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Report of Working Group V (Insolvency Law) on the work of its sixty-fifth session (Vienna, 16–20 December 2024)

Contents

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I. Introduction

1. At its sixty-fifth session, the Working Group continued its consideration of the two topics referred to it by the Commission (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.195).

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its sixty-fifth session in Vienna, from 16 to 20 December 2024.

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

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

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

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

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

(b) *Invited international governmental organizations*: European Bank for Reconstruction and Development (EBRD), Gulf Cooperation Council (GCC) and International Association of Insolvency Regulators (IAIR);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), 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), European Banking Federation (EBF), European Law Institute (ELI), Groupe de réflexion sur l'insolvabilité et sa prévention (G.R.I.P. 21), Ibero-American Institute of Bankruptcy Law, INSO Section, INSOL Europe, INSOL International, International Association of Young Lawyers (AIJA), International Bar Association (IBA), International Insolvency Institute (III), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Moot Alumni Association (MAA), National Association of Bankruptcy Trustees (NABT), New York City Bar (NYCBAR) and P.R.I.M.E. Finance.

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.195);

(b) Note by the Secretariat: background notes on asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.196);

(c) Note by the Secretariat: toolkit for expedited asset tracing and recovery in insolvency proceedings (ATR) (A/CN.9/WG.V/WP.197);

(d) Note by the Secretariat: applicable law in insolvency proceedings (A/CN.9/WG.V/WP.198); and

(e) Note by the Secretariat: transmitting a proposal by the delegation of Australia for preparation of an updated Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (A/CN.9/WG.V/WP.199).

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 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.196 and A/CN.9/WG.V/WP.197, and of APL on the basis of working paper A/CN.9/WG.V/WP.198. 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.

11. Under agenda item 5, the Working Group had before it a proposal by the delegation of Australia for preparation of an updated Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (A/CN.9/WG.V/WP.199), heard another proposal for possible future work by UNCITRAL in the area of insolvency law and was informed about other matters of relevance to the work of the Working Group. The summary of deliberations of the Working Group on that agenda item may be found in chapter VI below.

IV. Consideration of legal issues arising from asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.196 and A/CN.9/WG.V/WP.197)

A. General

12. The Working Group had before it draft background notes on asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.196) (the draft background notes) and a draft toolkit for expedited civil asset tracing and recovery in insolvency proceedings (ATR) (the draft toolkit) (A/CN.9/WG.V/WP.197). It took note of document A/CN.9/WG.V/WP.182/Add.2 which compiled submissions by Italy, Poland and France[1] that the Working Group had considered, respectively, at its sixty-first, sixty-second and sixty-fourth sessions,[2] expanding the inventory found in

[1] Listed in the order of their submissions. The compilation contains a longer version of the submission from France, which was not before the Working Group at its sixty-fourth session.

[2] A/CN.9/1126, para. 13; A/CN.9/1133, paras. 11 and 12; and A/CN.9/1169, para. 11.

documents A/CN.9/WG.V/WP.182 and Add.1 that was before the Working Group at its sixty-first session.[3] The Working Group heard support for the project.

B. Comments on the draft background notes (A/CN.9/WG.V/WP.196)

13. The Working Group agreed to: (a) keep footnote 3 as originally drafted; (b) add "shall" after "should" in paragraph 11 and put parts of the draft background notes where "shall" was used in quotation marks to convey that those parts were reproduced from other instruments; (c) replace "may be" with "is" in the first sentence of paragraph 76; (d) replace "documents" with "information" in the second sentence of paragraph 83; (e) remove "personally" in the first sentence of paragraph 84; (f) add a reference to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents[4] in paragraph 119; (g) revise the first sentence of paragraph 172 to reflect different practices of States; (h) replace "letter-of-request" with "request for service" in the second sentence of paragraph 172; and (i) revise the second entry in the annex to differentiate functions of registers mentioned there.

C. Comments on the draft toolkit (A/CN.9/WG.V/WP.197)

14. It was agreed to: (a) add "based on the facts and circumstances of that specific case" after "cases" in the last sentence of the third paragraph of the preface and at the end of general feature #2; (b) add "domestic and cross-border" before "enforcement" in item (d) of introductory paragraph 1; (c) ensure broader understanding of the term "court" throughout the draft toolkit as in the draft background notes; (d) delete general safeguard #5; (e) replace "the debtor and its assets and affairs" with "assets and affairs of the debtor" in general feature #5; (f) amend the title of section II.A to "Information and disclosure measures" and introduce consequential changes in the draft background notes; (g) replace "(missing) assets that belong to the insolvency estate" with "assets of the insolvency estate" in disclosure objective #2; (h) replace "the digital assets" with "assets of the insolvency estate" in disclosure feature #3; (i) replace "demonstrate the real risk" with "provide proof of the risk" in disclosure safeguard #3, and add "or will not be made available" at the end of that safeguard; (j) delete "(further)" in asset protection objective #3; (k) amend asset protection safeguard #1 to read after "the defendant", "and that there is proof of the risk that, without the asset protection measure sought, the assets in question will be hidden, transferred or dissipated"; (l) amend asset protection safeguard #2 to read "Asset protection measures should be of limited duration and may be conditioned upon presentation of a claim and commencement of proceedings after their imposition"; and (m) consider at a later date the need for reproducing the content of paragraph 11 of the draft background notes in the draft toolkit.

15. Suggestions to (a) redraft introductory paragraphs 2, 3 and 4, (b) replace "substantiate them in any ensuing proceedings" by "pursue such actions in an appropriate proceeding" in disclosure objective #3, (c) add the phrase "as to insolvency estate assets" after "necessary information" in disclosure safeguard #1 and (d) include references to subpoenas, did not receive sufficient support.

16. In subsequent discussion, it was agreed to: (a) replace "a final judgment" with "an enforceable judgment" in asset recovery safeguard #1; (b) delete "(further)" throughout the draft toolkit and the word "further" in ex parte feature #1; (c) add another ex parte objective, reading "to utilize ex parte measures to be granted standing, if necessary, to initiate actions in other jurisdictions to recover assets expeditiously"; (d) add another ex parte feature, reading "the foreign representative, based on the standing granted by the originating court, should be recognized by the receiving court to initiate and pursue actions to recover assets of the insolvency

[3] A/CN.9/1126, chapter IV.

[4] Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille

estate"; (e) delete the word "high" in ex parte feature #2 (a); (f) include "or destruction of information or evidence" at the end of ex parte feature #2 (b); (g) delete the word "urgent" in ex parte safeguard #2; (h) amend non-disclosure safeguard #1 to read "A non-disclosure measure should be imposed only when necessary to safeguard the purpose and effectiveness of the ATR measure(s)"; (i) correct the word "reasonably" to read "readily" in enforcement feature #6; (j) replace the word "guarantees" with "assurances" in enforcement safeguard #5, which would align the wording with the one used in other UNCITRAL texts;[5] (k) delete the word "informal" in court-to-court cooperation and coordination feature #6 and merge the resulting feature with court-to-court cooperation and coordination feature #7 as follows: "the use of electronic means of communication for notification, sharing evidence and written materials or for other purposes"; (l) delete the word "formal" in court-to-court cooperation and coordination safeguard #3; (m) delete court-to-court cooperation and coordination safeguard #4; and (n) add a court-to-court cooperation and coordination safeguard that would refer to notices to affected parties and their rights to be present and to be heard.

17. A suggestion to replace the word "frank" by "fair" in ex parte feature #2 (d) did not receive support.

18. To align the draft background notes with the draft toolkit in the relevant part, the Working Group agreed to add in paragraphs 116–119 of the draft background notes something along the following lines, leaving it to the secretariat to adjust the wording and place it where it would be most appropriate: "Also, asset tracing and recovery measures may include the use of ex parte applications to recover assets of the insolvency estate located in other jurisdictions". The Working Group requested the secretariat to ensure that the term "assets of the insolvency estate" instead of "assets that belong to the insolvency estate" were consistently used throughout the draft background notes and the draft toolkit.

19. With respect to the enforcement and sanctions section, the Working Group took note of coordination between the secretariat and the International Institute for the Unification of Private Law (UNIDROIT) secretariat in the context of the project currently under discussion at the UNIDROIT Working Group on Best Practices for Effective Enforcement,[6] as reflected in footnote 60 of the draft toolkit. The Working Group heard that, in the light of the outcomes of that UNIDROIT project, expected to be completed around the same time as the ATR project in UNCITRAL, changes in that section of the draft toolkit might need to be introduced for consideration at the next session of the Working Group or by the Commission upon finalization and adoption of the toolkit.

D. Next steps

20. With reference to paragraph 2 of the introduction to the draft background notes and paragraphs 3 and 4 of the introduction to the draft toolkit, views differed on whether the background notes and the toolkit should be published separately or in one consolidated publication. Some delegations preferred publishing them separately, at the same time maintaining the interconnection between the two, possibly through the use of hyperlinks. Some other delegations stressed that publishing two texts in one publication would make the final product of UNCITRAL on the subject more user-friendly. Most delegations in that group considered that the toolkit should be placed first in the consolidated publication. Some other delegations were flexible as regards those two options but shared the view that the toolkit should appear first if one publication were to be prepared.

[5] See e.g. the UNCITRAL Model Law on Electronic Signatures (2001) and the UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (2022), both available at https://uncitral.un.org/en/texts/ecommerce.

[6] For further information, see https://www.unidroit.org/work-in-progress/enforcement-best-practices/.

21. The prevailing view was to produce a consolidated publication with the toolkit placed first. The understanding was that the secretariat would need to include an introduction to the consolidated publication that would explain the relationship between the two texts ("introductory materials").

22. The need for inclusion of an extensive glossary of terms in the toolkit was questioned. It was considered sufficient to define only essential terms in the toolkit, such as "courts", to facilitate the correct understanding and application of the text, and to cross refer to the glossary in the background notes for definition of other terms used in the toolkit.

23. With respect to the title of the final product, the Working Group considered whether it would be necessary to reinstate the word "civil" in the title of the texts and if so, whether it would be necessary to do so only in the title of the toolkit or also in the title of the background notes and the title of the consolidated publication. After discussion, the Working Group confirmed the prevailing view on that matter reached at its sixty-fourth session[7] that, despite what was stated in paragraph 5 preceding the tables in the draft toolkit, the title of the consolidated publication would remain "Asset tracing and recovery in insolvency proceedings: toolkit and background notes", the title of the background notes would remain "Background notes in asset tracing and recovery in insolvency proceedings" and the title of the toolkit would remain "Toolkit for expedited asset tracing and recovery in insolvency proceedings". The secretariat was requested to explain in the introductory materials the extent of the coverage of criminal law matters in the background notes and the absence of any such coverage in the toolkit. It was agreed to amend the title of chapter IV of the draft background notes to read "Related criminal proceedings".

24. Views differed on desirability of circulating the texts as revised after the session to States for comment. Some delegations were of the view that the texts should be circulated as soon as possible after they became ready in early 2025. Other delegations questioned the desirability of doing so at the risk of reopening issues that had extensively been discussed in the Working Group. The Working Group was informed of relevant time, translation and other considerations.

25. After discussion, the Working Group agreed to circulate the draft background notes and the draft toolkit in a consolidated form, as revised by the secretariat to reflect changes agreed to be made to those texts at the current session, to States for comment before their consideration by the Commission at its fifty-eighth session, in 2025. The Working Group agreed to consider the revised drafts of the background notes and the toolkit at its sixty-sixth session together with any comments by States on those texts that might be received by the secretariat by that time.

V. Consideration of the topic of applicable law in insolvency proceedings (A/CN.9/WG.V/WP.198)

A. Close-out netting

26. The value of the exception for bringing legal certainty to the intended markets was questioned. It was argued that proper operation of close-out netting depended on an effective substantive legal framework, such as the one reflected in recommendations 101–107 of the UNCITRAL Legislative Guide on Insolvency Law (the Guide),[8] rather than on a choice-of-law rule designating the law chosen by the parties as the law governing the effects of insolvency proceedings on the operation of a close-out netting arrangement.

[7] See A/CN.9/1169, para. 39.

[8] United Nations publication, Sales No. E.05.V.10. Available at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.

27. In response, it was recalled that the Working Group had agreed to include the exception to the *lex fori concursus* for close-out netting arrangements.[9] It was argued that inclusion of that exception in the draft legislative provisions was without prejudice to the need to promote in parallel an enabling legal framework for close-out netting arrangements. It was understood that States enacting the exception would also implement its accompanying commentary that would be expected to reinforce the complementarity of both approaches and encourage States to recognize validity and effectiveness of close-out netting arrangements under eligible financial contracts. It was also argued that it was reasonable to expect that parties to a close-out arrangement would designate the law favourable to close-out netting as the law applicable to that arrangement.

28. The Working Group was invited to consider whether the draft legislative provision contained sufficient safeguards for the exception to be acceptable to States and for prevention of potential misuse by the parties. Delineating the scope of the exception narrowly was considered such a safeguard. The Working Group heard different suggestions on how to narrow down the scope of the exception appropriately, including by limiting the application of the exception only to close-out netting under eligible financial contracts. Noting different definitions of "financial contracts" found in international texts[10] and evolving financial market practices, the prevailing view was that it would be impossible to define "financial contracts" with reference to the exhaustive list of contracts and agreements intended to be covered by the exception. It was considered sufficient to provide a non-exhaustive definition of the term, as was done in the Guide, and leave it to States to expand or narrow it down as they consider appropriate under their conditions.

29. The opposite view was that such an approach would not be conducive to achieving certainty in the market and might lead to opportunistic attempts to qualify any contracts as eligible financial contracts. For that reason, the second bracketed text was preferred with the replacement of the words "and other similar contracts or agreements" by "other agreements specified in [the relevant law of the State]". Another proposal was to refer to an internationally accepted market standard for the definition of the term and the scope of the exception, instead of trying to delineate them in the draft legislative provisions. Another suggestion was to limit the scope of the exception to contracts between the debtor and financial institutions.

30. In subsequent discussion of paragraph 1 of the draft legislative provision, the Working Group agreed to: (a) retain the second bracketed text with the replacement of the words "other similar contracts or agreements" with "other contracts or agreements that a State may wish to specify"; and (b) delete the words "and there is no other reasonable basis for applying that law", which were considered to give rise to controversies and contradict the immediately preceding part.

31. As regards paragraph 2 of the draft legislative provision, concerns were expressed that the wording in the first set of square brackets impinged on substantive law aspects. For that reason, the text in the second set of square brackets, with some amendments, was preferred. In view of some delegations, proposed amendments nullified the value of the exception. Preference was expressed either to delete paragraph 2 or retain it with the original narrow scope. The view prevailed that it should be retained in square brackets for consideration by the Working Group at the next session, redrafted as follows: "[Notwithstanding paragraph 1 of this legislative provision, the *lex fori concursus* applies to avoidance and a stay of proceedings in relation to the close-out netting arrangement in insolvency proceedings commenced with respect to any party to that close-out netting arrangement.]."

[9] See A/CN.9/1169, para. 62.

[10] See e.g. the *Key Attributes Assessment Methodology for the Banking Sector* adopted by the Financial Stability Board, available at https://www.fsb.org/2016/10/key-attributes-assessment-methodology-for-the-banking-sector/.

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

32. The Working Group agreed to replace the second sentence of the draft legislative provision with the following sentence: "That law shall also govern the effects of insolvency proceedings on the finality of payments or transactions in that system, market or facility."

33. The Working Group requested the secretariat to redraft paragraph 9 of the accompanying commentary, deleting the reference to a stay, distinguishing between the processing of payments and transactions in the systems, markets and facilities and the underlying transactions, explaining the term "finality" and eliminating all ambiguities about a very narrow scope of the exception based on such distinction. Concern was expressed also about reference to blockchain and retail investors in paragraph 2 (f) of the draft commentary as potentially broadening the scope of the exception.

C. Item (j) on the *lex fori concursus* list

34. The Working Group received a suggestion to amend the wording of item (j) on the *lex fori concursus* list to read: "(j) the treatment of rights in rem in respect of the debtor's assets". It also received the following wording for inclusion as additional paragraphs in the draft legislative provision on *lex fori concursus*:

> "(X) Notwithstanding paragraph 1 (j), the treatment of a right in rem in respect of the debtor's assets shall be governed by the *lex rei sitae*, if the *lex fori concursus* puts the holder of the right in rem ("right holder") at a substantial disadvantage as compared to the treatment under the *lex rei sitae* [adequate protection].
>
> The *lex fori concursus* shall be deemed to put the right holder at a substantial disadvantage, if it:
>
> (i) Impairs the right holder's entitlement to the value of the encumbered asset under the *lex rei sitae*; or
>
> (ii) Unduly interferes with the right holder's right to a timely liquidation of the right in rem under the *lex rei sitae*."

35. It was explained that the additions were based on paragraphs 31 and 32 of the draft commentary that were elevated to the draft legislative provisions to respond to the needs of some States for more certainty in legislation itself as regards applicable law and conditions for applying it. It was suggested that an accompanying commentary would explain that the aim of the provisions was to protect secured creditors from the undue interference of the *lex fori concursus* and from substantial disadvantage that they might face if the *lex fori concursus* instead of *lex rei sitae* applied to the enforcement of their security interests. A risk of the negative impact of a potentially long stay that might be imposed on secured creditors under *lex fori concursus* was highlighted in that context. Reference was made to internationally accepted standards according to which a collateral was recognized as a risk mitigation technique only if it could be realized timely.[11]

36. While broad support was expressed for the use of the proposed wording as the starting point in future deliberations of item (j) on the *lex fori concursus* list, the following issues were raised in relation to that wording for consideration by the Working Group at its next session:

(a) Superior rights of privileged creditors, such as workers, over secured creditors, as envisaged under the constitution and international obligations of some

[11] See the Basel Framework of the Basel Committee on Banking Supervision (BCBS), available at https://www.bis.org/basel_framework/index.htm.

States, should be recognized. In response, it was observed that those issues could be addressed in the context of the public policy exception and treatment of labour claims;

(b) Reference to rights in rem as opposed to the treatment of secured creditors in item (j) was queried, acknowledging that the former was considerably broader than the latter;

(c) Uncertainty, increased litigation and other negative implications of the need for comparison between effects of *lex fori concursus* and *lex rei sitae* should be carefully considered;

(d) Whether proposed provisions should be limited to immovable property should also be considered. That approach was justified for historical and socioeconomic reasons as well as because the location of immovable property as opposed to movable property was certain. Otherwise, it was argued, multiple laws might apply, especially where rules applicable to localization of assets were not uniform or where localization of assets, such as intellectual property, digital and other similar assets, was difficult, if not impossible, or where a security interest was created over all assets of the debtor (tangible and intangible). That in turn increased uncertainty, unpredictability, complexities as well as risks of practices that strategically undermined the insolvency process and of other abuses;

(e) The meaning of substantive disadvantage and undue interference would need to be clarified, including to reflect the concept of adequate protection;

(f) Preserving more flexibility would be desirable for some States.

37. With reference to the last sentence of paragraph 29 of the draft commentary and in response to questions on whether reference to the *lex fori concursus* in the proposed provisions was intended to be to the law of the State where the centre of the debtor's main interests (COMI) was located, suggestions were made to clarify issues arising from potential or existing parallel proceedings in chapter II more generally at a later stage of deliberations. It was considered necessary to link chapters II and III and each chapter with the UNCITRAL cross-border insolvency framework, such as article 28 of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI).[12] Possible amendments were proposed to the introductory text of chapter II and paragraph 2 of the *lex fori concursus* provision to achieve that result, acknowledging, however, that specific amendments would depend on the final form of the text.

38. The Working Group agreed to retain the provisions as proposed at the session in square brackets for consideration at its next session, together with the issues listed above.

D. Avoidance

39. Different views were expressed as regards draft paragraph 3 in the draft *lex fori concursus* legislative provision, including whether it should be: (a) deleted; (b) retained as drafted; (c) amended by deleting all exceptions to the exception or only the last portion as was done for the exception for close-out netting (see para. 30 (b) above); or (d) presented as drafted or amended as an option for States to enact. Queries were raised whether "acts detrimental to all the creditors" intended to cover only fraud.

40. The Working Group recalled an earlier proposal to link chapters II and III and each chapter with the UNCITRAL cross-border insolvency framework (see para. 37 above). It was considered that introducing those changes in the text might help to find compromises also with respect to avoidance.

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

41. After discussion, the view prevailed that the draft paragraph should be replaced with the following two options that would be placed in square brackets for further consideration by the Working Group:

(a) The first option would allow courts to defer to the insolvency law of the State that was the debtor's COMI at the time of conclusion of the transaction giving rise to avoidance if that deference was necessary for protecting legitimate interests of the parties, including in case of COMI shifts;

(b) The second option would read "The court shall protect the legitimate expectations of a third party at the time of the transaction with respect to the law applicable to insolvency of the debtor", possibly restructured along the lines of paragraph 2 in the draft *lex fori concursus* legislative provision.

42. In view of some delegations, the second option was preferable because it also accommodated situations when the originating court had to defer to the insolvency law of the State where the debtor had an establishment at the time the transaction was concluded. In view of other delegations, the first option was preferable as ensuring certainty and predictability because "legitimate expectations" referred to in the second option would in any event need to be explained in the commentary, most likely with reference to the reliance by the parties at the time of conclusion of their transaction on the insolvency law indicated in the first option.

43. In response to a suggestion to replace "shall" with "may" in the second option, it was explained that, where the court established that legitimate interests were to be protected, the court ought to protect them. After hearing different views on whether courts should have discretion to opt out of the exception, the Working Group requested the secretariat to provide for both mandatory and optional application of both options, for further consideration by the Working Group.

44. Other issues raised with respect to draft paragraph 3 included whether it would be relevant to introduce the notion of "substantial disadvantage", as was done for rights in rem, and definition of *lex causae*, which might be the same as *lex contractus*. It was stressed that any resulting exception with respect to avoidance: (a) did not intend to undermine avoidance as an essential insolvency law tool, as was acknowledged in the ATR project; and (b) would recognize that the *lex fori concursus* was the starting point and that, for its displacement, the burden would be on the defendant to prove that the relevant act could not be avoided under law more closely connected with the act. It was submitted that it had proved to be difficult to satisfy that requirement, with the consequence that the exception might rarely be applied.

E. Set-off

45. The points raised at the earlier sessions of the Working Group with respect to that exception were emphasized.[13] They included that there should be no confusion between substantive insolvency law and applicable law provisions, that applicable law rules in the draft text did not displace private international law rules applicable to the validity and effectiveness of pre-commencement rights and claims, such as set-off, and that the project did not deal with validity and effectiveness of those rights and claims, only with the law applicable to insolvency effects on them.

46. Concern was expressed that the exception found in paragraph 4 of the draft *lex fori concursus* legislative provision as drafted interfered with substantive insolvency law choices made by States as regards the treatment of set-off in insolvency proceedings. For that reason, some delegations supported the deletion of draft paragraph 4. Some other delegations expressed support for retaining the draft paragraph with both exceptions to the exception set out at the end, considering them important safeguards against manipulation and abusive forum shopping. Some other

[13] See A/CN.9/1094, para. 78; A/CN.9/1126, para. 44; A/CN.9/1169, paras. 58–61.

delegations suggested replacing draft paragraph 4 with a solution similar to the one found in paragraph 41 (a) above.

47. After considering implications of different solutions, the Working Group requested the secretariat to provide for the following two options in square brackets for further consideration by the Working Group:

(a) An amended version of draft paragraph 4 reading "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 in the relevant case, insolvency rules of that law [may] [should] [shall] apply unless it has no substantial relationship to the claim and there is no other reasonable basis for applying it"; and

(b) A provision to be drafted according to the approach set out in paragraph 41 (a) above.

48. The Working Group took note that it would need to consider further the impact on draft paragraph 4 of changes suggested for avoidance and rights in rem. While acknowledging that there were many similarities with security interests, a point was made that protection of set-off unlike security interests in insolvency was not uniform and other differences existed between the two, including vis-à-vis third parties.

F. Chapter III

49. A suggestion was received to split the current draft legislative provision in chapter III into several, each dealing separately with a foreign main proceeding, foreign non-main proceeding, a foreign proceeding that was not main and not non-main and a foreign planning proceeding. It was noted that, depending on the form of an instrument, definitions and other provisions, such as on coordination of relief, might need to be added in chapter III. The view prevailed that the draft legislative provision with a broad reference to a foreign proceeding and with the word "(planning)" deleted should be retained.

50. In the light of agreements reached at the current session as regards the need for an appropriate link between chapters II and III (see paras. 37 and 40 above), it was suggested that such a link should be made not only in the draft commentary but also in the draft legislative provision and that could be achieved, for example, by including the following words at the end of that provision "as determined by the court under chapter II." While provisionally accepting that additional wording, the Working Group acknowledged that it would need to be changed if the final form of the text were a model law.

51. After hearing different views on whether the draft legislative provision should stay permissive, the Working Group agreed to keep it permissive in line with the chapeau provision of article 21 (1) of MLCBI. Recalling its deliberations on chapter II at the current session, the Working Group deferred the draft legislative provision as revised at the session for further consideration at its next session, noting that additional issues might need to be reflected in chapter III, such as provisions of article 21 (3) of MLCBI and concerns over COMI shifts.

52. The Working Group received an oral submission by a State that highlighted several issues, some of which had been discussed by the Working Group in the context of chapter II at the current session (see in particular paras. 37 and 40 above) and some of which raised issues similar to those addressed in article 32 of MLCBI. The Working Group agreed to consider that submission in detail at the next session, requesting the proposing delegation to submit it in writing.

G. Arbitration

53. The Working Group heard a suggestion that a stay of arbitral proceedings might need to be elevated to the level of an international public policy across States to achieve its desired effect on ongoing arbitral proceedings. It was noted that the Working Group might wish to formulate such a recommendation to States in the commentary, for example in paragraph 11 of the draft commentary to the *lex fori concursus* list. The view prevailed that the suggestion raised the matter of substantive law outside the scope of the project.

54. Views differed as regards the need to retain references to arbitration agreements in paragraphs 18 and 19 of the draft commentary to the *lex fori concursus* list. The Working Group decided to keep them in square brackets for further consideration.

55. It was agreed that there was no need for arbitration-related definitions in the text, which could instead be explained in the draft commentary, where necessary and appropriately, ensuring consistency with their descriptions in UNCITRAL arbitration texts.[14] It was noted that arbitration-related Latin terms in question were not understood uniformly.

56. Concern was again expressed about the use of Latin terminology. While the Working Group agreed to retain the current terminology, it was noted that the issue could be raised at the Commission.

57. The view prevailed that the text as drafted with respect to other arbitration matters should be retained for further consideration by the Working Group, with issues arising from international mediation possibly to be added. Support was expressed for the *lex fori concursus* to determine effects of insolvency proceedings on ongoing arbitral proceedings, commencement of arbitral proceedings after commencement of insolvency proceedings and enforcement of the award pending the conclusion of the insolvency proceedings. In response, it was recalled that article 18 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)[15] took a different approach. A view was reiterated that a different treatment of arbitration and litigation should be avoided in the project. It was noted that solutions considered for rights in rem might be explored for finding a solution also for arbitration-related matters that remained outstanding in the project. Insolvency law experts in member State delegations to the Working Group were encouraged to consult with relevant arbitration experts in their jurisdictions so as to reach a coordinated position on arbitration-related matters addressed in the project.

VI. Other business

A. Proposals for future work

58. The Working Group had before it a proposal by the delegation of Australia for updating the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (GEI) (A/CN.9/WG.V/WP.199). When introducing the proposal, the delegation highlighted developments that underpinned the proposal that occurred in the area of insolvency law since 2013, when GEI was prepared, including: (a) the adoption of new UNCITRAL insolvency texts, such as the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)[16] and the UNCITRAL Model Law on Enterprise Group Insolvency (2019);[17] and

[14] Available at https://uncitral.un.org/en/texts/arbitration.
[15] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848.
[16] United Nations publication, Sales No. E.19.V.8. Available at https://uncitral.un.org/en/texts/insolvency/modellaw/mlij.
[17] United Nations publication, Sales No. E.20.V.3. Available at https://uncitral.un.org/en/MLEGI.

(b) landmark cases related to MLCBI collected in the CLOUT database[18] and analysed in the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency[19] and elsewhere. Digitalization and increased use of generative artificial intelligence and recent developments, including in the maritime, outer space and environmental areas, were also mentioned. The delegation of Australia clarified that its proposal included holding a colloquium on the topic.

59. Several delegations supported the proposal. Some of them stressed the importance of adding enterprise group perspectives in GEI. The ongoing update of the 2009 Practice Guide on Cross-Border Insolvency Cooperation (see section C below) and the consolidated text of three model laws and its accompanying guidance[20] were considered relevant. A view was expressed that the work on the update of GEI might give the impetus to the enactment of the UNCITRAL cross-border insolvency framework by additional States.

60. On the understanding that the work on the update of GEI should not aim at amending provisions of MLCBI, some delegations supported the proposal, including organizing a colloquium with a view to identifying required updates. A related suggestion was that the colloquium might consider a future work programme of UNCITRAL in the area of insolvency law more broadly.

61. The Working Group received another proposal for a possible future work by UNCITRAL in the area of insolvency law aimed at addressing climate change and environment protection aspects arising in insolvency proceedings. Several delegations expressed support for the proposal, some of them suggesting that the same or a separate colloquium might help to delineate topics for future work on that topic as well. Other delegations, referring to deliberations and outcomes of two colloquiums held by UNCITRAL on climate change, urged cautious approach. A view was expressed that the update of GEI should be the priority for UNCITRAL while the second proposal could be taken up at a later stage. Another view was that discussion of climate change issues should be held in other United Nations bodies under relevant international law frameworks.[21] The alternative view was that UNCITRAL would not duplicate or interfere in the work of other relevant United Nations bodies if it addressed purely technical aspects of relevance to climate change that judges and other practitioners faced in insolvency cases.

62. The Working Group recommended to the Commission to consider those proposals at its next session, in 2025, including organization of possible colloquium(s).

B. Future dates

63. The Working Group took note of dates allocated to its sixty-sixth session (12–16 May 2025) and tentative dates for its sixty-seventh session (10–14 November 2025).[22] The Working Group was informed that, although the tentative dates were subject to approval by the Commission at its fifty-eighth session, in 2025, the Commission emphasized the need to ensure that tentative dates allocated to working groups should remain unchanged to the extent possible.[23]

[18] Further information is available at https://uncitral.un.org/en/case_law.
[19] Available at https://uncitral.un.org/en/texts/insolvency.
[20] Available at https://uncitral.un.org/en/consolidated-text-uncitral-model-laws-cross-border-insolvency-recognition-and-enforcement.
[21] I.e. the United Nations Framework Convention on Climate Change (UNFCCC) and its protocols.
[22] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 17* (A/79/17), para. 375.
[23] Ibid.

C. Update of the Practice Guide

64. Following its endorsement of the secretariat plans to seek a mandate from the Commission to update the 2009 *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*,[24] the Working Group heard that the Commission, at its fifty-seventh session, in 2024, requested the secretariat to update that publication in consultation with experts and present an updated text for review by the Working Group before transmitting it to the Commission for consideration and finalization.[25] The Working Group noted the plans of the secretariat to present an updated draft of the Practice Guide to the Working Group in 2026.

65. The Working Group was also informed that, in parallel with updating the Practice Guide, the secretariat was preparing in the six official languages of the United Nations training materials covering the entire UNCITRAL cross-border insolvency framework, for use by the UNCITRAL secretariat and other interested organizations in their judicial and other capacity-building programmes in the area of insolvency law. The Working Group was also informed about a recent launch of the UNCITRAL online course on UNCITRAL insolvency texts at https://uncitral.un.org/en/onlinecourses.

[24] A/CN.9/1169, para. 90.

[25] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 17* (A/79/17), para. 256.