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United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
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Draft report

Addendum

V. Consideration of the topic of applicable law in insolvency proceedings (A/CN.9/WG.V/WP.194) (*continued*)

E. Ongoing arbitration proceedings

1. The Working Group confirmed that, when it dealt with arbitration matters in the current project, it addressed only effects of commencement of insolvency proceedings on them. It was queried whether the Working Group had the mandate to address anything else related to those matters in the current project. Examples of other matters discussed during the session included issues of arbitration law, such as: (a) whether lex arbitri and lex loci arbitri were always the same law; (b) whether lex arbitri encompassed rules of arbitral institutions or referred only to the law of a State chosen by the parties as applicable to the arbitration agreement; (c) issues of severability of an arbitration clause; and (d) other laws that might be relevant to arbitration proceedings and awards. Issues of substantive insolvency law were also raised, such as: (a) whether arbitration proceedings ought to be always automatically stayed as a result of the commencement of insolvency proceedings; (b) issues of arbitrability of insolvency-related matters; and (c) the scope of the (international) public policy exception as applicable to the recognition and enforcement of arbitral awards.

2. It was considered within the mandate of the Working Group and desirable to indicate in a commentary that: (a) in some jurisdictions, the arbitral award resulting from the arbitral proceedings commenced or continued in disregard of the stay of proceedings imposed under the lex fori concursus would be considered void; (b) in some places of arbitration, such an award would be annulled by the court under the domestic public policy; (c) in other jurisdictions, such an award might be set aside or not recognized and enforced by invoking the public policy or other exception under the New York Convention or other applicable framework; and (d) the arbitral tribunal's disregard of mandatory conflicts of law provisions imposed under insolvency law might lead to the same results.

3. Some delegations considered it essential to include those explanations in a commentary and emphasize there also the special nature and autonomous status of international commercial arbitration, with reference, for example, to article 28 of the

UNCITRAL Model Law on International Commercial Arbitration (MAL) or paragraph 180 of the Guide to Enactment and Interpretation of the MLCBI. It was, however, queried whether differentiating between domestic and international commercial arbitration would be necessary for the purposes of the project.

4. With respect to effects of insolvency proceedings on ongoing arbitral proceedings, which was the focus of the discussion at the current session, the starting point was that the same treatment should be accorded to ongoing arbitral and court proceedings. The prevailing view was that the lex fori concursus should be the law governing effects of insolvency proceedings on both proceedings. That approach was considered coherent with the other items on the lex fori concursus list and the goal to prevent interference of irrelevant laws in the administration of insolvency proceedings. It was also explained that the impact that ongoing proceeding would have for the insolvency estate in terms of claims, liabilities, assets and costs, and because that impact would be assessed and managed by the insolvency representative and the insolvency court, justified that the lex fori concursus would be the governing law. Taking that approach was considered also appropriate and timely in the light of current trends in the arbitration market and attempts of more States to attract international arbitration cases by providing a framework favourable to arbitration, which might be at the cost of insolvency law considerations. It was submitted that a rule deferring to the lex loci arbitri might exacerbate those concerns. Nevertheless, it was acknowledged that the lex fori concursus could not govern on all matters related to arbitration.

5. Views differed on whether the New York Convention was relevant to those issues. The view prevailed that the chosen approach would in any event not contradict the Convention.

6. In terms of specific drafting suggestions, it was suggested that the last sentence in footnote 35 of the draft text, which contained the definition of a stay of proceedings, should be expanded by adding the word “or continue” after the words “to commence”. With respect to related definitions in the Definition section, it was suggested that the definition of the term “lex arbitri” should be amended to read “the law of the State chosen by the parties to govern arbitral proceedings” and “lex loci arbitri” should be defined as “the law that governs arbitration matters in the State where the arbitration has its seat”. Support was expressed for the use of the term “seat of arbitration”, which was considered to be clearer than the term “place of arbitration” or the phrase “where the arbitration takes place” used in UNCITRAL arbitration texts. It was also acknowledged that both terms “seat” and “place” referred to the legal seat of arbitration, not to the venue of arbitration, which might be in multiple locations and online, hence different from the seat of arbitration. The Working Group was requested to assess implications of those differences in future discussions.

7. The need to ensure consistency with the UNCITRAL arbitration framework in the current project was emphasized. A suggestion to involve UNCITRAL Working Group II in the consideration of arbitration-related matters of the project was reiterated. It was recalled that Working Group II had historically been reluctant to take position on some issues of relevance to the project, such as on public policy exception and arbitrability, especially under the New York Convention for which UNCITRAL was not a treaty body (that Convention having been adopted before UNCITRAL was established). It was noted that those concepts were evolving and not understood uniformly.

8. The Working Group requested the secretariat to reflect the points discussed at the session in a commentary. It took note of and welcomed coordination between the UNCITRAL secretariat’s teams servicing UNCITRAL Working Groups II and V. The Working Group confirmed that effects of insolvency proceedings on the enforcement of arbitration agreements and awards would be discussed at a later date. Consequently, it deferred consideration of the texts in square brackets in paragraphs 16 and 17 of the draft commentary to the lex fori concursus list.

F. Public policy exception

9. Different views were expressed on whether the word “only” should be deleted in the draft provision. The view prevailed that it should be deleted. The Working Group agreed to retain the draft provision without square brackets and without the word “only”.

G. Chapter III

10. The Working Group agreed to delete the draft provisions on public policy exception and on other grounds for refusing the relief. It was noted that the need for the deleted parts might need be revisited depending on the outcome of the deliberations of the Working Group on exceptions to the lex fori concursus.

11. Views differed on whether to retain the draft provision on giving effect to the lex fori concursus and other laws applied by the foreign court. Some delegations supported deleting it as unnecessary in the light of the broad and flexible relief framework under the MLCBI. Concern was expressed that the provision might interfere with that framework. Some other delegations were of the view that the draft provision, being enabling like article X of MLIJ, would serve distinct and useful purpose. Some other delegations welcomed making that provision prescriptive so as to make it responsive to the needs in their jurisdictions. Possible negative implications of that approach for obtaining the best relief in the recognizing State were noted.

12. The Working Group agreed to retain the draft provision, noting a suggestion to replace the words “to that proceeding in the form of” by the word “by”. The Working Group agreed to place the remaining draft provisions of chapter III in a commentary that should provide guidance on the practical implementation of the legislative provision on giving effect to the lex fori concursus and other laws applied by the foreign court.

13. Doubts were expressed about the need for chapter III. It was suggested to reflect the provisions agreed to be retained in chapter III in chapters I and II. The Working Group agreed to retain chapter III, not excluding that the structure of the draft text might be revisited at a later stage.

H. Labour contracts and relationships

14. Reference was made to a query raised at the end of the draft commentary to the exception on labour contracts and relationships on whether paragraph 2 of that commentary should be expanded with discussion of ipso facto clauses. The Working Group decided not to expand it.

15. In subsequent discussion (see below), it was noted that paragraphs 16–18 of the commentary to the lex fori concursus list might note that the lex fori concursus could suspend ipso facto clauses in contracts with the debtor’s personnel considered essential for successful reorganization or liquidation of the debtor.

I. Regulated financial markets

16. In response to a suggestion to add a reference to contracts in the draft provision, the prevailing view was to retain the provision as drafted and reflect a point on the contract life in the commentary (e.g. in paragraph 5).

17. The Working Group requested the secretariat to elaborate in the draft commentary on points of relevance to avoidance, including that the exception did not intend to insulate avoidable transactions from the effects of the lex fori concursus even though those transactions or some aspects thereof might have been processed through the system, markets and facilities covered by the exception. Reference was

made in that context to a safe harbour rule for financial contracts found in some jurisdictions. The secretariat was also requested to align a proposed commentary to an exception for close-out netting and the commentary to this exception as regards a short stay.

18. The Working Group did not agree to expand the exception to clients of the participants of the covered markets, systems or facilities.

J. Lex fori concursus list

19. The Working Group acknowledged that agreement reached on several issues during the session would require consequential changes in the commentary to the lex fori concursus list. It was recalled that issues arising from the treatment of ipso facto clauses discussed during the session in the context of labour contracts and relationships (see above) could be added in the commentary to item (h).

20. Suggestions were made: (a) to simplify the drafting of item (g) by replacing the current wording with the reference to "avoidance of transactions"; and (b) to amend item (m) to read "role of creditors and functions of the creditor committee" and to consider referring more broadly to parties in interest in that item. A query was raised about appropriateness of a reference to implementation of a reorganization plan in item (f). The Working Group agreed to amend item (m) to read "role of the creditors and creditor committee" but did not take up the other suggestions.

21. With respect to a draft introduction to chapter II, it was considered useful to retain it, replacing reference to "guiding rules" with "[guidance][rules]" and revisiting that drafting once the form of the instrument was agreed upon. The Working Group agreed to clarify the reference to a foreign element in the third sentence, with reference to the location of an asset or an interested party in a different jurisdiction. A suggestion to replace the word "closure" with "finalization" did not receive support. Views differed on whether the second paragraph should be retained in the introduction or moved to chapter III. It was agreed to retain it in square brackets, with the opening part changed to read "Chapter II is supplemented by chapter III that suggests mechanisms …", for further consideration.

K. General

22. The Working Group took note that the drafting style would need to be adjusted to the form of the final instrument.