United Nations A/CN.9/1169

General Assembly

Distr.: General
24 May 2024

Original: English

United Nations Commission on International Trade Law
Fifty-seventh session
New York, 24 June–12 July 2024

Report of Working Group V (Insolvency Law) on the work of its sixty-fourth session (New York, 13–17 May 2024)

Contents

V.24-09148 (E) 070624 100624

I. Introduction

1. At its sixty-fourth session, the Working Group continued its consideration of the two topics referred to it by the Commission (civil asset tracing and recovery in insolvency proceedings (ATR) and applicable law in insolvency proceedings (APL)). Background information on those topics may be found in the annotated provisional agenda of the session (A/CN.9/WG.V/WP.191).

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its sixty-fourth session in New York, from 13 to 17 May 2024.

3. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Finland, France, Germany, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Morocco, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

4. The session was attended by observers from the following States: Denmark, Egypt, Equatorial Guinea, Guatemala, Guinea-Bissau, Lithuania, Myanmar, Oman, Philippines and Sri Lanka.

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

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

(a) *Organizations of the United Nations system*: International Monetary Fund and the World Bank Group;

(b) *Invited international governmental organizations*: International Association of Insolvency Regulators (IAIR);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Centre for International Legal Studies (CILS), China Council for the Promotion of International Trade (CCPIT), Civil Law Initiative, Conference on European Restructuring and Insolvency Law (CERIL), Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires (CNAJMJ), Ibero-American Institute of Bankruptcy Law, INSO Section, INSOL Europe, INSOL International, Inter-American Bar Association (IABA), International Association of Lawyers (UIA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Inter-Pacific Bar Association (IPBA), Moot Alumni Association (MAA), National Association of Bankruptcy Trustees (NABT), New York City Bar (NYCBAR), and P.R.I.M.E. Finance Foundation.

7. The Working Group elected the following officers:

Chair: Mr. Xian Yong Harold Foo (Singapore)

Rapporteur: Ms. Jasnica Garašić (Croatia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.191);

(b) Note by the Secretariat: civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.192);

(c) Note by the Secretariat: draft toolkit for expedited civil asset tracing and recovery in insolvency proceedings (ATR) (A/CN.9/WG.V/WP.193); and

(d) Note by the Secretariat: applicable law in insolvency proceedings (A/CN.9/WG.V/WP.194).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of insolvency topics:
   (a) Legal issues arising from civil asset tracing and recovery in insolvency proceedings; and
   (b) Applicable law in insolvency proceedings.
5. Other business.
6. Adoption of the report.

III. Deliberations

10. Under agenda item 4, the Working Group continued deliberations of legal issues arising from ATR on the basis of working papers A/CN.9/WG.V/WP.192 and A/CN.9/WG.V/WP.193, and of APL on the basis of working paper A/CN.9/WG.V/WP.194. The summary of deliberations of the Working Group on ATR may be found in chapter IV below. The summary of deliberations of the Working Group on APL may be found in chapter V below.

IV. Consideration of legal issues arising from civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.192 and A/CN.9/WG.V/WP.193)

A. General

11. The Working Group had before it the third draft of a text on civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.192) (the draft text) and a draft toolkit for expedited civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.193) (the draft toolkit), both texts of descriptive, informational and educational nature. It took note of a submission by France and the Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires (CNAJMJ) on instruments of civil asset tracing and recovery in insolvency proceedings used in France, which intended to supplement the submissions by States on the topic that were before the Working Group at its previous sessions.[1]

12. A proposal was made that ATR-related recommendations from UNCITRAL insolvency texts mentioned in the draft text should be highlighted in bold or appear in boxes. Views differed on whether they should all be consolidated and listed at the outset of the draft text. Preference was expressed against doing so. The Working Group noted that the need would arise to amend section E if UNCITRAL recommendations would be consolidated and placed at the outset of the draft text.

[1] See A/CN.9/WG.V/WP.182, A/CN.9/WG.V/WP.182/Add.1 and reports of the Working Group on the work of its sixty-first and sixty-second sessions (A/CN.9/1126, para. 13 and A/CN.9/1133, para. 12).

B. Comments on the draft text (A/CN.9/WG.V/WP.192)

1. Glossary

13. The Working Group received proposals to add the following terms to the glossary: (a) “debtor”; (b) “disclosure orders” (proposed to be defined as “order entered by the court approving the disclosure of information requested by an insolvency representative”); (c) “ex parte application” (proposed to be defined as “an application submitted to the court requesting relief without the disclosure to the third party”); (d) “freezing orders” (proposed to be defined as “an order by the court freezing the assets to preserve the status quo”); (e) “non-disclosure orders” (proposed to be defined as “an order of the court restricting the disclosure of information provided by a third party”); (f) “ultimate beneficial ownership (UBO)”; (g) “unauthorized transactions”, which should be differentiated from “fraudulent transactions”; and (h) “tracking orders” as compared to “search orders”, both terms being used in paragraph 59 of the draft text.

14. Questions were raised with respect to some proposed definitions. It was noted that some terms were not understood uniformly.

15. The Working Group agreed to revert to the glossary after it had reviewed the draft text and the draft toolkit. In subsequent discussions, it was suggested to define the term “debtor”, in particular because the glossary included definitions of “creditor” and “debtor-in-possession”. The following definition was proposed for that term: “‘debtor’: a natural or legal person that vis-à-vis a creditor does not meet an obligation at the time of the commencement of insolvency proceedings or prior to this.” The absence of the definition of the “debtor” in UNCITRAL insolvency texts, difficulties with drafting such a definition and the need to include a reference to obligor to reflect secured transactions specificities in the proposed definition were noted.

16. After discussion, the Working Group decided not to include the definition of the “debtor” in the glossary.

2. Other parts of the draft text

17. A preference was expressed against using the term “should” in the draft text since otherwise the nature of the draft text would change from descriptive to prescriptive.

18. The Working Group requested the secretariat to: (a) clarify the last sentence of paragraph 15; (b) insert a reference to recommendation 112 of the UNCITRAL Legislative Guide on Insolvency Law[2] (the Guide) in a footnote to be added at the end of the first sentence of paragraph 20; (c) replace “is usually the case” with “may be the case” in paragraph 62; (d) replace the conjunction “and” with “or” in the first sentence of paragraph 65 and the word “authorize” with the word “validate” in the last sentence of the same paragraph; (e) specify in the last sentence of paragraph 65 that court authorization might (not) be required for some validation actions by the insolvency representative; (f) split paragraph 84 to convey clearer several messages contained therein, without, however, changing its descriptive nature; (g) delete the word “insolvency” before the word “judge” in paragraph 111; (h) change the title before paragraph 137 to read “Relief”; (i) redraft the first sentence of paragraph 163 to read: “the respondent generally has the right to be heard before the measure is taken”; (j) consider adding in paragraph 172 reference to a requirement of translation of materials to the official language of the receiving State; (k) in paragraph 175, replace reference to “MLAT” with reference to judicial legal assistance treaties and reflect that the law of some States allows the direct evidence-taking, even in the absence of inter-State arrangements, when the person from whom the evidence was to be taken agreed to cooperate; (l) delete reference to “a growing trend” in paragraph 177, indicating instead that some States did not refuse recognition and enforcement of interim measures on the sole ground that they were interim; (m) either delete or explain the reference to the Convention on the Recognition and Enforcement

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

of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")[3] in paragraph 177; (n) clarify references to the framework in question and the insolvency representative in paragraph 188 (b); and (o) consider adding in the section on "Compliance requirements" references to additional compliance requirements (e.g. data privacy and protection, collection and storage of data during the ATR investigation, anti-corruption and anti-bribery safeguards).

19. The following proposals did not receive support: (a) to amend item (b) in paragraph 17; (b) to start paragraph 39 with the words "UNCITRAL recommends"; (c) to provide examples in paragraph 43 of instances when creditors or other persons may transfer the assets of the debtor; (d) to broaden the scope of paragraph 45; (e) to amend paragraph 58 by specifying disclosure responsibilities and obligations of the debtor; (f) to amend paragraph 59 by clearly specifying what the insolvency representative could (not) do without the court order; and (g) to recommend on the basis of the content of paragraph 84 that the insolvency representative should have unhindered access to registers.

20. A question was raised about the need for paragraph 64 in the light of subsequent paragraphs. With respect to the content of paragraph 124, it was recalled that, as noted in paragraph 122 of the draft text, some States required recognition before granting ATR-related assistance while others did not, and each approach had implications on the effectiveness of ATR. With respect to paragraph 202, efforts to explore further an additional layer of complexity for ATR arising from the interplay between insolvency law and asset-specific laws were welcomed.

21. With respect to paragraph 131, it was noted that the efficient use of the UNCITRAL cross-border insolvency framework required judicial capacity and institutional support, in the absence of which ATR could be significantly hindered. With respect to paragraph 133, it was noted that the opening of local proceedings might be necessary to ensure effectiveness of ATR. It was recalled in that context that article 28 of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI)[4] restricted the types of proceedings that the State could commence after it recognized the foreign main proceeding. With respect to paragraph 136, it was highlighted that, to avoid being perceived as intrusive, the powers of a foreign representative and the relief granted under the law of the recognizing State upon recognition should be balanced against the local interests.

C. Comments on the toolkit for expedited ATR (A/CN.9/WG.V/WP.193)

22. It was agreed to: (a) change "must" to "may" in paragraph 10 (c) and reconsider the use of "should" and "must" in other cases, where and as appropriate, ensuring compliance with the UNCITRAL insolvency framework (see further paras. 35 and 40 below); (b) redraft paragraphs 11 and 12 to convey that they referred to the framework of the UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI);[5] and (c) split paragraph 14 into two, a second paragraph commencing with the third sentence of paragraph 14.

23. The Working Group agreed to restructure the toolkit by merging sections on ex parte proceedings, restrictions on disclosure and provisional measures with sections on disclosure, asset protection and asset recovery measures. It requested the secretariat to place first the section on disclosure measures, renaming it to "Information", with references to evidence-taking and disclosure orders provided for illustration in parentheses. Preference for the use of the word "measures" as opposed to "orders" throughout the draft toolkit was reiterated. The Working Group requested

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

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

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

the secretariat to reflect cross-border and legal standing aspects throughout the draft toolkit and to explain the meaning of "ex parte" in the draft text and the draft toolkit with reference to recommendation 43 of the Guide.

1. Ex parte measures

24. The Working Group agreed to move safeguard No. 1 to the column on "Features" and rename that column throughout the draft toolkit to either "Conditions" or "Features and conditions". It also agreed to remove safeguard No. 3 to the section on asset protection measures. Views differed on whether safeguard No. 5 should be moved there as well. The view prevailed that it should stay in the ex parte section. No support was expressed for a suggestion to reflect the content of paragraphs 166 and 192 of the draft text in the draft toolkit.

2. Restrictions on disclosure

25. Suggestions were made to reconsider a reference to the court staff in feature No. 1 and to add "unless the court decides that the time period must be extended in the light of the prevailing circumstances" at the end of safeguard No. 2.

3. Provisional measures

26. The Working Group agreed to change the word "may" to "should" in safeguard No. 3 and to add in that safeguard a reference to the likelihood that a foreign proceeding would be recognized in the receiving State. In line with its decision on paragraphs 11 and 12 of the draft toolkit (see para. 22 above), it agreed to add a reference to the MLEGI in a footnote to feature No. 1 where a reference to a foreign planning proceeding appeared.

4. Disclosure measures

27. Views differed on whether the text in square brackets included in feature No. 6 should stay in the text. The prevailing view was that it should be deleted, which would align the text with article 19 of MLCBI.

28. The Working Group agreed to remove "the" from feature No. 1, delete feature No. 7, change a reference to the (receiving) court in safeguards Nos. 2 and 3 to read "the court or the receiving court, as the case may be," and specify in safeguard No. 2 that the reference was to the disclosure provisions of insolvency or related law.

29. A suggestion was made to add additional safeguards in the context of cross-border insolvency proceedings, for example to require the commencement of insolvency proceedings in the originating State and to provide for a stricter control over the information requested under the law of the originating State. That suggestion was not taken up.

5. Asset protection measures

30. The Working Group agreed to replace "may" with "should" in the safeguard. It heard a view that while asset protection measures also deserved expedited treatment, they would most likely be covered by provisional measures that would be subject to lex rei sitae.

6. Asset recovery measures

31. The Working Group agreed to expand a reference to a cash payment in feature No. 2 by adding a reference to other forms of consideration.

7. Enforcement and sanctions

32. The Working Group requested the secretariat to include a cross-reference to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related

Judgments (MLIJ)[6] in safeguard No. 2. As regards a reference in that safeguard and in footnote 48 to the UNIDROIT project on Best Practices for Effective Enforcement (BPEE),[7] the Working Group took note of the expected completion of that project in 2025, and that the project would cover, in addition to general aspects of enforcement, enforcement against secured assets and immovables. The Working Group welcomed receiving further information about substantive provisions emanating from that project and their relevance to the ATR project, which should allow it to decide on inclusion of cross references to those provisions in the draft text and the draft toolkit. The Working Group recalled that the Commission emphasized the need to avoid unnecessary duplication of efforts with UNIDROIT, the Hague Conference on Private International Law and other relevant organizations by ensuring close coordination and cooperation with them in the current projects of the Working Group.[8]

33. The Working Group agreed to replace feature No. 3 with the following wording: “Sanctions should be effective, encourage compliance and deter fraud and non-compliance.”

34. A proposal to replace the word “must” with “may” in feature No. 2 did not receive support. It was agreed instead to use “should” in that context. It was explained that sanctions encompassed broadly procedural and substantive adverse consequences for the parties when they failed to comply, and such consequences should be envisaged in the laws of States.

35. As regards the use of the words “may”, “must” and “should” in the draft toolkit more generally, it was considered necessary to assess their use on a case-by-case basis taking into account the context in which they were used, existing UNCITRAL recommendations with reference to which those words were included, the nature and form of the toolkit and its place among UNCITRAL instruments (see paras. 22 and 40).

36. Suggestions to include references to international comity in common law jurisdictions (and equivalent notions in other jurisdictions), letters rogatory for judicial assistance and legislation of an originating State were not taken up.

8. Court-to court cooperation and coordination tools

37. It was agreed to: (a) replace the word “enabled” with the word “encouraged” in the chapeau provision; (b) add reference to the foreign representative in feature No. 1; (c) add the words “absent objections” at the end of feature No. 11; and (d) delete safeguard No. 1 referring to a public policy exception. It was noted that the latter exception was generally applicable to all other measures addressed in the draft toolkit. Mentioning it only in the last section of the draft toolkit was considered undesirable. A suggestion to move feature No. 8 to safeguards did not receive sufficient support.

D. Form and title of the final product

38. Different views were expressed about the form and titles of the final product and its separate parts found in the draft text and the draft toolkit. Reasons for avoiding terms in the titles that implied reference to a standard, such as “key principles”, were noted. Support was expressed for omitting the word “civil” in the titles, for two main reasons: (a) the original proposal had evolved from civil asset tracing and recovery to asset tracing and recovery in insolvency proceedings; and (b) the draft text discussed criminal proceedings in aid of ATR.

---

[6] United Nations publication, Sales No. E.19.V.8. Available at https://uncitral.un.org/en/texts/insolvency/modellaw/mlij.

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

[8] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 190.

39. The prevailing view was that: (a) the draft text in its final form should be called "Background notes on asset tracing and recovery in insolvency proceedings"; (b) the draft toolkit in its final form should be called "Toolkit for expedited asset tracing and recovery in insolvency proceedings"; and (c) those two separate parts could be grouped together under the heading: "Asset tracing and recovery in insolvency proceedings: toolkit and background notes".

40. In response to a concern that the style of presenting materials in the draft toolkit was different from the style used in a toolkit adopted by UNCITRAL in 2023,[9] the view prevailed that there was no predetermined style for toolkits, which were flexible instruments and hence, no need would arise to align the style of the draft toolkit with the one adopted by UNCITRAL in 2023. Nevertheless, views were reiterated that both parts of the final product of UNCITRAL on ATR would remain descriptive, with the words "should" and "must" used where and as appropriate (see paras. 22 and 35).

41. Views differed on whether the draft text and the draft toolkit should be consolidated in one publication. Views also differed on whether the toolkit should appear first or second if one consolidated publication of the two separate parts were to be prepared. The Working Group deferred the final decision on that matter.

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

42. The Working Group considered draft provisions and commentary on applicable law in insolvency proceedings found in document A/CN.9/WG.V/WP.193. The Working Group took note that the drafting style would need to be adjusted to the form of the final instrument.

A. Secured creditors

43. The Working Group heard a proposal to include in a commentary to item (j) on the lex fori concursus list some key elements relating to the treatment of secured creditors. According to that proposal, in addition to a broad definition of secured creditors and aspects contained in paragraphs 22–23 of the draft commentary, the commentary would emphasize the flexible approach contemplated by the legislative provision and highlight:

(a) The importance of reorganization for many jurisdictions and, consequently, of a stay of secured creditors' actions that could undermine reorganization efforts. Abuses by secured creditors that jeopardise any chances of successful reorganization were recalled in that context;

(b) That secured creditors would be entitled to adequate protection under the lex fori concursus, such as protection against a decrease in value of their collateral as a result of application of a stay (e.g. a right to request relief from the stay if the collateral was of no value for reorganization or liquidation, or if a reorganization was not possible);

(c) That lex rei sitae could apply to the treatment in insolvency of secured transactions relating to immoveable property, acknowledging, however, that localization of moveable assets or some rights, including movable assets attached to immoveable property, could be difficult.

[9] COVID-19 and International Trade Law Instruments: a Legal Toolkit by the UNCITRAL Secretariat, United Nations publications, 2024, available at https://uncitral.un.org/covid-impact-website.

44. Many delegations welcomed the proposal as a starting point. In ensuing discussion, the following specific points were raised related thereto:

(a) While paragraph 22 of A/CN.9/WG.V/WP.194 was considered appropriate, it was agreed that paragraph 23 should be substantially revised (see para. 55 below);

(b) The commentary should remain focused on applicable law and avoid addressing substantive aspects, including by prescribing approaches to reorganization (e.g. a stay);

(c) The commentary should acknowledge that lex rei sitae could displace the lex fori concursus, in particular when enforcement of a security interest in immovable property located in another jurisdiction was sought.

45. It was stated that item (j) encompassed both the effects on claims and those on security interests, including: (a) whether secured creditors could initiate insolvency proceedings; (b) whether they were required to submit claims in insolvency proceedings and if so, how those claims were treated and ranked; (c) whether secured creditors had the right to participate in creditor committees and vote; (d) whether they could request the annulment of decisions of creditors' meetings; and (e) cram down rules. While there was broad agreement that effects of insolvency proceedings on claims should be governed by the lex fori concursus to ensure an orderly administration of insolvency proceedings, regardless of whether those proceedings were liquidation or reorganization, a view was expressed that the ranking of claims should not be covered by item (j).

46. As regards the effects of insolvency proceedings on security interests, it was noted that paragraph 22 of the draft commentary to item (j), while making it clear that the project did not deal with the law governing the validity and effectiveness of security interests and secured claims, did not address the law that governed the effects of insolvency proceedings on enforcement and execution of secured creditors' rights against the collateral. Divergent views were expressed on whether enforcement and execution of those rights would be subject to the law of the State where the assets were located. Views differed on the extent to which it was the lex fori concursus or the lex rei sitae that governed issues such as a stay of enforcement and execution.

47. Those delegations that considered that those rights were subject to the lex rei sitae suggested that paragraph 23 of the draft commentary should be replaced by an alternative wording that would provide sufficient assurances of foreseeability to secured creditors as regards their enforcement and execution rights against the collateral. Although it was submitted that a secured creditor in its dealings with a debtor whose centre of main interests (COMI) was in a foreign State should have expected that the law of that State would apply in case of the debtor's insolvency, those assurances were considered essential when COMI moves.

48. Those delegations that preferred the application of the lex fori concursus also to secured creditors' enforcement and execution rights referred to the principles of modified universalism that underpinned the UNCITRAL insolvency framework. They considered that, while it would be most practical for the originating court to apply its own law, i.e., the lex fori concursus, the need to ensure, for example, that creditor rights were properly protected, that parallel proceedings were not opened and that the effects of the lex fori concursus were recognized in foreign States where assets of the debtor were located might dictate other approaches. It was noted that the receiving court might, in turn, be expected to give effect to the lex fori concursus, for example when granting additional assistance or a discretionary relief under MLCBI,[10] subject to the public policy exception and adequate protection of creditors.[11] It was recalled that, although rules of the States at the place of enforcement would apply to enforcement, the provisions of article 15 of MLIJ on the equivalent effect should not be overlooked.

[10] See e.g. articles 7 and 21.

[11] See e.g. articles 6, 21 (2) and 22 of MLCBI.

49. The relevance of provisions of chapter III, and the interaction of those provisions with the lex fori concursus provisions in chapter II, of the draft text were highlighted. It was considered that in granting, denying, modifying or terminating relief, the recognizing State would unavoidably compare the treatment accorded to secured creditors under the lex fori concursus and the treatment accorded to secured creditors under the otherwise applicable law, including its own law.

50. It was emphasized that an approach that would be chosen for the treatment of secured creditors would have far-reaching and wide-ranging consequences, including on financial and housing markets (e.g. availability and cost of credit), although views that the impact on those markets was uncertain were also expressed. It was suggested to address the treatment of secured creditors in a stand-alone provision to provide more clarity on that fundamental issue.

51. With reference to provisions of the Guide (in particular recommendations 31 and 34 and their accompanying commentary (e.g. para. 88)) and MLCBI (in particular articles 20 (2) and 22 and their accompanying commentary in the Guide to Enactment and Interpretation, e.g. para. 183), it was emphasized that they addressed issues discussed in the current project in a nuanced and balanced way that made cooperation and coordination in cross-border insolvencies possible. It was submitted that disturbing that balance might produce unintended consequences including a negative impact on the continued uptake of the UNCITRAL insolvency framework across the world. Pros and cons of (de)centralization of insolvency proceedings were highlighted.

52. Broad support was expressed for formulating minimal standards for protection of secured creditors if the lex fori concursus (potentially not foreseen by the secured creditor at the time of entering into a secured transaction with the debtor) instead of the lex rei sitae applied to their substantive rights. The reference to adequate protection under article 22 of MLCBI was considered vague and requiring precision. Proposed examples of a threshold for adequate protection included that secured creditors would be no worse off under the lex fori concursus than under the lex rei sitae and they would be allowed to proceed with the enforcement of their rights against the collateral if reorganization failed. Further examples included that secured creditors would be entitled to the same value in distribution as the value that would have been realized in the State where the asset was located if the insolvency proceedings were not opened in another State.

53. The other view was that, while attempts could be made to clarify the meaning of adequate protection, specifics of such protection would depend on each case, including the need to achieve balance between protection of interests of secured and unsecured creditors. Views also differed on whether minimal standards for protection of secured creditors should be formulated only or primarily with a particular type of proceeding (e.g. reorganization as opposed to liquidation) or asset (immovable as opposed to movable) in mind. It was recalled that in some States there was no differentiation between the two types of proceedings at the stage of commencement of insolvency proceedings and, even where such differentiation was found, conversion of proceedings was possible.

54. As regards specific drafting suggestions for item (j), views differed on whether that item should be kept on the lex fori concursus list. Some delegations considered that it could be kept without square brackets. Other delegations suggested adding a qualifier referring to adequate protection. In response, it was observed that adequate protection was already built in the UNCITRAL insolvency framework. Other delegations felt that there was no need to retain item (j) on the lex fori concursus list since other listed items had already covered issues of relevance to secured creditors, including the treatment and ranking of their claims.

55. The Working Group agreed to keep item (j) in square brackets adding at the end, in an additional pair of square brackets, the words “subject to adequate protection”. It encouraged interested delegations to find pragmatic solutions to outstanding issues, including an alternative wording to paragraph 23 of the draft commentary.

B. Deferral to the law of another State by the originating court

56. Views differed on whether the paragraph should be retained in the text with or without amendments. The following amendments were proposed: (a) to delete the part preceding the words “to facilitate”; (b) to align the text closer with the relevant provisions of MLEGI and to cross-refer to them; and (c) to mention both the treatment and ranking of claims. In response to a point raised that the provision, unlike the relevant provisions of MLEGI, was drafted to apply to insolvency proceedings with respect to both multiple debtors-members of the same enterprise group and a single debtor, some delegations welcomed such an expanded scope and recalled corresponding practices reported in paragraph 196 of the Guide to Enactment of MLEGI.

57. The Working Group agreed to retain the provision without square brackets with the addition of a reference to the ranking of claims. It was agreed that an accompanying commentary would address points raised with respect to that provision, including that it: (a) was consistent with the provisions on undertakings found in articles 28–32 of MLEGI; (b) was intended to empower courts to defer to the law of a foreign State, when necessary, for example, in order to ensure adequate protection of secured creditors discussed earlier in the session; and (c) could produce various implications on administration of insolvency proceedings in the originating State.

C. Avoidance and set-off

58. Some delegations preferred deleting those paragraphs. They considered them prone to abuses, even with the envisaged safeguards that might be insufficient and unprecise to avoid litigations.

59. Other delegations preferred retaining the paragraphs in square brackets for further consideration, noting their relevance to the treatment of rights in rem and safeguards against COMI shifts, discussed earlier in the session.

60. It was suggested to clarify reference to “the law of a State that applies to the transaction” in paragraph 3, possibly by replacing it with lex causae. A suggestion was made to add the words “in the relevant case” in paragraph 4, noting that they appeared also in paragraph 3. The safeguards at the end of the provisions were considered less relevant for set-off than for avoidance. With respect to paragraph 4, a reference to the law applicable to the debtor’s claim instead of the debt was questioned.

61. The Working Group agreed to retain the paragraphs in square brackets for further consideration.

D. Close-out netting

62. Views differed on whether such an additional exception to the lex fori concursus should be included in the draft text. After discussion, the view prevailed that the exception should be retained but with a narrow scope, which could be delineated possibly with reference to contracts mentioned in paragraph 209 of the financial contracts and netting section of the Guide[12] and with clarification of matters that would remain under the lex fori concursus. Intersection of the exception with financial regulations, including application of a short stay, were highlighted as additional issues worth considering.

63. The Working Group agreed to replace the words “the law chosen by the parties to that arrangement” with the words “the law applicable to that arrangement”. A

[12] See part two, chapter II, section H, of the Guide.

suggestion to cover in the provision also avoidance of transactions covered by the exception did not receive support.

E. Ongoing arbitration proceedings

64. 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) the meaning of lex arbitri and the meaning of lex loci arbitri; (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, or it referred to the law chosen by the parties to govern arbitral procedure; (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. It was noted that arbitration laws of most States as well as the rules of arbitral institutions, as a rule, did not contain express provisions on the effects of opening of insolvency proceedings on arbitration proceedings.

65. 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.

66. 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) [13] 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.

67. 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 proceedings 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,

[13] United Nations publication, Sales No. E.08.V.4. Also available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_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 all matters related to arbitration.

68. 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.

69. 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 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.

70. 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.[14] 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.

71. 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 on proceedings not yet commenced) 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

72. 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

73. 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

[14] A/CN.9/1163, para. 73.

the deleted parts might need to be revisited depending on the outcome of the deliberations of the Working Group on exceptions to the lex fori concursus.

74. 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 a 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.

75. 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.

76. 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

77. 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.

78. In subsequent discussion (see para. 82 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. Payment, clearing and settlement systems, regulated financial markets and other multilateral trading facilities

79. 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 para. 5).

80. 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 (see para. 62 above) and the commentary to this exception, without prejudice to the finality of payments and transactions processed through the systems, markets and facilities covered by this exception. A view was expressed that the exception could include a provision on a short stay under the regulatory framework and financial regulation.

81. 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

82. 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 para. 78 above) could be added in the commentary to item (h).

83. 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.

84. 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. Scope

85. Recalling its agreement to change "guiding rules" to "[guidance][rules]" in paragraph 1 of the introduction to chapter II (see para. 84 above), the Working Group agreed to make the same change in paragraph 1 of the draft provision, with the same understanding that the drafting would be revisited once the decision on the form and nature of the instrument was taken.

86. With reference to paragraph 3 of the draft provision, while keeping the draft as it was, the Working Group requested the secretariat to ensure that the commentary conveyed unambiguously that exemptions from the application of the instrument being prepared were discouraged.

87. The Working Group did not agree: (a) to expand paragraph 1 of the draft provision with insolvency-related references; (b) to remove references to recognition and relief proceedings in the same paragraph; (c) to expand reference to the enabling nature of some provisions; and (d) to draft a separate provision on insolvency proceedings on the basis of paragraph 2 of the draft commentary.

L. Purpose and objectives

88. The Working Group agreed to retain the provision and its commentary as drafted. It did not agree to change the first sentence of paragraph 3, and include the phrase "and promote harmonization of the law applicable in insolvency proceedings" after the words "those gaps" in paragraph 4, as suggested at the session. A suggestion was made that some repetitions between paragraphs 2 and 4 with respect to the definition of the lex fori concursus might need to be eliminated.

VI. Other business

89. With reference to the tentative dates of the sixty-sixth session of the Working Group (25–29 November 2024) indicated in paragraph 27 of document A/CN.9/WG.V/WP.191 and on the understanding that the Commission was expected to consider and decide on the date and place of future meetings at its fifty-seventh session, delegations exchanged views on those dates. Some delegations preferred changing those dates to 16–20 December 2024 in order to avoid conflicts for participants and ensure as full participation as possible. Other delegations preferred keeping the originally scheduled dates, to avoid an overlap with the dates of UNIDROIT sessions scheduled in December and not to disturb the already made travel plans of some delegations. Other delegations did not mind swapping the original dates of Working Group V with the dates of the forty-fifth session of Working Group VI (9–13 December 2024). Some other delegations were flexible.

90. Support was expressed for the secretariat's plans to seek a mandate from the Commission at its upcoming session to update the 2009 UNCITRAL Practice Guide on Cross-border Insolvency Cooperation.[15]

91. The Working Group took note of issues arising from the use of the recently introduced system for delegations' self-registration for UNCITRAL sessions on the INDICO platform. The importance of resolving them was acknowledged since that would have a direct impact on timely registration for the session, obtaining badges, preparation of a list of participants, communication of essential information to delegations and other steps that the secretariat took between and during sessions.

92. In response to a suggestion for the Working Group to hold intersessional informal consultations between the sixty-fourth and the sixty-fifth sessions, the Working Group agreed not to hold them. A point was made that holding in-session informal consultations was more useful.

[15] United Nations publication, Sales No. E.10.V.6, available at https://uncitral.un.org/en/texts/insolvency/explanatorytexts/practice_guide_cross-border_insolvency.