para. 69.

additional exception to the lex fori concursus for close-out netting arrangements (see the relevant section below) was linked to item (i) on the lex fori concursus list.[65] Consequently, that proposed exception for close-out netting arrangements will also be linked to an exception for the treatment of set-off claims envisaged in item (e) of the deleted illustrative list if it were to be retained in the text.

14. The Working Group may wish to recall that it deferred consideration of the other items from that deleted illustrative list ((b), (c) and (d) related to immovable property, rights in rem and assets subject to registration) to its intersessional informal consultations. Those items were expected to be considered during those consultations together with 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.[66] At its sixty-fourth session, the Working Group may expect to hear an oral report about the results of those consultations.

15. Parts of the draft commentary that refer to difficulties with cross-border recognition and enforcement of effects of the lex fori concursus have been removed from the draft commentary in this section since they are more relevant to issues raised in chapter III.[67] Their content may be reflected in the commentary to that chapter, as appropriate. The Working Group deferred the consideration of other proposals related to the draft commentary, noting their relevance to other parts of the text.[68] Issues raised by those proposals are highlighted in the relevant parts of the text. At its sixty-third session, the Working Group did not take up a suggestion made at its earlier session[69] that specific issues arising from the insolvency of individuals should be addressed in the project.

1. Draft legislative provision

Lex fori concursus as the main law governing all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects

1. Except as provided otherwise in these legislative provisions, the lex fori concursus shall govern all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects, including:

(a) Identification of the debtors that may be subject to insolvency proceedings;

(b) Determination of when insolvency proceedings can be commenced and the type of proceeding that can be commenced, the party that can apply for commencement and whether the commencement criteria should differ depending upon the party applying for commencement;

(c) Constitution and scope of the insolvency estate;

(d) Protection and preservation of the insolvency estate, including application of a stay of proceedings, and, if it applies, its scope and duration, modification and termination;

(e) Use and disposal of assets;

(f) Proposal, approval, confirmation and implementation of a reorganization plan;

(g) Avoidance of certain transactions that could be prejudicial to certain parties;

(h) Treatment of contracts, including automatic termination and acceleration clauses (ipso facto clauses);

[65] Ibid., para. 72.
[66] Ibid., paras. 66, 67 and 74.
[67] Ibid., para. 63 and section 10.
[68] Ibid., para. 61.
[69] A/CN.9/1126, para. 72.

(i) Treatment of set-off;

[(j) Treatment of secured creditors];[70]

(k) Rights and obligations of the debtor;

(l) Duties and functions of the insolvency representative;

(m) Functions of the creditors and creditor committee;

(n) Treatment of claims;

(o) Ranking of claims;

(p) Costs and expenses relating to the insolvency proceedings;

(q) Distribution of proceeds;

(r) Closure of the proceedings;

(s) Discharge; and

(t) Related actions (arising as a consequence of or are materially associated with an insolvency proceeding).

[2. To minimize the commencement of foreign insolvency proceedings with respect to the same debtor or enterprise group or to facilitate the treatment of claims in domestic insolvency proceedings that could otherwise be brought by a creditor in foreign insolvency proceedings, the court may choose to apply the law of another State to accord to those claims the treatment that they would have received in a foreign insolvency proceeding if it were to be opened.][71]

[3. Notwithstanding paragraph 1 (g) of this legislative provision, where the counterparty to a transaction subject of avoidance provides proof that the law of a State that applies to the transaction does not allow avoiding the transaction in the relevant case, that other law [may] [should] [shall] apply unless it has no substantial relationship to the parties or the transaction and there is no other reasonable basis for applying that law to the transaction.][72]

[4. Notwithstanding paragraph 1 (i) of this legislative provision, where the law applicable to the debtor's claim provides for the right of creditors to demand the set-off of their claims against the claims of the debtor, that law [may] [should] [shall] apply unless it has no substantial relationship to the claim and there is no other reasonable basis for applying that law to the claim.][73]

2. Draft commentary

General

1. Under these legislative provisions, the lex fori concursus governs all aspects of insolvency proceedings and their effects unless explicitly stated otherwise.

2. The legislative provisions make the lex fori concursus applicable to all aspects of the commencement, conduct, administration and closure of insolvency proceedings. Those aspects cover: (a) procedural matters (such as serving notices, convening meetings, establishing the quorum, ascertaining voting rules or specifying

[70] **The secretariat keeps this sub-item and accompanying commentary in square brackets noting that the issue has not yet been resolved by the Working Group. See A/CN.9/1163, paras. 65–67 and para. 14 of the secretariat notes above.**

[71] **At its sixty-third session, the Working Group agreed that the paragraph should be redrafted, in particular with reference to articles 28–32 of MLEGI, to convey its exceptional nature and narrow scope (A/CN.9/1163, para. 68).**

[72] **See paragraph 13 of the secretariat notes above.**

[73] **Ibid.**

deadlines for submission of claims);[74] and (b) all post-commencement rights, obligations and claims, i.e. those arising from the insolvency proceedings, such as claims against the insolvency representative or in relation to post-commencement finance, realization of the insolvency estate or distribution of proceeds.

3. The legislative provisions extend the application of the lex fori concursus also to the effects of the insolvency proceedings, including on rights, claims and obligations that existed before the commencement of insolvency proceedings. For example, although under recommendation 4 of the Guide, a security interest effective and enforceable under law other than the insolvency law should be recognized in insolvency proceedings as effective and enforceable, enforcement of security rights may be stayed under the lex fori concursus unless and until the court grants relief from the stay (recs. 46–51 of the Guide). In addition, under recommendation 88 of the Guide, a security interest effective and enforceable under law other than the insolvency law may be subject to the avoidance provisions on the same grounds as other transactions. Apart from a stay of proceedings and avoidance, the insolvency law may impose the subordination of claims, for example on related persons (rec. 184 of the Guide). It may also prohibit enforcement of some contractual clauses (e.g. ipso facto clauses (rec. 70 of the Guide)) and give some discretion to insolvency representatives as regards the treatment of contracts, including their assignment notwithstanding restrictions in the contract (rec. 83 of the Guide), and the use and disposal of assets, including their sale free and clear of encumbrances and other interests (recs. 52–62 of the Guide).

(a) Identification of the debtors that may be subject to insolvency proceedings

4. Under the legislative provisions, the lex fori concursus governs eligibility, jurisdiction and related issues, such as which debtors have sufficient connection to the State to be subject to its insolvency law and which insolvency regime (e.g. standard or simplified) should apply to the debtor depending on the economic sector in which the debtor operates, the size of the debtor's business, the level of the debtor's indebtedness or other criteria.

(b) Determination of when insolvency proceedings can be commenced and the type of proceeding that can be commenced, the party that can apply for commencement and whether the commencement criteria should differ depending upon the party applying for commencement

5. Under the legislative provisions, the lex fori concursus determines commencement standards (whether it is the balance sheet test or cash flow test or both or something different or in addition). The lex fori concursus also specifies: (i) circumstances under which a particular type of insolvency proceeding may be commenced; (ii) whether it is the debtor only or creditors and other parties as well that will be able to apply for commencement of insolvency proceedings; and (iii) procedural steps and other requirements that will need to be fulfilled by the applicant for commencement (for example, in some States, only a certain number of creditors or creditors holding a certain value of claims can commence insolvency proceedings). The lex fori concursus also defines criteria for denial of the application and dismissal of the proceedings and establishes rules for notices of application and commencement, including the content of those notices and the manner of giving them.

[74] Some matters that are considered procedural in some States (e.g. set-off or limitation period) may be considered substantive in other States. The court makes this determination in accordance with the law of its State, e.g. the lex fori concursus in insolvency proceedings.

(c) Constitution and scope of the insolvency estate

6. Under the legislative provisions, the lex fori concursus determines which assets of the debtor[75] are to be included in the insolvency estate[76] and the time of constitution of the insolvency estate. It also governs the treatment of post-commencement assets (e.g. assets acquired after commencement of insolvency proceedings and assets recovered through avoidance or other actions).

7. The laws other than the insolvency law that might apply as part of the lex fori concursus in the context of this item could be property law, human rights obligations, secured transactions law, family law, civil procedure law and tort law, including as regards characterization of an asset (tangible or intangible, movable or immovable) and rights thereto (property or contractual), determination of ownership and other property rights as well as the treatment of encumbered assets, third-party-owned assets, jointly owned assets and foreign assets.

8. This item is closely linked to another item on the lex fori concursus list – the treatment of secured creditors since encumbered assets may or may not be made part of the insolvency estate. Moreover, this item is closely linked to the provisions on primacy of international obligations since the treatment of some assets in insolvency proceedings may be subject to a special regime binding on the State party thereto. Such regime may determine whether a particular asset is to be included in the insolvency estate and, in case of concurrent proceedings, in which insolvency proceeding it should be administered.

(d) Protection and preservation of the insolvency estate, including application of a stay of proceedings, and, if it applies, its scope and duration, modification and termination

9. Under the legislative provisions, the lex fori concursus governs all issues related to measures for protection and preservation of the insolvency estate, including provisional measures and measures upon commencement of insolvency proceedings (e.g. a stay of proceedings, a total or limited displacement of the debtor or the debtor-in-possession[77] regime). Those issues include types of measures that can be imposed, conditions for imposing those measures, their duration and scope as well as grounds and procedures for seeking and granting relief from the measures and other protections.

(e) Use and disposal of assets

10. Under the legislative provisions, the lex fori concursus determines: (i) effects of insolvency proceedings on the debtor's control of the business, including total or limited displacement of the debtor or debtor-in-possession; (ii) terms and limits for the use and disposal of the assets (e.g. creditor notifications, court approvals); (iii) the treatment of pre- and post-commencement finance, unauthorized transactions and transactions with related persons after commencement of insolvency proceedings, and causes of action against a counterparty in unauthorized transactions; and (iv) notions such as "ordinary course of business", "related persons", etc.

11. The provisions of laws other than the insolvency law that might apply as part of the lex fori concursus in the context of this item are, for example: (i) family law, which may apply to the use and disposal of assets co-owned by the debtor (an individual entrepreneur) with family members; (ii) laws prohibiting or restricting foreign ownership in certain sectors of the economy, which will determine whether disposal of assets to foreigners is allowed and, if so, under which conditions; (iii) secured transactions law, which may apply to the use and disposal of encumbered assets and their methods of sale; (iv) environmental and other law, which may address conditions for relinquishment of assets (e.g. environmentally dangerous assets or assets hazardous to public health and safety) and persons that might be entitled to claim the relinquished assets; and (v) cultural heritage law, which may require special treatment of assets enjoying specific protection under that law.[78]

(f) Proposal, approval, confirmation and implementation of a reorganization plan

12. Under the legislative provisions, the lex fori concursus determines the nature and form of a reorganization plan; when it is to be proposed; who is permitted to prepare such a plan; its content; its approval by creditors; treatment of dissenting creditors; whether court confirmation of the plan is required; the effect of the plan; and its implementation.

13. The laws other than the insolvency law may apply as part of the lex fori concursus, for example, to: (i) debt-to-equity conversions; (ii) redundancies, modifications in collective bargaining agreements and involvement of employees and trade unions in insolvency proceedings; (iii) foreign investment and foreign exchange controls; and (iv) protection of confidential or commercially sensitive information.[79]

(g) Avoidance of certain transactions that could be prejudicial to certain parties

14. Under the legislative provisions, the lex fori concursus determines: (i) types of transaction that can be avoided and types of transaction exempted from avoidance; (ii) avoidance criteria, including elements to be proven and defences; (iii) the duration of the suspect period and from which date it runs retroactively; (iv) persons eligible to commence avoidance and under which conditions; (v) sources of covering expenses of avoidance actions, including permissibility of third-party funding and conditions and safeguards for raising such funding; (vi) effects of avoidance; (vii) liability of the counterparty to the avoidable transaction and remedies in case of non-compliance; and (viii) permissibility of avoidance in case of conversion of the proceedings and, if it is permitted, extent of avoidance and transactions that may be avoided as well as transactions that are exempted from avoidance in such cases. In the context of insolvency proceedings, “avoidance” means actions taken in accordance with the provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors (the Glossary, term (c); and also, the Guide, part five, section two, term (a)).

15. Under the legislative provisions, avoidance in some instance falls under an exception to the lex fori concursus. In particular, the legislative provisions envisage an exception to the lex fori concursus with respect to avoidance of payments or transactions that took place in a payment, clearing or settlement system or in a regulated financial market or other multilateral trading facility. Avoidance in those cases is to be governed by the law applicable to that system or market. [A similar exception is envisaged for close-out netting arrangements: avoidance in those cases is to be governed by the law applicable to the arrangement.] In comparison, no similar exception is envisaged for avoidance in relation to labour contracts or relationships although most other aspects related to labour contracts or relationships (e.g. their rejection or continuation) fall under the law applicable to the contract or relationship. The lex fori concursus remains the law that governs avoidance in relation to labour contracts or relationships, for example avoidance of unreasonable remuneration

[75] Defined broadly as property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor’s interests in encumbered assets or in third-party-owned assets (see the Glossary in the Introduction to the Guide, term (b)).

[76] The Guide defines the insolvency estate as assets of the debtor that are subject to the insolvency proceedings (see the Glossary in the Introduction to the Guide, term (t)).

[77] Defined in the Guide as a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative (see the Glossary in the Introduction to the Guide, term (l)).

[78] **A/CN.9/1163, para. 54.**

[79] General contract law and thus rules outside the scope of these legislative provisions may apply to the implementation of the reorganization plan in those States that provide for the closure of insolvency proceedings after approval (or confirmation where required) of the plan.

packages negotiated as part of modification of labour contracts before the commencement of insolvency proceedings.

[*This part may need to be elaborated depending on the decision of the Working Group with respect to paragraph 3 of the draft legislative provision*.

In addition, the Working Group may wish to recall that it deferred consideration of a proposal to add in the paragraph above reference to digital assets and electronic securities.[80]]

(h) Treatment of contracts, including automatic termination and acceleration clauses (ipso facto clauses)

16. Under the legislative provisions, the lex fori concursus determines: (i) qualification of contracts; (ii) the treatment of contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, in particular the power of the insolvency representative to decide whether to continue performance of those contracts or reject or assign them, the time when those decisions should be made, and the time from which rejection will be effective retroactively; (iii) whether the insolvency law overrides automatic termination and acceleration clauses (also known as "ipso facto clauses") or they are left to be addressed under general contract law and, if the insolvency law overrides them, the power of the insolvency representative to reinstate contracts that were terminated just before the commencement of insolvency proceedings in order to avoid the application of those overriding provisions of the insolvency law; (iv) exceptions to the insolvency representative's powers in the preceding (ii) and (iii); (v) the treatment of post-commencement contracts; and [(vi) the treatment of arbitration agreements].[81]

17. Law other than the insolvency law that might apply as part of the lex fori concursus, including international treaties binding on the State where insolvency proceedings have commenced, may be relevant to, for example: qualification of contracts; calculation of damages; treatment of government contracts; [and treatment of arbitration agreements. For example, international commercial arbitration matters in most States will be addressed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[82] (the "New York Convention") that, among others, requires courts of States parties to give full effect to arbitration agreements and deny the parties' access to the court in contravention of their agreement to refer the matter to an arbitral tribunal (article II)].[83]

18. Under the legislative provisions, certain types of contracts (e.g. in a payment, clearing and settlement system or in a financial market) and most aspects of labour contracts (e.g. their rejection or continuation) fall under an exception to the lex fori concursus.

(i) Treatment of set-off

19. Under the legislative provisions, the lex fori concursus determines whether set-off[84] is permitted in insolvency proceedings and, if so, with respect to which obligations and under which conditions, in particular: (i) whether set-off is permitted only with respect to pre-commencement money obligations matured prior to the

[80] **A/CN.9/1163, para. 61.**

[81] **No comments were made in the Working Group with respect to this sub-item. However, some experts question references to arbitration agreements under this item on the lex fori concursus list and how those references would interact with a proposed exception for ongoing arbitral proceedings. The Working Group may wish to confirm whether this sub-item should be kept in this illustrative list. Pending that confirmation, the secretariat put the sub-item and the relevant parts in the next paragraph in square brackets.**

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

[83] **See footnote 81.**

[84] Defined in the Guide as "where a claim for a sum of money owed to a person is applied in satisfaction of reduction against a claim by the other party for a sum of money owed by that first person" (see the Glossary in the Introduction to the Guide, term (qq)).

commencement of insolvency proceedings or also those that would mature after commencement of insolvency proceedings; (ii) whether obligations subject to set-off must arise under a single contract or may arise under multiple contracts or related obligations[85] (i.e. not necessarily be mutual or related); (iii) whether the stay applies to the exercise of set-off rights or it is effectuated automatically upon commencement of insolvency proceedings; and (iv) how creditors with set-off claims are treated (e.g. as secured creditors or otherwise). The lex fori concursus also governs the treatment of set-off of claims arising after the commencement of insolvency proceedings.

20. Item (i) refers to mandatorily applicable insolvency set-off that would apply irrespective of any contractual arrangements between contracting parties. The word "treatment" in that item intends to convey that meaning [and also that the lex fori concursus governs the treatment of set-off in insolvency proceedings irrespective of the law that governs the validity and effectiveness of set-off rights and claims existing before the commencement of insolvency proceedings.][86]

21. The item is closely linked to other items on the list, including: item (d) on the protection and preservation of the insolvency estate; item (g) on avoidance; item (h) on treatment of contracts; and item (n) on treatment of claims. It is also linked to an exception to the lex fori concursus for the law governing the effects of insolvency proceedings on the rights and obligations of the participants and avoidance in payment, clearing and settlement systems, regulated financial markets and other multilateral trading facilities. Under that exception, the effects of insolvency proceedings on set-off rights and obligations in those systems and markets are governed by the law applicable to those systems and markets.

[*This part may need to be amended depending on the outcomes of the Working Group's discussions of paragraph 4 of the draft legislative provision and an exception for close-out netting arrangements outside payment, clearing and settlement systems, regulated financial markets and multilateral trading facilities. Such close-out netting arrangements may encompass set-off covered by this item on the lex fori concursus list. See the relevant section below.*]

[(j) Treatment of secured creditors

22. Under the legislative provisions, the lex fori concursus governs the treatment of secured creditors in insolvency proceedings.[87] "Secured creditor" in the context of insolvency proceedings means a creditor holding a secured claim, which is a claim assisted by a security interest (a right in an asset to secure payment or other performance of one or more obligations) taken as a guarantee for a debt enforceable in case of the debtor's default (the Glossary, terms (nn), (oo) and (pp)). The use of the word "treatment" in the item intends to convey that the lex fori concursus only governs effects of insolvency proceedings on the rights and obligations of secured creditors in insolvency proceedings, for example whether secured creditors are required to submit claims in insolvency proceedings.[88] The item does not intend to

[85] **A/CN.9/1163, para. 62.**

[86] **The part put in square brackets may need to be amended depending on the outcomes of the Working Group's discussions of paragraph 4 of the draft legislative provision. See A/CN.9/1163, para. 74.**

[87] This is in line with the UNCITRAL texts in the area of secured transactions (see recommendation 223 and chapter X, paras. 80–82 of the UNCITRAL Legislative Guide on Secured Transactions and the commentary to article 94 in the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions (para. 500) that cross-refers to recommendation 223 of the UNCITRAL Legislative Guide on Secured Transactions and recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law.

[88] Secured creditors may be excepted from the requirement to submit a claim in insolvency proceedings under insolvency laws that do not include encumbered assets in the insolvency estate and allow secured creditors to freely enforce their interests against the encumbered assets. This exception may apply only to the extent that the secured creditor's claim will be met from the value of the sale of the encumbered asset. Where the value of the encumbered asset is less than

refer to the law according to which the validity and effectiveness of security interests[89] created before the commencement of insolvency proceedings would be determined, which will remain to be determined by the generally applicable PIL rules of the State in which insolvency proceedings are commenced.[90] The commencement of insolvency proceedings does not displace those rules.[91]

23. In addition to the issues noted above, the lex fori concursus governs application of a stay on enforcement actions by secured creditors; protection of secured creditors from diminution of the value of encumbered assets if such stay applies to them; avoidance of security interests; ranking of secured claims; and the treatment of secured creditors and encumbered assets in the context of post-commencement finance. Therefore, this item is closely linked to other items on the list, including: (c) constitution and scope of the insolvency estate; (d) protection and preservation of the insolvency estate; (e) use and disposal of assets; (n) treatment of claims; and (o) ranking of claims.][92]

(k) Rights and obligations of the debtor

24. As noted above, under the legislative provisions, the lex fori concursus determines whether the debtor-in-possession regime or the total or limited displacement of the debtor will be in place. It also governs rights and obligations of the debtor, including its directors, in each of these regimes and in a specific insolvency case as well as conditions for conversion of one regime to another.

25. This item is linked to some other items on the lex fori concursus list, in particular item (e) that refers to the use and disposal of the assets of the insolvency estate, and in that context also to the definition of "ordinary course of business" and treatment of unauthorized transactions.

26. Law other than the insolvency law might apply as part of the lex fori concursus in this context, in particular, if the debtor is a natural person. In such case, human rights instruments binding on the State where insolvency proceedings have been commenced may address, as part of the lex fori concursus, the extent of limitations that may be imposed on the freedom of movement by the debtor, disclosure of the debtor's private correspondence and other personal data protection aspects. There may also be a close interaction of insolvency law with civil and criminal procedure law, for example as regards disclosure, examination, search and seizure warrants with respect to the debtor. International treaties, such as on mutual legal assistance, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), and other international instruments, binding on the State where insolvency proceedings have been commenced, may apply as part of the lex fori concursus for any actions with respect to or by the debtor across borders.

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the amount of the secured creditor's claim, the creditor may be required to submit a claim for the unsecured portion as an ordinary unsecured creditor. Where the value of the sale of the encumbered asset is more than the amount of the secured creditor's claim, the secured creditor would be expected to contribute the difference to the insolvency estate.

[89] "Security interest": a right in an asset to secure payment or other performance of one or more obligations (see the Glossary in the Introduction to the Guide, term (pp)).

[90] Such rules are, for example, found in articles 84–100 of the UNCITRAL Model Law on Secured Transactions (2016). The commentary thereto may be found in the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions (2017).

[91] See article 94 of the UNCITRAL Model Law on Secured Transactions and recommendation 223 of the UNCITRAL Legislative Guide on Secured Transactions.

[92] **As noted in paragraph 14 of the secretariat notes above, the secretariat keeps item (j) and accompanying commentary in square brackets noting that the issue has not yet been resolved by the Working Group. See A/CN.9/1163, paras. 65–67.**

(l) Duties and functions of the insolvency representative

27. Under the legislative provisions, the lex fori concursus determines: instances when the insolvency representative[93] is to be appointed; the mechanisms for selection, appointment, removal and replacement of the insolvency representative, including the insolvency representative appointed on an interim basis; a method of calculating remuneration for insolvency representative services; the role of the court and creditors in oversight of the work done by the insolvency representative; and liability of the insolvency representative.

28. Apart from general duties, functions and powers of the insolvency representative, the lex fori concursus determines the authority conferred upon the insolvency representative in a specific case, which may include the authority to represent the proceeding across borders (article 5 of MLCBI) or to act in another State in respect of an insolvency-related judgment issued in the State of the opening of insolvency proceedings (article 5 of MLIJ), cooperate and directly communicate with foreign courts and representatives (article 26 of MLCBI) and give undertakings with respect to the treatment of claims that could otherwise be brought by creditors in an insolvency proceeding in another State (see articles 28–32 of MLEGI).

29. Law other than the insolvency law may apply as part of the lex fori concursus, for example if the insolvency representative is subject to certain professional standards and regulations (e.g. accountants, lawyers, etc.). In addition, international treaties, such as on mutual legal assistance, the Hague Service Convention or the Hague Evidence Convention, and other international instruments, binding on the State where insolvency proceedings have been commenced, may apply as part of the lex fori concursus with respect to the exercise of insolvency representative's powers abroad.

(m) Functions of the creditors and creditor committee

30. The lex fori concursus governs mechanisms for, and the level of creditor participation in, insolvency proceedings, in particular whether and, if so, when, creditor meetings are to be convened or a creditor committee is to be established and the role of those bodies in the oversight of insolvency proceedings; eligibility to participate in those bodies; the matters that would require creditor approval; a threshold for the approval; and mechanisms for seeking the approval and ascertaining that the approval was obtained. In the context of insolvency proceedings, "creditors" are any natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings (the Glossary, term (j)), and a "creditor committee" is a representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law (the Glossary, term (k)). As a general rule, creditors encompass both creditors in the forum State and foreign creditors (the Glossary, para. 10).

31. The item is closely linked to the preceding two items that address rights and obligations of the debtor and duties and functions of the insolvency representative.[94] It is also linked to the next item (treatment of claims).[95]

(n) Treatment of claims

32. Under the legislative provisions, the lex fori concursus determines: (i) which creditors should be required to submit claims (e.g. whether secured creditors are required to do so), types of claim that should be submitted, excluded claims and claims subject to special treatment (e.g. claims by related persons); (ii) the procedure for submission, verification and admission of claims, including the deadline for submission of claims, to whom they should be submitted and formalities for submission of foreign claims;[96] (iii) consequences of failure to submit a claim; (iv) rules for valuation of claims; (v) treatment of disputed claims; (vi) effect of submission and admission of claims; (vii) review of decisions related to claims (e.g. their rejection or special treatment); (viii) treatment of post-commencement claims; (ix) treatment of claims upon conversion; (x) accrual and payment of interest; and (xi) rules for giving undertakings as regards the treatment of claims that could

otherwise be brought by creditors in an insolvency proceeding in another State, including whether the insolvency representative is authorized to give such undertakings and if so, with respect to which claims and under what conditions, and which formal requirements, including the form and language of undertakings, and procedures for seeking approval, review and enforcement of those undertakings, apply. Notwithstanding the exception to the lex fori concursus for some aspects of labour contracts and relationships in these legislative provisions, the lex fori concursus determines the status and treatment of labour claims and regulates possible undertakings with respect to them.

33. In the context of insolvency proceedings, "claims" means a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent. Some jurisdictions recognize the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim (see the Glossary, item (g)).

34. Law other than the insolvency law might apply as part of the lex fori concursus, such as secured transactions law in relation to the treatment of secured creditors' claims. In addition, criminal law may intersect with insolvency law in relation to the treatment of false claims. International conventions, such as the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (5 October 1961), and other international instruments, binding on the State where insolvency proceedings have been commenced, may apply as part of the lex fori concursus to submission, verification and admission of foreign claims. Special rules may apply to the treatment of (foreign) public claims[97] and claims emanating from arbitral awards. In most States, the New York Convention will be applicable to the treatment of foreign and non-domestic[98] arbitral awards.

35. This item is linked to the items on the lex fori concursus list on avoidance (g), [the treatment of secured creditors (j)] and the treatment of set-off (i), [including exceptions to the lex fori concursus envisaged for them under these legislative provisions, some of which apply generally while others apply on a case-by-case basis]. This item is also linked to the item on the implementation of a reorganization plan since the latter usually addresses the treatment of creditor claims and may stipulate the law applicable to that treatment. Law other than the lex fori concursus may be applied by the court on a case-by-case basis in other instances. For example, the court may consider and apply the overriding mandatory provisions of the law of the State where recognition and enforcement of the effects of domestic insolvency proceedings would likely need to be sought to ensure such cross-border recognition

[93] The Glossary in the Introduction to the Guide defines the term as including a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate (see item (v)). Depending on the context, the term "insolvency representative" may also refer to an "independent professional": an individual or entity of appropriate qualifications, independent from the debtor, creditors and other parties in interest, appointed by the competent authority to perform one or more tasks related to a simplified insolvency proceeding, subject to appropriate clearances as regards ethical, professional and other requirements and the absence of conflicts of interest (see the Guide, part five, section two, para. 25 (d)).

[94] For the description of the role of creditors and creditor committees, including in supervising the debtor-in-possession and the insolvency representative, see e.g. recommendations 126–136 of the Guide and accompanying commentary.

[95] Creditors may be able to assume certain functions in insolvency proceedings (e.g. participation in creditor meetings) after submitting claims, while the exercise of other creditor functions (e.g. approval of a reorganization plan) may be conditioned upon verification and admission of claims. See e.g. recommendations 169–184 of the Guide and accompanying commentary.

[96] See articles 13 and 14 of MLCBI and accompanying commentary in paras. 118–126 of GEI.

[97] See article 13 (2) of MLCBI and accompanying footnote and commentary in para. 120 of GEI.

[98] The term "non-domestic" embraces awards which, although made in the State of enforcement, are treated as "foreign" under its law because of some foreign elements in the proceedings, e.g. another State's procedural laws are applied. See the New York Convention Guide, available at https://uncitral.un.org/en/texts/arbitration.

and enforcement. In addition, if the lex fori concursus allows giving undertakings as regards the treatment of claims that could otherwise be brought by a creditor in an insolvency proceeding in another State, the affected claims could be treated in accordance with the treatment they would receive in an unopened proceeding, including the otherwise applicable law.

(o) Ranking of claims

36. Under the legislative provisions, the lex fori concursus determines the order in which claims will be satisfied from the estate, including claims of the insolvency representative, claims arising after commencement of insolvency proceedings and administrative claims or expenses (for the meaning of the latter, see the item immediately below). It specifies the classes of creditors that will be affected by the insolvency proceedings and the treatment of those classes in terms of priority and distribution. It specifies also rules for establishing functional equivalence between domestic and foreign claims and consequences of the failure to establish such equivalence.[99] Where subordination is envisaged, the lex fori concursus governs the conditions and limits of subordination. Where giving undertakings as regards the ranking of claims that could otherwise be brought by creditors in an insolvency proceeding in another State is allowed, the lex fori concursus determines rules for giving such undertakings. Notwithstanding the exception to the lex fori concursus for labour contracts and relationships in these legislative provisions, the lex fori concursus determines the ranking of labour claims and regulates possible undertakings with respect to them.

37. Law other than the insolvency law may apply as part of the lex fori concursus to the priority of claims in insolvency proceedings generally and in any given insolvency proceeding specifically, including labour law (which may encompass international labour conventions for States parties to those conventions),[100] tax law, secured transactions law and tort law. Special rules may apply to the ranking of (foreign) public claims. Perspectives of cross-border recognition and enforcement of the effects of insolvency proceedings might impact the ranking of claims of specific groups of creditors, such as workers and secured creditors.

(p) Costs and expenses relating to the insolvency proceedings

38. Under the legislative provisions, the lex fori concursus determines criteria relating to the allowance of administrative claims and expenses. In the context of insolvency proceedings, “administrative claims and expenses” means costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor, debts arising from the exercise of the insolvency representative’s functions and powers, costs arising from continuing contractual and legal obligations and costs of proceedings.[101] The lex fori concursus governs the assessment of expenses, the role of the court in approval of expenses and distribution of costs and expenses, in particular which expenses would be covered from the insolvency estate, which may need to be covered by creditors or other parties in interest and for which the insolvency representative may be personally liable. The lex fori concursus also determines the treatment of debtors whose assets and sources of revenue are insufficient to meet the costs of administering the insolvency proceeding,

[99] As noted in the Guide, the test to apply is whether or not domestic and foreign claims, given their essential content and their function, correspond to each other to the extent that they can be considered as “functionally interchangeable”. If the answer is in the affirmative, the claims would be considered equivalent and receive the same treatment in insolvency proceedings. In the event that equivalence cannot be established, the claim would generally be treated as an ordinary claim. Criteria usually used to assess functional equivalence of claims include the source of the obligation, the nature of creditors and the underlying interest that justify the preferential treatment of the claim.

[100] E.g. the ILO Protection of Workers’ Claims (Employer’s Insolvency) Convention, 1992 (No. 173).

[101] See the Glossary in the Introduction to the Guide, term (a).

in particular whether in such cases the application will be denied or alternative mechanisms for covering costs of administering insolvency proceedings will be used and if so, which ones. It also determines rules related to third-party funding.

39. This item is linked to the other items on the lex fori concursus list. For example, costs and expenses relating to the insolvency proceedings would include costs and expenses of participation of the insolvency representative in various proceedings impacting the insolvency estate, such as litigation or arbitration with respect to disputed claims or avoidance proceedings.

(q) Distribution of proceeds

40. Under the legislative provisions, the lex fori concursus determines rules for distribution of proceeds, which may be different for liquidation and reorganization.[102]

41. This item is closely linked to the other items on the lex fori concursus list, in particular item (n) on treatment of claims and item (o) on ranking of claims. If the lex fori concursus allows giving undertakings as regards the treatment of claims that could otherwise be brought by creditors in an insolvency proceeding in another State, the affected claims could be treated in accordance with the treatment they would receive in an unopened proceeding, including as regards the distribution of proceeds.

(r) Closure of the proceedings

42. Under the legislative provisions, the lex fori concursus determines how a proceeding is to be concluded and closed, the prerequisites for closure, the procedures to be followed and whether conversion constitutes formal closing of the proceeding being converted. The lex fori concursus specifies the party that can apply to close the proceedings; whether the application and the decision to close should be publicized; and whether creditors could be heard on the application.

(s) Discharge

43. Under the legislative provisions, the lex fori concursus determines: (i) general conditions for discharge, including debts that are not dischargeable; (ii) procedures and preconditions for discharge, which may be different in different types of proceedings (liquidation, reorganization, standard or simplified proceedings); (iii) the date from which discharge will be effective;[103] and (iv) criteria for denying discharge and revoking discharge granted.[104] In the context of insolvency proceedings, discharge means release of a debtor from claims addressed in the insolvency proceedings (Glossary, term (m)).

(t) Related actions (arising as a consequence of or are materially associated with an insolvency proceeding)

44. Item (t) is a catch-all provision intended to cover actions not specifically named on the lex fori concursus list that nevertheless arise as a consequence of an insolvency proceeding or are materially associated with an insolvency proceeding. Examples include: (i) insolvency-related adjustments that lead to the special treatment of claims of related persons or claims against such persons; and (ii) actions based on insolvency law to hold directors liable for their actions causing or contributing to insolvency.

45. Unlike the effects of insolvency proceedings on directors' obligations and liabilities arising during insolvency proceedings encompassed by item (k), which are always governed by the lex fori concursus, the legislative provisions do not envisage that effects of insolvency proceedings on all directors' obligations and liabilities in

[102] General contract law, and thus rules outside the scope of these legislative provisions, would apply to the distribution of proceeds in reorganization proceedings if the proceedings close after approval (or confirmation where required) of the reorganization plan and the distribution of proceeds takes place in accordance with the distribution rules contained in the reorganization plan.

[103] Reference to "their effects" in the chapeau of the legislative provision is intended to capture both situations, when discharge is granted during insolvency proceedings and after their closure.

[104] **Paragraph 47 in A/CN.9/WG.V/WP.187 was deleted. A/CN.9/1133, para. 42 (i).**

the period approaching insolvency should be governed by the lex fori concursus. In most cases, the lex societatis will continue to apply to them notwithstanding the opening of insolvency proceedings. Item (t) intends to capture specific[105] grounds that may give rise to the liability of directors and causes of action against directors upon commencement of insolvency proceedings under insolvency law. Such grounds include in many States wrongful trading and violation of the duty to file for commencement of insolvency proceedings. Other than in those very few cases closely connected to insolvency law and insolvency proceedings, it will be inappropriate to subject directors' obligations and liability in the period approaching insolvency to the retrospective effect of the lex fori concursus.

46. For example, in some States, directors may face criminal liability for not filing for commencement of insolvency proceedings within the period specified in the law after occurrence of certain events. In other States, no such requirement may apply and instead directors may be encouraged to engage in out-of-court debt restructuring negotiations. The limited interpretation of item (t) in its application to directors ensures that directors in the second group are shielded from unexpected liability and obligations that would apply to and be expected by directors in the first group. Risks of exposure to such unexpected liability and obligations may be different depending on whether insolvency proceedings are opened at the location of: (i) COMI that is the same as the debtor's place of registration or incorporation or "real seat"; (ii) COMI that is different from the debtor's place of registration or incorporation or "real seat"; (iii) the debtor's establishment; or (iv) the debtor's assets. Such risks are higher where insolvency proceedings are commenced by creditors in a non-COMI State. In other cases, the assessment conducted as regards the lex societatis may be similar to the assessment of the COMI with the result that the lex societatis will most likely be the same as the lex fori concursus.

47. In this context, the provisions of laws other than the insolvency law might apply as part of the lex fori concursus, especially if the lex fori concursus follows a broad interpretation of "directors", as for example recommended in part four of the Guide.[106] Depending on persons found to be in factual control of the debtor's business in the period approaching insolvency (e.g. a regulated institutional lender, an auditor or a legal advisor), different laws (e.g. laws regulating certain professions) may apply, including on disqualification and other remedies and enforcement mechanisms available against such persons.

B. Exceptions to the lex fori concursus

1. Labour contracts and relationships

16. At the sixty-third session of the Working Group, in response to a suggestion to delete the exception, the Working Group recalled its earlier deliberations and decision on the topic.[107] It was noted that the public policy exception and other provisions of the draft text sufficiently addressed the concern expressed at the session. The legislative provision, whose formulation was agreed upon by the Working Group at its sixty-first session,[108] and its accompanying commentary, appear substantively unchanged in this note.

[105] **A/CN.9/1133, para. 42 (j).**

[106] 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).

[107] A/CN.9/1163, para. 70.

[108] A/CN.9/1126, para. 79.

(a) Draft legislative provision

Law governing the effects of insolvency proceedings on labour contracts and relationships

The effects of insolvency proceedings on labour contracts and relationships shall be governed by the law applicable to the contract or relationship.

(b) Draft commentary

1. According to this legislative provision, the effects of insolvency proceedings on labour contracts and relationships are to be governed by the law applicable to those contracts and relationships. Reference to that law intends to encompass the labour law, the insolvency law and any other law that may be relevant to labour contracts or relationships.

2. The treatment of labour claims and ranking of labour claims are not covered by the exception found in this provision. The lex fori concursus (if different from the law applicable to the labour contract or labour relationship, henceforth referred to as the "foreign lex fori concursus") remains applicable to them. The same applies to qualification of a contract or relationship as a labour contract or relationship and to avoidance actions related to labour contracts (e.g. unreasonable remuneration packages as a consequence of the modification of labour contracts or relationships between the debtor and chief executive officers or other managers in the period approaching insolvency). However, where the lex fori concursus authorizes giving undertakings with respect to labour claims that could otherwise be brought by workers in an insolvency proceeding in another State (see the commentary to items (n), (o) and (q) on the lex fori concursus list above), the affected labour claims could be treated in accordance with the treatment they would receive in an unopened proceeding.

3. The rationale for the exception to the application of the lex fori concursus found in the legislative provision is that labour contracts and relationships raise many socioeconomic policy considerations. For that reason, States usually devise a special regime for the treatment of issues arising from labour contracts and labour relationships in insolvency. In some insolvency laws, priority is given to maintaining continuity of employment over other objectives of insolvency proceedings, such as maximization of value of the estate for the benefit of all creditors. This may be evidenced by a focus on sale of the business as a going concern with the transfer of existing employment obligations, as opposed to liquidation or reorganization where those obligations may be altered or terminated. Mandatory provisions of law, including those found in international treaties,[109] may: (a) protect workers against unfair dismissal and discrimination; (b) provide for a financial safety net for workers; impose restrictions on the rejection or modification of labour contracts [110] and conditions for implementing redundancies (including an advance notice to relevant State authorities); and (c) ensure workers' rights to be properly informed about all matters arising from insolvency proceedings affecting their employment status and entitlements. Different regimes may apply in liquidation and reorganization. For example, in some States, employees follow the business in case of sale as a going concern in both liquidation and reorganization, in others only in reorganization.

4. The legislative provision aims to reduce the risk of uncertainty or inconsistency in the treatment of labour contracts and relationships in insolvency proceedings. That risk increases if the effects of insolvency proceedings on those matters are governed by the foreign lex fori concursus. Providing more certainty and consistency to workers' expectations is justified because workers usually have a relatively weaker bargaining position than their employer, especially where no collective bargaining agreements are in place. In addition, workers may be unfamiliar with insolvency

[109] See e.g. the ILO Termination of Employment Convention, 1982 (No. 158).
[110] See recommendation 71 of the Guide and accompanying commentary.

proceedings and the protection accorded to them in case of financial difficulties of their employer and may remain uninformed and unaware of plans related to their employment status. Insolvency proceedings may be used to erode their protection, for example, where the business is to be sold as a going concern and the elimination of onerous employment contracts could increase the sale price, or where the debtor uses an application for insolvency as a means of obtaining relief from onerous obligations arising from labour contracts or relationships.

5. While agreeing on the exception, UNCITRAL recognized that the approach taken in the legislative provision may remove the flexibility that may be desirable and necessary for continuing the operation of the business, preserving employment and guaranteeing salaries, in particular in reorganization. In addition, where the debtor's workforce is subject to different labour regimes, the approach taken in the legislative provision may interfere with the efficient conduct and administration of insolvency proceedings because a need to assess those different regimes would arise. This would be the case, for example, where the debtor has workers in different States where the local labour law is mandatorily applicable to labour contracts or relationships. Such a need may also arise where there is a freedom to choose the law applicable to labour contracts or relationships. That freedom is usually accompanied by safeguards to protect workers from the adverse consequences of their own, but potentially coerced or uninformed, agreement with the chosen law. Those safeguards may vary across States (for example, with respect to non-competition clauses). They usually include that a choice of law may not have the result of depriving workers of the protection afforded to them by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable (which for many States would include provisions of international labour treaties binding on them as well as constitutional guarantees) or that would have more connection with the labour contract or relationship.

6. Nevertheless, without that exception, the effects of insolvency proceedings on the treatment of labour contracts and relationships may end up being governed by the law of the State that has no or a very distant connection to a given labour contract or relationship (e.g. the law of the COMI State outside the location of all or most workers of the debtor). Such a result would require reconciling the protection afforded to workers under the foreign lex fori concursus, the chosen law, where applicable, and the law that would have been mandatorily applicable in any event. Envisaging a combination or hierarchy of applicable laws may be another solution with the advantage of preserving flexibility, but it may impede the efficient conduct and administration of insolvency proceedings since courts would be expected to compare implications of the application of various labour regimes. Although, as noted in the preceding paragraph, a similar disadvantage would be present also in the approach taken in the legislative provision, the view prevailed in UNCITRAL that, on balance, that approach was preferable.

7. The public policy exception (see below) would allow the court at the State of the commencement of insolvency proceedings not to apply a foreign law if the effects of the application of that law would be manifestly contrary to the public policy of that State (e.g. that effectively legitimizes modern slavery, etc.). In such case, the labour or other relevant law of the State of the commencement of insolvency proceedings may apply as part of the lex fori concursus. Depending on the PIL rules of the lex fori concursus applicable to labour contracts and relationships, the law of another State that has a closer connection to the labour contract or relationship than the lex fori concursus may apply instead of the lex fori concursus.

[*The draft commentary does not address the impact of this exception on the treatment of ipso facto clauses. The Working Group may wish to consider whether the commentary should be expanded in that respect*.]

2. Payment, clearing and settlement systems, regulated financial markets and other multilateral trading facilities

17. At its sixty-third session, the Working Group agreed to remove square brackets from the draft legislative provision below, at the same time noting the need for achieving more precision as regards the scope of the provision.[111] A view was expressed that unregulated multilateral trading facilities should not be covered by the exception. The Working Group did not consider a link of the draft legislative provision with a possible exclusion from the scope of application of the legislative provisions of financial institutions that are the usual participants in a payment, clearing or settlement system, a regulated financial market or other multilateral trading facilities covered by the exception.

18. The secretariat included in the draft commentary the content of the glossary that was before the Working Group at its sixty-third session, clarifying there that multilateral trading facilities are usually self-regulated financial trading venues.

(a) Draft legislative provision

Law governing the effects of insolvency proceedings on the rights and obligations of the participants as well as avoidance in a payment, clearing or settlement system, a regulated financial market or other multilateral trading facilities

The effects of insolvency proceedings on the rights and obligations of the participants in a payment, clearing or settlement system, a regulated financial market or another multilateral trading facility shall be governed by the law applicable to that system, market or facility. That law shall also govern avoidance of payments or transactions in that system, market or facility.

(b) Draft commentary

1. For the purpose of this exception:

(a) A payment system is a set of instruments, procedures and rules for the transfer of funds between or among participants (see (f) below for the explanation of the term “participants”). It is typically based on an agreement between or among participants and the operator, and the transfer of funds is implemented using an agreed-upon operational infrastructure. Narrowly, the term may refer only to interbank funds transfer systems in which all or almost all participants are credit institutions and which facilitate the circulation of money in a country or currency area. More broadly, it may refer to any funds transfer formal arrangements, either based on a private contract or legislation, with multiple membership, common rules and standardized processes, for the transmission, clearing, netting or settlement of monetary obligations arising among its participants. Payment systems may be part of the financial markets (see (d) below for the explanation of the term “regulated financial market”) or may operate separately according to their own governance structure and operating rules;

(b) A clearing system is a set of rules and procedures that establish the final positions of participants prior to their settlement in the settlement system (see (c) below for the explanation of the term “settlement system”). They may be part of the settlement systems or may operate separately according to their own governance structure and operating rules;

(c) A settlement system is a set of instruments, procedures and rules that enables funds, assets or financial instruments to be transferred according to predetermined rules. The transfers would become final (i.e. irrevocable and unconditional) in the settlement system. The settlement systems may operate

[111] A/CN.9/1163, para. 71. The secretariat held further consultations on these issues with experts who had taken part in the June 2023 expert group meeting. The results of those consultations are reflected in the draft commentary.

separately according to their own governance structure and operating rules or as part of a central counterparty (CCP) or as part of a financial market or a central securities depository;

(d) A regulated financial market is a regularly functioning multilateral marketplace, authorized by a competent authority, operated or managed by a market operator, where multiple buyers and sellers engage in the trading of interests in financial instruments (e.g. stocks, bonds, derivatives, trust units) that are admitted to trading in that market under the rules of that market. It operates under specific laws or regulations and subject to oversight or prudential supervision by the competent authority. Before granting authorization to the market operator and the market to function as a regulated financial market, such authority must be satisfied that the market operator and the market comply with the applicable requirements. Examples of regulated financial markets include stock exchanges, bond and derivative markets. Unlike payment, clearing and settlement systems, each of which may operate separately or be part of the other or the financial market, a regulated financial market represents the complex integrated infrastructure for clearing, settling and recording payments, securities, derivatives or other financial transactions;

(e) A multilateral trading facility (MTF) is an electronic platform that facilitates trading in various types of financial instruments. It may operate as part of, or in addition to, a regulated financial market. It is usually a self-regulated financial trading venue, which may operate under discretionary or non-discretionary rules. MTFs operating on a non-discretionary basis do not exercise discretion over the execution of trades. They match orders from various participants based on predefined rules. MTFs operating on a discretionary basis can exercise discretion over the execution of trades. This allows them to act as counterparties to the trades, providing liquidity and executing client orders. MTFs may specialize in the trading of particular types of financial instruments (e.g. equity (shares, bonds) or non-equity (emission allowances) financial instruments);

(f) The participants in the system, market or facility covered by the exception are persons both (i) identified and recognized as such by the relevant system, market or facility, and (ii) allowed directly or indirectly to effectuate transfers through that system, market or facility. Traditionally, the participants have included credit institutions, investment firms, public authorities, a CCP, settlement and clearing agents and operators of the system, market or facility. Most recently, they have been expanded to include other persons, for example, indirect participants and, in systems, markets or facilities based on distributed ledger technologies (DLT), such as blockchain, retail investors who may interact with each other directly, without intermediaries.

2. The systems, markets and facilities (and their different combinations) covered by the exception enable multiple parties buying and selling trading interests in financial instruments to interact. The inability of one or more participants to perform their obligations in those systems, markets and facilities causes other participants in those systems, markets and facilities to be unable to meet their obligations to the other participants and third parties when they become due. This “domino” effect is often referred to as systemic risk.

3. The operation of the covered systems, markets and facilities may be disrupted not only by internal factors (e.g. operational failures or deficiencies or fraud) but also external factors, such as insolvency proceedings, leading to losses and liquidity problems, to ineffectiveness of measures that those systems, markets and facilities take to reduce their operational risks and to systemic risks. The purpose of the exception is to minimize disruptions that insolvency proceedings cause to the operation of those systems, markets and facilities. By identifying a single law that governs effects of insolvency proceedings on the operation of the system, market or facility (that is, the law of that system, market or facility), the exception helps to make disruptions caused by insolvency proceedings more predictable and hence more manageable. Without that exception, in the light of multiplicity of the participants in those systems, markets and facilities and multiplicity of third parties whose insolvency proceedings may affect the

operation of those systems, markets and facilities, numerous undefined, uncertain and unpredictable lex fori concursus could apply, making the management of operational risks difficult, if not impossible, thereby amplifying systemic risks.

4. The exception does not specify whether it refers to insolvency proceedings of the participants of a system, market or facility or of other persons. Thus, any insolvency proceeding impacting the operation of the covered system, market or facility will fall under the scope of the exception.

5. However, the exception refers to the effects of insolvency proceedings only on the rights and obligations of the participants in the covered system, market or facility. Those rights and obligations may arise from the statutory or regulatory rules, or procedures or contracts, that govern, impact or are otherwise directly relevant to the operation of the system, market or facility (e.g. risk control and liquidity-saving mechanisms). They include the rights and obligations of participants arising from, or related to: (a) settlement and payment netting; (b) assumption and discharge of obligations; (c) finality of transfers; (d) novation; (e) open offers or other binding arrangements through which a CCP becomes a counterparty to trades with participants; (f) the provision of collateral to cover current and potential future exposures; and (g) the provision of various types of guarantees. They may also include the rights and obligations arising from, or related to, contracts directly relevant to the operation of those systems, markets and facilities that are entered between or among the participants or between the operator of the system, market or facility and third parties. Such contracts may concern netting, enforcement of collateral arrangements, credit support arrangements and guarantees and the treatment of ipso facto clauses.

6. The exception is not intended to interfere with the law applicable to insolvency proceedings that may be commenced with respect to any participant in a payment, clearing or settlement system, a regulated financial market or MTF. To illustrate: Party A, located in State A, is a participant in a regulated financial market governed by the law of State B and in that capacity entered into transactions with multiple parties (B, C, D, etc.) in that market. Under these legislative provisions, if insolvency proceedings are commenced with respect to Party A in State A, the lex fori concursus of that State A will apply to all aspects of those insolvency proceedings (e.g. to the eligibility of Party A to be the debtor under insolvency law of State A, the commencement standards, etc.) except for those identified in these legislative provisions, including that, under this exception, the law of State B will determine effects of the commenced insolvency proceedings in State A on transactions between Party A and multiple parties B, C, D, etc. in the market.

7. In addition, the rights and obligations arising from contracts and other transactions linked to the covered systems, markets and facilities but not directly relevant to their operations remain to be governed by the lex fori concursus. To illustrate, for a payment system, if Party A ordered its Bank B to transfer funds to the account of Party C maintained at Bank D, the exception will apply only to the rights and obligations arising from that funds transfer order between A and B, B and D and D and C but not to the rights and obligations arising from the underlying transaction between A and C that triggered that funds transfer order, which will be subject to the lex fori concursus.

8. The law applicable to systems, markets and facilities covered by the exception is the law of the State as chosen by the system, market or facility itself or, failing that, by their participants. A requirement may apply to choose the law of the State in which at least one participant has its head office. The choice of law by the system, market or facility or by the participants is subject to verification by the competent authority, which will not permit the choice of the law that circumvents the fundamental public policy of its State. In the absence of the choice of law or in case of the deficient choice, the law of the location of the system or market usually applies.

9. The systems, markets and facilities covered by the exception often identify the law that will apply to each aspect of their operations in the rules governing their activities. Under some applicable law, they may be required to do so. As a risk

mitigation strategy, they are often also under requirement to identify and analyse potential conflict-of-laws issues that would arise from their activities and develop rules and procedures to mitigate those conflict-of-laws risks.

10. The exception should be interpreted and applied flexibly in order to achieve the intended purpose of the exception, which is to protect public interests, contain systemic risk and ensure investor protection, financial market integrity and financial stability. The principles of technology neutrality, functional equivalence and non-discrimination are relevant to the interpretation and application of the exception with the result that the exception is envisaged to apply to the covered systems, markets and facilities regardless of technology they use in their operations as long as they meet the criteria for application of the exception.

11. The court at the State of the commencement of insolvency proceedings will be able to invoke the public policy exception (see below) if effects of applying a foreign law determined as applicable under this exception would be manifestly contrary to the public policy of that State. The lex fori concursus would be expected to provide rules for determining which other law, if not the lex fori concursus itself, will apply in such case.

3. Close-out netting outside payment, clearing and settlement systems, regulated financial markets or other multilateral trading facilities[112]

19. At its sixty-third session, 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 above exception for FMIs but were susceptible to market risks. It was said that such arrangements were found not only in financial markets.[113] Paragraphs 22 and 23 of document A/CN.9/WG.V/WP.190 as well as provisions of the UNIDROIT Principles on the Operation of Close-Out Netting Provisions and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes were considered relevant.

20. The Working Group may wish to note that neither the World Bank Principles[114] nor the UNIDROIT Principles[115] propose rules for determining the law that would govern effects of insolvency proceedings on close-out netting arrangements. In the light of the divergent views expressed in the Working Group as regards the scope of application of the UNIDROIT Principles, the Working Group may wish to note that, under UNIDROIT Principles 3 and 4, close-out netting protection applies only to financial transactions where at least one public authority (such as a central bank) or a qualifying financial market participant is a party. Nevertheless, they contemplate that implementing States may extend that protection to other situations, for example to contracting parties that are not a public authority or a qualifying financial market participant[116] and to other transactions (e.g. the sale, purchase or delivery of fungible commodities).[117]

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[112] The secretariat held further consultations on the issues covered in this section with experts who had taken part in the June 2023 expert group meeting (see para. 15 of A/CN.9/WG.V/WP.190). The results of those consultations are reflected in the draft legislative provision and secretariat notes before it.

[113] A/CN.9/1163, para. 72.

[114] See Principle C10.4 and footnote 9.

[115] See para. 12: "[T]he protection of the operation of close-out netting provisions afforded under the Principles might be applicable even in proceedings conducted under the law of a State other than an implementing State. This may be the case, for instance, where a rule of private international law or international insolvency law of the forum leads to the application of the law of an implementing State, or the parties have chosen the law of an implementing State and the choice of law is upheld by the competent court. However, the Principles do not attempt to propose such rules to determine the law applicable."

[116] See commentary under Principle 4, paras. 82–85.

[117] Ibid., paras. 86–87.

21. As noted in paragraph 21 of document A/CN.9/WG.V/WP.190, close-out netting arrangements are used in different contexts. For example, they are used in enterprise groups for cash-pooling, in wholesale energy contracts, commodity contracts, trading in non-standardized over-the-counter derivatives that might not be eligible for clearing and settlement through FMIs, and by airline and similar businesses where prices fluctuate rapidly or under other justified circumstances (e.g. defaults between or among parties may produce the systemic risk for systems, markets and facilities covered by the exception for FMI).[118]

22. These arrangements are entered into by the parties to bilateral or multilateral transactions for the sole or primary purpose of ensuring certainty and protection for all parties in the event of the default by one of them. The parties to such arrangements may be located in the same or different States. They are free to choose the law of the State that governs close-out netting arrangements, and they obviously choose the law of a State that protects close-out netting arrangements, which laws of not all States do.

23. In line with the above considerations, and as requested by the Working Group, the secretariat drafted a legislative provision for consideration by the Working Group, without an accompanying commentary at this stage. The draft legislative provision was drafted on the understanding that the State where the legislative provisions would be incorporated would be the best placed to delineate the scope of application of this exception, both as to eligible parties and transactions.

24. The draft legislative provision contains a safeguard that the chosen law can be displaced by the court in the State of opening insolvency proceedings if the chosen law has no substantial relationship to the parties or the arrangement and there is no other reasonable basis for applying that law. A public policy exception may also apply in appropriate circumstances. Depending on connecting factors, the lex fori concursus itself or another law with a closer connection to the issue may apply in lieu of the displaced law (e.g. the lex rei sitae if the close-out netting arrangements are linked to a collateral or a right in rem located in a different jurisdiction).

25. Given implications of this exception for equitable treatment of similarly situated creditors in insolvency proceedings, the Working Group may wish to consider whether other or additional safeguards are required. In addition, the Working Group may consider whether the provisions should preserve the application of a short stay or other temporary measure[119] if it applies under the lex fori concursus or other applicable resolution regime applicable to a bank or similar institution but is not applicable under the law chosen by the parties as applicable to the arrangement. In this context, it should be recalled that, as envisaged in these draft legislative provisions, banks and similar financial institutions may or may not be excluded from the scope of application of the legislative provisions.

26. As was noted at the sixty-third session of the Working Group and in paragraph 13 of the secretariat notes to the lex fori concursus provision above, feasibility of maintaining distinction between set-off and close-out netting arrangements throughout the draft text would need to be assessed in the light of current practices and laws.[120] In any event, a possible conflict between this proposed exception and item (i) on the lex fori concursus on the treatment of set-off, any possible exception to that item and accompanying commentary would need to be reconciled.[121]

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[118] See Principle 4, “Key considerations in respect of this definition”.

[119] See UNIDROIT Principle 8 and accompanying commentary.

[120] As mentioned in the commentary to the UNIDROIT Principles, “close-out netting is often understood as resembling the classical concept of set-off applied upon default or insolvency of one of the parties.” According to the UNIDROIT Principles, “set-off falls within the scope of the Principles where the parties to a close-out netting provision have agreed within that provision that their mutual obligations should be set off, or where the applicable principles of law provide for a set-off as regards the aggregation element of a close-out netting provision.”

[121] See A/CN.9/WG.V/WP.190, para. 23.

Draft legislative provision

Law governing the effects of insolvency proceedings on close-out netting arrangements outside payment, clearing and settlement systems, regulated financial markets or other multilateral trading facilities

The effects of insolvency proceedings on the operation of a close-out netting arrangement between a debtor [that is [*the State includes requirements concerning an eligible debtor*]] and [*the State includes requirements concerning eligible counterparties*] concluded with respect to [*the State includes requirements concerning eligible transactions*] shall be governed by the law chosen by the parties to that arrangement unless that law has no substantial relationship to the parties or the arrangement and there is no other reasonable basis for applying that law.

4. Ongoing arbitration proceedings

27. A summary of the Working Group deliberations on this item at its sixty-third session is found in the report of that session (A/CN.9/1163, para. 73). Due to the lack of time, the Working Group was unable to consider all issues raised in paragraphs 25–34 of document A/CN.9/WG.V/WP.190 in detail and agree on the approaches to treating them. The Working Group may wish to continue those deliberations, in particular on desirability of including an exception to the lex fori concursus for ongoing arbitral proceedings, considering that matter holistically with the law governing effects of insolvency proceedings on ongoing litigation. Discussions may need to cover the stay of arbitral proceeding and other issues proposed to be discussed at the earlier sessions of the Working Group, such as the continued capacity of the debtor to arbitrate after insolvency proceedings have been commenced.

28. If the Working Group decides to include such an exception, it would need also to agree on its scope and the corresponding law that should govern effects of insolvency proceedings on ongoing arbitral proceeding. In the latter context, the Working Group may wish to consider appropriateness of using the term lex arbitri or lex loci arbitri (the latter was suggested at the session[122]), noting that they may refer to the same or different laws[123] but in any event both are generally understood as referring to the law addressing purely arbitration matters. In addition, the Working Group may wish to confirm whether the exception, if it is to be included, would cover only international or also domestic arbitration in the meaning given to the former under the UNCITRAL Model Law on International Commercial Arbitration (art. 1), and whether it would address all covered arbitration proceedings regardless of where they take place. Finally, as noted in the context of item (h) on the lex fori concursus and accompanying commentary that refers to arbitration agreements, the Working Group may wish to consider implications of this possible exception on that item and possible consequential amendments that may need to be introduced in the accompanying commentary to that item.

C. Public policy exception

29. The draft legislative provision below is based on the drafts that were before the Working Group at its previous sessions. In the light of divergent views expressed as regards its content, it is kept in square brackets for further consideration.[124]

[122] A/CN.9/1163, para. 50.

[123] The UNCITRAL Secretariat Guide on the New York Convention acknowledges that this situation is uncommon: “Courts have decided that it referred instead to the procedural law governing the arbitration, in the rare situation where the parties have selected a law to govern the arbitration that is different from the law of the place of arbitration.” (See para. 23 under article V-1 e).

[124] A/CN.9/1163, para. 58.

1. Draft legislative provision

Public policy exception

[The court may refuse the application of the foreign law [only] if the effects of the application of that law would be manifestly contrary to the public policy of the court's State.]

2. Draft commentary

1. The public policy exception allows courts not to apply the foreign law determined as applicable under the provisions of this chapter (for example, the law applicable to the labour contract or relationship or the law of the system, market or facility). That exception can be invoked [only] if the court ascertained that the effects of applying that law would be manifestly contrary to the public policy of the court's State.

2. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted. However, since the legislative provisions deal with matters of international cooperation, public policy should be understood more restrictively than domestic public policy. This intention is conveyed by the expression "manifestly" in the legislative provision. The purpose is to emphasize that the public policy exception should be interpreted and applied narrowly and restrictively and invoked only under exceptional circumstances concerning matters of fundamental importance for the State where insolvency proceedings have been commenced. The same narrow and restrictive interpretation of the exception should be followed regardless of the type of the proceeding (liquidation or reorganization).

3. Public policy implications of applying the foreign law designated by the legislative provisions of this chapter are to be assessed in each concrete case. In accordance with the intended narrow and restrictive interpretation and application of the legislative provision, a public policy exception may be expected to be invoked where the relevant foreign law, as applied to the facts of the case, would infringe the security or sovereignty of the State where insolvency proceedings have been commenced or produce a result which departs so radically from that State's concepts of fundamental justice that its application would be intolerably offensive to that State's basic values. This could be the case, for example, when applying the foreign law designated by the legislative provisions of this chapter would have the consequence of effectively legitimizing illegal schemes or practices (for example, evasion of mandatorily applicable law and obligations, such as environmental, human rights and other social responsibilities, or the use of law for attaining politically motivated goals).

4. The consequences of not applying the otherwise applicable foreign law on grounds of public policy would be addressed in the lex fori concursus. Depending on connecting factors, the lex fori concursus itself or another law with a closer connection to the issue may apply in lieu of the displaced foreign law.

Chapter III. Recognition of the effects of the lex fori concursus and other laws applied by the foreign court[125]

30. The legislative provisions have been drafted on the basis of the relevant provisions of the UNCITRAL insolvency model laws and reflecting comments made at the sixty-third session of the Working Group.[126] Depending on the form of the final text, transposition of several definitions from the UNCITRAL insolvency model laws to the Definitions section of this text may be required. Such definitions would include definitions of "foreign proceeding", "foreign main proceeding", "foreign non-main proceeding", "foreign planning proceeding" (together with terms linked thereto) and "foreign court". Conversely, if the final text takes the form of a supplement to a UNCITRAL insolvency model law, those definitions and some other provisions, such as on public policy exception, may not need to be reproduced in this text.

31. No accompanying commentary to the draft legislative provisions has been drafted pending the Working Group's consideration of those provisions and several issues ensuing therefrom. For example, the secretariat did not draft a provision for proceedings that are neither foreign main proceedings nor foreign non-main proceedings assuming that they would not be covered in this text. Also, the secretariat did not draft separate relief provisions for different types of the covered foreign proceedings (main, non-main and planning) assuming that a single relief provision would apply to all of them, and that the relief envisaged in this chapter would always be discretionary. In addition, the secretariat assumed that no "cherry picking" by the recognizing court would be possible, and that the relief cannot be applied as a provisional relief. The Working Group may wish to confirm accuracy of those assumptions.

Draft legislative provisions

Giving effect to the lex fori concursus and other laws applied by the foreign court

Upon recognition of a foreign (planning) proceeding, the court may grant relief to that proceeding in the form of giving effect to the lex fori concursus and other laws applied by the foreign court.

Public policy exception

Nothing in the preceding provision prevents the court from refusing to grant the relief if granting it would be manifestly contrary to the public policy of its State.

Other grounds for refusing the relief

The court [may] [shall] refuse granting the relief if the foreign court applied the law different from the law envisaged in chapter II of this text for the same matters [unless there was a reasonable basis for the foreign court to apply a different law for those matters in a given case].

Protection of creditors and other interested persons

In granting or denying the relief or in modifying or terminating it, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. With respect to secured creditors, the court must in addition ascertain that the law that was applied to effects of insolvency proceedings on the treatment of secured creditors:

(a) Recognizes a security interest effective and enforceable under the law other than the insolvency law as effective and enforceable in insolvency proceedings;[127]

[125] Ibid., para. 75.
[126] Ibid., paras. 75–80.
[127] See recommendation 4 of the Guide.

(b) Applies only a short stay to secured creditors in liquidation proceedings;[128]

(c) Entitles a secured creditor, upon application to the court, to protection of the value of the assets in which it has a security interest;[129] and

(d) Envisages relief from the stay upon request of a secured creditor to the court on grounds such as that the encumbered asset is not necessary to a prospective reorganization or sale of the debtor's business, or the value of the encumbered asset is diminishing as a result of the commencement of insolvency proceedings and the secured creditor is not protected against that diminution of value, or a reorganization plan is not approved within any applicable time limits.[130]

Coordination of the relief in concurrent proceedings

1. The court may refuse granting the relief if granting it would interfere with the administration of a foreign main proceeding.

2. The relief may not be granted to a foreign non-main proceeding if granting it would produce effects on assets that, under the domestic law, should not be administered in the foreign non-main proceeding or on information that is not required in that proceeding.

3. The relief may not be granted to the foreign planning proceeding if granting it would produce effects on the assets and operations of an enterprise group member that is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings.

4. The relief granted to a foreign non-main proceeding must be consistent with the foreign main proceeding. The court shall review, modify or terminate the relief in effect that is inconsistent with the foreign main proceeding.

5. The court shall grant, review, modify or terminate the relief granted to foreign non-main proceedings for the purpose of facilitating coordination of those proceedings.

[128] Ibid., recommendation 49 (c) and accompanying commentary.

[129] Appropriate measures of protection include cash payment by the estate and provision of additional security interests. See ibid., recommendation 50 and accompanying commentary.

[130] Ibid., recommendation 51 and accompanying commentary.