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Applicable law in insolvency proceedings

Note by the Secretariat

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I. Introduction

1. The provisional agenda of the sixty-third session of the Working Group (A/CN.9/WG.V/WP.188) provides background information about the project on applicable law in insolvency proceedings referred to the Working Group by the Commission at its fifty-fourth session, in 2021.[1] At its sixty-second session (New York, 17–20 April 2023), the Working Group requested the secretariat to revise draft legislative provisions and commentary reflecting deliberations at the session.

2. The secretariat sets out revised draft legislative provisions and commentary in chapter II below. The footnotes in bold accompanying the draft legislative provisions and commentary indicate the source for the most recent revisions. Other footnotes accompanying those materials intend to stay in the final text as appropriate depending on its final form. Issues for consideration by the Working Group are set out before the draft materials. Although the Working Group agreed to proceed on a working assumption that the text would take the form of a model law,[2] provisionally, the secretariat retains references to the legislative provisions on the understanding that they will be replaced in due course by references appropriate for the agreed form of the instrument. Other revisions would be required to be made throughout the text depending on the final form of the text and on how the text will relate to other UNCITRAL texts in the area of insolvency law.

II. Draft legislative provisions with accompanying commentary

Chapter I. General provisions

A. Purpose and objectives

3. The Working Group may wish to consider the draft legislative provision and commentary that have been revised to reflect the deliberations of the Working Group at its sixty-second session. The Working Group has not yet decided on whether to keep reference to “abusive forum shopping”. At its sixty-second session, it was suggested to replace the word “abusive” with the word “prejudicial”.[3] That suggestion was added in square brackets for consideration by the Working Group.

1. Draft legislative provision

Preamble

The purpose of these legislative provisions is to provide clear rules for determining the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects (the “governing law”), including in concurrent proceedings with respect to a single debtor or members of an enterprise group, so as to achieve the key objectives of effective and efficient insolvency proceedings, including legal certainty and predictability, and to reduce the risk of [abusive][4] [prejudicial][5] forum shopping and other acts detrimental to creditors and other parties in interest.

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 215–217.
[2] A/CN.9/1126, para. 80.
[3] A/CN.9/1133, para. 29 (b).
[4] **A/CN.9/1126, para. 58.**
[5] **A/CN.9/1133, para. 29 (b)**.

2. Draft commentary

1. The legislative provisions provide rules for determining the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects (the "governing law"). They aim to establish clarity in that respect especially for insolvency proceedings involving assets or parties located in different States.

2. Achieving clarity on those matters is desirable for the various reasons. It is generally accepted across States that the law of the place in which insolvency proceedings are commenced (the lex fori concursus) normally governs the procedural aspects of insolvency proceedings, such as commencement, conduct, administration and closure of insolvency proceedings. However, different criteria are used for determining the law governing the effects of insolvency proceedings on certain types of assets, rights and claims (e.g. rights in rem, set-off rights). There are exceptions to the application of the lex fori concursus in those cases in some States, while in other States the law may be silent on those issues or address them only partly. The diversity in the number and scope of those exceptions, or the absence of any rules on those matters, with the result that courts are left to determine the governing law on a case-by-case basis, creates uncertainty and unpredictability.

3. Ascertaining the governing law becomes more complex when several proceedings take place concurrently in respect of the same debtor or members of an enterprise group, each being subject to its own rules for determining the governing law. Concurrent proceedings may be any combination of a foreign main proceeding (one of which may become the planning proceeding under the UNCITRAL Model Law on Enterprise Group Insolvency[6] (MLEGI)), a foreign non-main proceeding and an insolvency proceeding that is neither a foreign main nor a foreign non-main proceeding opened at the location of the debtor's assets (see article 28 of the UNCITRAL Model Law on Cross-Border Insolvency[7] (MLCBI)). Some of those proceedings may become the subject of a recognition proceeding in other States that may or may not open local ancillary insolvency proceedings. The recognizing State may apply its own law to issues such as the scope of the automatic relief resulting from the recognition of a foreign main proceeding (article 20 (2) of MLCBI), discretionary relief (articles 19 (1) (c) and 21 (1) (g) of MLCBI), additional assistance (article 7 of MLCBI) and allocation of assets between or among different proceedings (articles 21 (3), 23 (2), 28 and 29 (c) of MLCBI). The recognizing State may or may not recognize the effects of the foreign lex fori concursus (of main, non-main or other insolvency proceedings). Those concurrent or parallel proceedings necessitate clarification of the governing law or the coordination of the application of several governing laws.

4. Earlier UNCITRAL insolvency texts do not explicitly[8] address those matters. They facilitate cross-border recognition and enforcement of effects of the lex fori concursus of the foreign main proceeding only to some extent.

5. The main purpose of these legislative provisions is to fill in those gaps by offering simple and clear rules to address the governing law that States can incorporate in their domestic law. The legislative provisions do so by: (a) establishing a general rule that the law of the State of the opening of insolvency proceedings (the lex fori concursus) governs all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects on persons, rights, claims and proceedings; (b) explaining the meaning and scope of that law; (c) providing for a limited number of exceptions to that rule; (d) delineating the scope of each exception

[6] United Nations publication, Sales No. E.20.V.3. UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019) | United Nations Commission on International Trade Law.

[7] United Nations publication, Sales No. E.14.V.2. Available at UNCITRAL Model Law on Cross-Border Insolvency (1997) | United Nations Commission on International Trade Law.

[8] **A/CN.9/1133, para. 29 (a)**.

and specifying when each of them applies; [and (e) establishing rules for determining the governing law, or coordinating the application of several governing laws, in concurrent proceedings with respect to a single debtor or members of an enterprise group].[9]

6. Adherence to the framework suggested in the legislative provisions may help reducing divergences and filling in gaps left by fragmented or incomplete rules on the matters addressed in the legislative provisions. This in turn is expected to enhance: (a) certainty and predictability of outcomes of insolvency proceedings on the rights and claims of parties affected by those proceedings; (b) efficiency and effectiveness of insolvency proceedings through reduction of complexities and costs; (c) coordination of cross-border insolvency proceedings; and (d) trade and investment.

7. In addition, by adhering to the legislative provisions, States may reduce the risk of [abusive] [prejudicial] forum shopping and other acts detrimental to creditors and other parties in interest. What would be considered ["abusive"] ["prejudicial"] would be determined by a court on a case-by-case basis. Identifying the optimum forum, including for restructuring or reorganization, is generally acceptable across States. However, the choice made for the detriment of the general body of creditors or for other improper purposes (e.g. evading obligations or liabilities, sheltering assets from the effects of the otherwise applicable insolvency law) is usually considered [abusive] [prejudicial].

8. The legislative provisions aim to achieve an appropriate balance between competing considerations that may be involved in insolvency proceedings. For example, the consideration of efficiency may justify that the court in the State of the opening of insolvency proceedings apply the lex fori concursus to all issues arising in the insolvency proceedings because that court is best positioned to articulate and apply its own law; where the court applies a foreign law, it may face the need to learn about the content and interpretation of that other law and deal with foreign legal categories that may be unknown to its legal system. However, other considerations, for example with respect to the proper regime for labour contracts and relationships, may outweigh the consideration of efficiency and require the application of foreign law.

9. The scope of the legislative provisions is limited to rules for determining the governing law and does not extend to rules for determining the law applicable to the validity and effectiveness of rights or claims existing at the time of the commencement of insolvency proceedings. That law remains to be determined by the generally applicable rules of private international law (conflict-of-laws) (henceforth referred to as "PIL rules") of the State in which insolvency proceedings are commenced or of the other forum State where insolvency-related proceedings may be brought (e.g. adjudication of claims or avoidance). Insolvency proceedings and the governing law do not displace those generally applicable PIL rules but they may produce effects on the valid and effective pre-commencement rights, for example, by suspending or terminating: the right to commence an arbitral proceeding under an arbitration agreement concluded by the debtor with its creditors before the commencement of insolvency proceedings; the right of a creditor to offset its claims against the debtor; rights arising from transactions that were avoided in the insolvency proceeding; and the rights of enforcement.[10]

[9] **Ibid., para. 28**.
[10] **Ibid., para. 29 (a)**.

B. Scope of application of the legislative provisions

4. The Working Group may wish to consider the draft legislative provision and commentary, revised to reflect deliberations in the Working Group at its sixty-second session. The Working Group may wish to recall that, at that session, with reference to the definition of an "insolvency proceeding" in the then draft UNIDROIT principles on digital assets and private law,[11] the Working Group was invited to consider whether the legislative provisions should apply also to restructuring proceedings that might not be captured by UNCITRAL's definition of "insolvency proceedings".[12] It may also wish to recall that there was a suggestion in the Working Group to add in the commentary, in the list of proceedings captured by UNCITRAL's definition of insolvency proceedings, reference to pre-packs and to explain that term.[13] It may also wish to recall that, at the same session, a suggestion was made to list entities excluded from the scope of application of the legislative provisions either in the scope provision itself or in the accompanying commentary (referring, among others, to insurance, reinsurance, banking institutions and entities operating under public law).[14] The Working Group did not consider those points at that session and may wish to do so at its sixty-third session.

5. With respect to the first point, the Working Group may wish to recall its deliberations leading to amendments of the 1997 Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and adoption by UNCITRAL in 2013 of the revised version of the Guide, which it called the Guide to Enactment and Interpretation (GEI). At that time, the Working Group had discussed, among others, hybrid proceedings and the MLCBI-related case law related to the definition of "foreign proceeding".[15] As a result of those discussions, the cumulative list of requisites of UNCITRAL for a proceeding to be considered a foreign proceeding, in particular the requisites of financial distress of the debtor (actual or imminent insolvency) and control or supervision (present, past or potential) of assets and affairs of the debtor by the court, was reinforced.[16] The commentary to the definition of "insolvency proceeding" in the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ)[17] and MLEGI[18] builds on and cross-refers to the commentary to the definition of "foreign proceeding" in the GEI.[19] As regards "pre-packs", the Working Group may wish to recall that, as noted in the draft commentary below, the term "reorganization" as used in UNCITRAL insolvency texts includes the sale of the business (or part of it) as a going concern. The Working Group may wish to consider whether, consequently, different types of pre-pack

[11] References to "insolvency proceeding" in that text have since changed to references to "insolvency-related proceeding" defined in the Principles adopted by the UNIDROIT Governing Council at its 102nd session (Rome, 10–12 May 2023) as "a collective judicial or administrative proceeding, including an interim proceeding, in which, for the purpose of reorganisation or liquidation, at least one of the following applies to the assets and affairs of the debtor: (a) they are subject to control or supervision by a court or other competent authority; (b) the debtor's ability to administer or dispose of them is limited by law; (c) the debtor's creditors' ability to enforce on them is limited by law" (Principle 2 (6)). The adopted Principles are available at www.unidroit.org/wp-content/uploads/2023/04/C.D.-102-6-Principles-on-Digital-Assets-and-Private-Law.pdf.

[12] A/CN.9/1133, paras. 25 and 29 (f).

[13] Ibid., para. 29 (e).

[14] Ibid., para. 29 (c).

[15] See e.g. A/CN.9/738, para. 15.

[16] GEI, paras. 48–51 and 65–78.

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

[18] See the Guide to Enactment of MLIJ, paras. 48–49, and the Guide to Enactment of MLEGI, para. 40.

[19] For the related deliberations in the Working Group when those model laws were prepared, see e.g. A/CN.9/937, para. 113; A/CN.9/966, paras. 121–122, 127–129 and 131–132; and A/CN.9/972, para. 37.

procedures[20] are covered by expedited reorganization proceedings.[21] As regards paragraph 3 of the draft legislative provision, the Working Group may wish to agree on its formulation, which will inform the content of accompanying commentary.[22]

1. Draft legislative provision

Scope of application

1. The legislative provisions provide rules for determining the governing law.

2. The legislative provisions do not provide rules for determining the law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings. The law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings shall be determined by the private international law rules of the State where insolvency proceedings are commenced or other relevant forum State. Except as provided in these legislative provisions, these legislative provisions do not displace those rules.

3. [The legislative provisions do not apply to a proceeding concerning financial, insurance and reinsurance institutions as well as entities operating under public law].

[20] The common feature of such procedures is that arrangements with respect to an insolvent or distressed business are negotiated among those interested and concerned and put in place before commencement of an insolvency proceeding, for example the sale of the business (or parts thereof) as a going concern to a pre-determined buyer. The outcome of those arrangements is presented for approval by the court. Upon approval, an expedited liquidation or reorganization with respect to the debtor takes place.

[21] Recommendations 160–168 of the Guide and accompanying commentary.

[22] The secretariat was not in a position to draft a commentary at this stage since the Working Group has not yet agreed whether: (a) the legislative provisions are intended to apply to any insolvency proceeding without exception; (b) the legislative provisions are contemplated to apply to all insolvency proceedings, at the same time acknowledging that States could exclude from the scope of application of the legislative provision some proceedings, such as those concerning financial, insurance and reinsurance institutions as well as entities operating under public law, but such exclusions are discouraged; (c) the legislative provisions are contemplated to apply to all insolvency proceedings, at the same time acknowledging that States could exclude from the scope of application of the legislative provisions some proceedings, such as those concerning financial, insurance and reinsurance institutions as well as entities operating under public law, and such exclusions are encouraged; or (d) the legislative provisions are clearly contemplated not to apply to insolvency proceedings concerning some entities, such as financial, insurance and reinsurance institutions as well as entities operating under public law (the latter approach has been reflected in the draft further to the suggestions made at the sixty-second session of the Working Group).

2. Draft commentary

General

1. The scope of application of the legislative provisions is linked to the notions of "insolvency proceedings"[23] and "commencement of insolvency proceedings".[24] UNCITRAL insolvency texts set out a cumulative list of requisites that a proceeding must meet in order to be considered an "insolvency proceeding": (a) collective proceeding (judicial or administrative);[25] (b) pursuant to a law relating to insolvency (which includes company law);[26] (c) under control or supervision by a court (which includes the debtor-in-possession);[27] (d) with respect to a debtor (natural or legal person) that is in severe financial distress or insolvent;[28] and (e) with the goal of liquidating or reorganizing that debtor as a commercial entity.[29]

2. "Insolvency proceedings" under UNCITRAL insolvency texts encompass: (a) "liquidation", defined as proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law;[30] (b) "reorganization", defined as the process by which the financial well-being and viability of a debtor's business can be restored and the business can continue to operate, using various means, possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or part of it) as a going concern;[31] (c) "expedited reorganization proceedings" that combine voluntary restructuring negotiations and acceptance of a plan with an expedited procedure conducted under the insolvency law for court confirmation of that plan;[32] (d) simplified insolvency proceedings;[33] and (e) interim, restructuring and any other proceeding, that the court may ascertain on a case-by-case basis as meeting the cumulative list of the requisites set out above.[34]

3. Any other proceedings that do not meet the requisites set out above would fall outside the scope of application of the legislative provisions. For example, a debt collection proceeding or receivership initiated by a particular creditor or group of creditors or gathering up assets in winding-up or conservation proceedings that do not also include provision for addressing the claims of other creditors are excluded.[35]

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[23] The Glossary in the UNCITRAL Legislative Guide on Insolvency Law (the "Guide" and the "Glossary"), terms (s) and (u), to be read together and also with the explanation provided in the Guide, part one, para. 2; the Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) (GE), paras. 22, 48 and 49; and the Guide to Enactment and Interpretation of MLCBI (GEI), paras. 48–51 and 65–80.

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

[25] GEI, paras. 69–72.

[26] GEI, para. 73.

[27] Recommendation 112 of the Guide, and GEI, paras. 71, 74–76, and 86.

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

[29] GEI, paras. 77–78.

[30] The Glossary, term (w).

[31] The Glossary, term (kk).

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

[33] The Guide, part five.

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

[35] GEI, para. 69.

A judicial or administrative proceeding for a solvent entity that does not seek to restructure its financial affairs but rather to dissolve its legal status is also excluded.[36] Financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt, where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law, are also outside the scope of the legislative provisions.[37] In addition, proceedings that are designed solely to prevent dissipation and waste of assets, rather than to liquidate or reorganize the insolvency estate, as well as proceedings designed to prevent detriment to investors rather than to all creditors, are also excluded.[38]

Paragraph 1

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

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

6. Examples of issues covered by (b) include: the relative position of claims vis-à-vis each other (i.e. the ranking and priorities); avoidance; and restrictions and modifications to which the pre-commencement rights and claims may become subject in order to fulfil the collective aims of insolvency proceedings (e.g. a stay of proceedings[39] or subordination).

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

Paragraph 2

8. As stated in paragraph 2 of the legislative provision, the legislative provisions do not establish rules for determining the law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings. To determine that law, the court that controls or supervises the insolvency proceeding or another court adjudicating an insolvency-related matter will apply the generally applicable PIL rules of its State, including any international conventions or other agreements in force for that State. This approach is reflected in recommendation 30 of the UNCITRAL Legislative Guide on Insolvency Law[40] (the

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

[37] GEI, para. 78.

[38] GEI, para. 77.

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

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

"Guide"). For example, typically, the law governing the contract will determine if a contractual claim exists against the debtor and the amount of that claim; and the law of the State where immovable assets are located will determine if, for example, a security interest in those assets has been created. These legislative provisions do not displace the generally applicable PIL rules and the applicable law resulting from the application of those rules.

9. Neither the legislative provisions establish rules for localization of assets. Those rules are part of the generally applicable PIL rules and may be found in other international instruments.[41]

10. Likewise, the legislative provisions do not establish jurisdictional rules. Although relevant to the governing law, in particular recognition and enforcement of effects of that law across borders, jurisdictional rules are addressed in other texts.[42] For example, the Guide recommends that the insolvency law should specify which debtors have sufficient connection to the State to be subject to its insolvency law, specifically recommending that the grounds upon which a debtor can be subject to the insolvency law should include that the debtor has either the centre of its main interests (COMI) or an establishment in the State.[43]

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

12. Nevertheless, insolvency proceedings produce effects on pre-commencement rights and claims (for examples of such effects, see para. 6 above).[44] According to these legislative provisions, those effects are determined by the governing law with the consequence that the generally applicable PIL rules do not apply to those matters.

Paragraph 3

[*To be elaborated, see para. 5 before the draft legislative provision*].

C. Definitions

6. Although the desirability of using Latin terms in the text was questioned, the prevailing view favoured their continued use.[45] No comments were made with respect to the definition of the "lex fori concursus" itself but a suggestion was made with respect to its accompanying draft commentary, in particular to delete examples (d), (e) and (f).[46] The Working Group did not consider that suggestion. In sections below, the secretariat reproduced the definition itself unchanged and kept examples (d), (e) and (f) in square brackets pending the Working Group's agreement on that point. In the light of deliberations at the sixty-second session of the Working Group, the secretariat added terms "lex rei sitae" and "lex societatis". They appear in square brackets for further consideration by the Working Group. The Working Group may wish to consider whether the explanation of the term "lex rei sitae" taken from the Guide[47] should be expanded by reference to the law of the State under authority of

[41] E.g. articles 90 and 91 of the UNCITRAL Model Law on Secured Transactions.
[42] E.g. article 14 (g) of MLIJ and paras. 110–115 of the GE.
[43] See recommendation 10 and its accompanying commentary. A footnote to that recommendation notes that other grounds, such as presence of assets, are used in some States, but are not recommended in the Guide.
[44] For examples of UNCITRAL and other international instruments that recognize effects of insolvency proceedings on pre-commencement rights and claims, see e.g. recommendations 3 and 88 of the Guide; recommendation 223 of the UNCITRAL Legislative Guide on Secured Transactions and the commentary to article 94 of the UNCITRAL Model Law on Secured Transactions; and article 14.2 of the UNIDROIT Convention on Substantive Rules for Intermediated Securities.
[45] A/CN.9/1133, para. 29 (h).
[46] Ibid., para. 29 (g).
[47] Glossary, term (y).

which the register in which the asset has been registered is kept. Because of a number of outstanding issues related to a possible exception to the lex fori concursus for ongoing arbitral proceedings (see below), the secretariat did not propose the definition of the "lex arbitri" at this stage. (For a possible additional term for inclusion in the Definition section, see para. 12 below.)

1. Draft legislative provision

Definitions

For the purposes of these legislative provisions:

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

(b) ["Lex rei sitae" means the law of the State where the asset is situated;] and

(c) ["Lex societatis" means the law of the State that governs the internal affairs of the debtor.]

2. Draft commentary

Lex fori concursus

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

2. Where the lex fori concursus defers to the law of another State, that deference should be understood as deference only to the substantive internal law of that State, not PIL rules of that State, which means that renvoi is not envisaged. This is in line with the approaches taken in other international texts.[48] The goal of that approach is to promote certainty as regards applicable law. In addition, the reference to the law of a foreign State would not encompass that State's public law, i.e. the law relating to the exercise of sovereign powers. Nevertheless, the lex fori concursus may address the treatment and ranking of foreign public claims (e.g. tax and social security claims).[49] The reference to the law of a foreign State does not encompass procedural law either, since courts apply their own procedural law and do not apply any foreign rule that they consider procedural. As discussed in these legislative provisions in the relevant contexts, some matters (e.g. a set-off or limitation period) may be qualified as substantive or procedural, depending on the legal systems. The legislative provisions point to the law that will govern those matters in insolvency proceedings.

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

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

[*Lex rei sitae*

3. "Lex rei sitae" is defined as the law of the State where the asset is situated. References to the "lex rei sitae" appear throughout the legislative provisions and accompanying commentary in the context of a possible exception to the lex fori concursus for certain type of property, such as real estate, and rights in rem, such as security rights.]

[*Lex societatis*

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

5. There is no uniform approach to determining the lex societatis. Some States follow the "incorporation" approach, while other States follow the "real seat" approach with the understanding of the latter not being uniform either. Under the "incorporation" approach, the law of the State in which the company is formed or incorporated applies to all aspects of governance of that company; under the "real seat" approach, the law of the country where the company has its "real" seat (i.e. its management and control centre) governs those matters. While similar and linked to the factors relevant to the determination of COMI (see the commentary to item (t) on the lex fori concursus below),[50] different connecting factors used for determining the lex societatis are not directly relevant to these legislative provisions. The term is used in the legislative provisions simply to convey the principle that the application of the lex societatis to the debtor's internal governance matters would remain unaffected by the commencement of insolvency proceedings except for very limited aspects of directors' obligations in the period approaching insolvency arising under insolvency law after the commencement of insolvency proceedings.]

D. Primacy of international obligations

7. At its sixty-first session, the Working Group agreed that a provision on the primacy of international obligations would need to be included unless the final text would take the form of a supplement to the UNCITRAL insolvency model laws where such provision was already found.[51] At its sixty-second session, the Working Group noted that, because the decision about the form of the final text was outstanding, the secretariat considered it premature to draft a provision and an accompanying commentary on the matter. If the need for its inclusion arises, the provision and its accompanying commentary might build on article 3 of MLCBI, MLIJ and MLEGI and its accompanying commentary. As suggested in the Working Group, the commentary to that provision may be expanded with references to treaties and other international instruments that address conflicts of law in insolvency proceedings, such as the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001) (the "Aircraft Protocol")[52] and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "EIR recast").[53]

[50] See e.g. GEI, paras. 145–147.

[51] A/CN.9/1126, para. 54.

[52] Available at: www.unidroit.org/instruments/security-interests/.

[53] Binding and directly applicable in European Union (EU) member States. Its scope is limited to insolvency proceedings in respect of a debtor whose COMI is located in the EU (see recital 25).

E. Public policy exception

8. The draft legislative provision remains substantively the same as at the sixty-second session of the Working Group. It appears in square brackets for further consideration by the Working Group in the light of views expressed at that session.[54] The accompanying commentary was revised further to the comments made at the sixty-second session of the Working Group. As drafted, the public policy exception is relevant to chapter II of the draft text (the governing law in a single domestic insolvency proceeding) and may be placed there instead of chapter I. Depending on the results of the Working Group's consideration of cross-border issues (see chapters III and IV below), this public policy exception could be supplemented by a public policy exception that would be applicable in the cross-border contexts (unless, depending on the final form of the text, provisions on a public policy exception in MLCBI, MLIJ and MLEGI would be considered sufficient in that context).

1. Draft legislative provision

Public policy exception

[The court may refuse the application of the law determined in accordance with these legislative provisions [only][55] if the effects of the application of that law would be manifestly[56] contrary to the public policy of the court's State.][57]

2. Draft commentary

1. The legislative provisions include a public policy exception that aims at allowing courts to disapply the otherwise applicable law if applying that law would be manifestly contrary to the public policy of the court's State.

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

3. Public policy implications of applying the law designated by these legislative provisions are to be assessed in each concrete case. In accordance with the intended narrow and restrictive interpretation and application of the legislative provision, a public policy exception may be expected to be invoked where the relevant foreign rule, as applied to the facts of the case, would infringe the security or sovereignty of the forum State or produce a result which departs so radically from that State's

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The EIR recast replaced and superseded Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, which in turn was based on the Convention on Insolvency Proceedings (done at Brussels on 23 November 1995), which did not enter into force. Articles 7 to 18 of the EIR recast contain rules on the law applicable in insolvency proceedings.

[54] A/CN.9/1133, para. 29 (j).

[55] **Ibid. At the sixty-second session of the Working Group, in response to suggestions to delete the word "only" in the draft provision on public policy exception, an alternative suggestion was to retain that word, or the draft provision in its entirety, in square brackets for further consideration. Doubts were expressed that the establishment of two sets of standards of different levels of rigidity for a public policy exception in the domestic and cross-border insolvency recognition contexts would be justified.**

[56] **At the sixty-first session of the Working Group, in response to the suggestion to delete the word "manifestly" from the draft legislative provision, the prevailing view was to retain it (A/CN.9/1126, para. 66).**

[57] **A/CN.9/1133, para. 29 (j). See footnote 55 above.**

concepts of fundamental justice that its application would be intolerably offensive to that State's basic values. This could be the case, for example, when applying the law designated by these legislative provisions would have the consequence of effectively legitimizing illegal schemes or practices (for example, evasion of mandatorily applicable law and obligations, such as environmental, human rights and other social responsibilities, or the use of law for attaining politically motivated goals).

4. The consequences of disapplying the otherwise applicable law on grounds of public policy would be addressed in the domestic law of the forum State. Depending on connecting factors, the lex fori concursus or another law may apply instead of the disapplied one.[58]

F. Interpretation

9. At its sixty-first session, the Working Group agreed that a provision on interpretation would need to be included unless the final text would take the form of a supplement to the UNCITRAL insolvency model laws where such provision was already found.[59] At its sixty-second session, the Working Group noted that, because the decision about the form of the final text was outstanding, the secretariat considered it premature to draft a provision and an accompanying commentary on the matter. If the need for its inclusion arises, the provision and its accompanying commentary may build on article 8 of MLCBI and MLIJ and article 7 of MLEGI and their accompanying commentary. As suggested in paragraph 62 of document A/CN.9/WG.V/WP.183/Add.1, additional elements may be included in the future commentary to reflect the distinct scope of the project, in particular that the application of the legislative provisions may lead to the application of a foreign law and, consequently, determination and verification of that law and the engagement of foreign legal cultures, systems and concepts. In such situations, there could be an elevated tendency towards references to the local concepts and rules. Such tendencies should be avoided to achieve a uniform interpretation and application of the legislative provisions. When a question concerning a matter governed by the legislative provisions is not expressly settled therein, it would be expected to be settled in conformity with the general principles on which the legislative provisions are based. Where necessary, analogous legal rules could be applied to produce the effects intended under the legislative provisions.

Chapter II. The governing law in a single domestic insolvency proceeding

A. The default rule: the lex fori concursus

10. The draft legislative provision and accompanying commentary were revised further to the views expressed at the sixty-second session of the Working Group. Parts of the draft commentary that refer to difficulties with cross-border recognition and enforcement of effects of the lex fori concursus have been retained in the draft commentary below in square brackets for further consideration of their location depending on the outcome of the Working Group's consideration of cross-border aspects (see chapters III and IV below). Those parts could be removed from chapter II and used for drafting a consolidated commentary to cross-border aspects, or they could be retained in chapter II with appropriate cross references to the other parts of the text that would address those difficulties.

[58] **A/CN.9/1133, para. 29 (k)**.
[59] A/CN.9/1126, para. 55.

11. At the sixty-second session of the Working Group, a suggestion was made to add "voidness of acts" in item (g).[60] The Working Group may wish to agree on the formulation of that item, noting that the current formulation was taken from recommendation 31 of the Guide. It may wish to recall in that regard that the term "avoidance (provisions)" is defined in the Guide as provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.[61] The Working Group may also wish to recall that article 23 of MLCBI refers in the same context to "actions to avoid or otherwise render ineffective acts detrimental to creditors". The term "avoidance" as defined in the Guide or as amended by the Working Group for the purposes of this project could be included in the Definition section of the legislative provisions and used consistently throughout the text for simplicity.

12. A new paragraph 2 was added in the draft legislative provision to enable the forum court, when necessary, to apply the law of another State on a case-by-case basis. That suggested provision is unlike the generally applicable exceptions to the lex fori concursus envisaged in the draft legislative provisions for the labour contracts and payment and settlement systems and regulated financial markets. The provision on case-specific application of the law of another State was drafted on the basis of the recurrent issues raised at the previous sessions of the Working Group, in particular with respect to: (a) avoidance;[62] (b) contracts relating to immovable property;[63] and (c) the treatment of secured creditors (or more broadly rights in rem)[64] (see items (g), (h) and (j), respectively, on the lex fori concursus list). The addition of that provision may alleviate the need for drafting a separate exception or variants for each item with respect to which those issues were raised. No accompanying commentary was drafted for that newly suggested provision pending its consideration by the Working Group. The commentary alone or also the legislative provision itself may illustrate circumstances when deviations from the lex fori concursus might be needed, for example: (a) where cross-border recognition and enforcement of effects of the domestic insolvency proceeding would need to be ensured in States where the immovable property is located. In those cases, the forum court may decide to apply the lex rei sitae; (b) to minimize the commencement of parallel proceedings, including by facilitating the treatment of claims in the domestic insolvency proceeding that could otherwise be brought by a creditor in an insolvency proceeding in another State. In those cases, the forum court may authorize the locally appointed insolvency representative to give undertakings to foreign creditors like those envisaged under articles 28–32 of MLEGI; and (c) to provide greater legal certainty for trade and investment in particular in conjunction with rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets situated in another State at the time of the opening of proceedings. In those cases, the insolvency law of another State (e.g. where the assets are located) may be made applicable to govern effects of insolvency proceedings on those rights.

13. At its sixty-first session, the Working Group heard a view that specific issues arising from the insolvency of individuals would need to be addressed in the project.[65] The Working Group may wish to consider that matter as well.

[60] A/CN.9/1133, para. 30.
[61] The Glossary, term (c); and also, the Guide, part five, section two, term (a).
[62] A/CN.9/1133, paras. 30–36; A/CN.9/1126, para. 43; and A/CN.9/1094, paras. 74–76.
[63] A/CN.9/1133, para. 42 (a); and A/CN.9/1126, para. 49.
[64] A/CN.9/1133, paras. 37–41; A/CN.9/1126, paras. 45–48; A/CN.9/1094, para. 79; and A/CN.9/1088, para. 65 (c).
[65] A/CN.9/1126, para. 72.

1. Draft legislative provision

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

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

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

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

(c) Constitution and scope of the insolvency estate;

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

(e) Use and disposal of assets;

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

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

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

(i) Treatment of set-off;

(j) Treatment of secured creditors;

(k) Rights and obligations of the debtor;

(l) Duties and functions of the insolvency representative;

(m) Functions of the creditors and creditor committee;

(n) Treatment of claims;

(o) Ranking of claims;

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

(q) Distribution of proceeds;

(r) Closure of the proceedings;

(s) Discharge; and

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

[2. Nothing in paragraph 1 of this legislative provision precludes the State from authorizing or requiring its courts to determine the effects of a domestic insolvency proceeding on rights and obligations of creditors and other parties in interest, including the debtor, in that proceeding, on a case-by-case basis in accordance with the law of another State where applying that other law will be necessary for: (a) the fair and efficient administration of that proceeding; (b) the protection of creditors and other parties in interest, including the debtor, in that proceeding; (c) the protection and maximization of the value of the insolvency estate; or (d) the cross-border recognition and enforcement of effects of that proceeding.]

[The need for applying the law of another State to the effects of a domestic insolvency proceeding on rights and obligations of creditors and other parties in interest, including the debtor, in that proceeding may arise in particular:

(a) Where the counterparty to a transaction subject of avoidance provides proof that the law of a State that applies to the transaction does not allow avoiding the transaction in the relevant case. That other law [may][should][shall] apply unless it has no substantial relationship to the parties or the transaction and there is no other reasonable basis for applying that law to the transaction.

(b) With respect to transactions with immoveable property situated in another State. The [insolvency law of that State] [the lex rei sitae] [may] [should] [shall] apply;

(c) Where the rights of rem of creditors or third parties are in respect of [assets of the debtor] [insolvency estate assets] [assets of the debtor that should belong to the insolvency estate] situated in another State at the time of the commencement of insolvency proceedings. The [insolvency law of that State] [lex rei sitae] [may] [should] [shall] apply;

(d) With respect to a ship, an aircraft or another asset subject to registration. The law of the State under which authority the register where the asset has been registered is kept [may] [should] [shall] apply;

(e) With respect to the right of creditors under the law applicable to the debtor's claim to demand the set-off of their claims against the claims of the debtor. That law [may] [should] [shall] apply unless it has no substantial relationship to the claim and there is no other reasonable basis for applying that law to the claim.]

2. Draft commentary

General

1. Under these legislative provisions, the lex fori concursus governs all aspects of insolvency proceedings and their effects unless explicitly stated otherwise. The observed convergence of substantive insolvency rules should make the application, as a rule, of the lex fori concursus to all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects less problematic.

2. The legislative provisions make the lex fori concursus applicable first to all aspects of the commencement, conduct, administration and closure of insolvency proceedings. Those aspects cover: (a) procedural matters (such as serving notices, convening meetings, establishing the quorum, ascertaining voting rules or specifying deadlines for submission of claims);[66] and (b) all post-commencement rights, obligations and claims, i.e. those arising from the insolvency proceedings, such as claims against the insolvency representative or in relation to post-commencement finance, realization of the insolvency estate or distribution of proceeds.

3. The legislative provisions make the lex fori concursus applicable also to the effects that insolvency proceedings produce, including on rights, claims and obligations that existed before the commencement of insolvency proceedings. For example, although under recommendation 4 of the Guide, a security interest effective and enforceable under law other than the insolvency law should be recognized in insolvency proceedings as effective and enforceable, enforcement of security rights may be stayed under the lex fori concursus unless and until the court grants relief from the stay (recs. 46–51 of the Guide). In addition, under recommendation 88 of the Guide, a security interest effective and enforceable under law other than the

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

insolvency law may be subject to t”e av’Idance provisions on the same grounds as other transactions. Apart from a stay of proceedings and avoidance, the insolvency law may impose the subordination of claims, for example on related persons (rec. 184 of the Guide). It may also prohibit enforcement of some contractual clauses (e.g. ipso facto clauses (rec. 70 of the Guide)) and give some discretion to insolvency representatives as regards the treatment of contracts, including their assignment notwithstanding restrictions in the contract (rec. 83 of the Guide), and the use and disposal of assets, including their sale free and clear of encumbrances and other interests (recs. 52–62 of the Guide).

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

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

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

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

(c) Constitution and scope of the insolvency estate

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

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

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

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

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

[10. Difficulties may arise in enforcing the effects of the lex fori concursus on the protection and preservation of the insolvency estate across borders, in particular as regards provisional measures and a stay of creditors' enforcement actions with respect to the collateral, or execution of rights in rem in other assets, located in foreign States. Domestic law enacting the UNCITRAL insolvency model laws that provide for recognition of foreign proceedings and recognition and enforcement of insolvency-related judgments could mitigate those difficulties to some extent. However, the principle underlying MLCBI, for example, is that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State (i.e. the lex fori concursus). Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding the consequences envisaged by the law of the recognizing State.[67] For example, the scope, duration, modification, termination of a stay of proceedings and other relief in the recognizing State are determined by provisions of the laws of that State, not the lex fori concursus.[68] They may thus be different in the State of the opening of the insolvency proceeding and in the recognizing State.

11. Nevertheless, under UNCITRAL insolvency texts, States are expected to cooperate and coordinate in cross-border insolvency cases to the maximum extent possible.[69] Means to achieve such maximum cooperation and coordination could be different, including by providing assistance to the foreign proceeding and the foreign representative under insolvency and non-insolvency laws. In addition, a basic principle of UNCITRAL insolvency texts is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings whether on an interim basis or as a result of recognition.[70] The relief under articles 19–21 or additional assistance under article 7 of MLCBI may include deference to the lex fori concursus, [as provided in chapter III of this text,] including on the scope, duration, modification and termination of a stay of proceedings, if the domestic law of the recognizing State so provides (see articles 20 (2) and 21 (1) (g) of MLCBI). Such possible deference would be subject to the usual protections, including the public policy exception and adequate protection of interests of creditors and other interested persons, including the debtor (articles 6, 21 (2) and 22 of MLCBI).

12. UNCITRAL insolvency texts build additional safeguards, such as that recognition and enforcement or a particular relief may be refused if this would interfere with the administration of the debtor's insolvency proceedings, in particular the foreign main proceeding, including by conflicting with a stay or other order that have already been or could be recognized or enforced in the receiving State. Inconsistency with a stay, for example, would typically arise where the stay permitted the commencement or continuation of individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition and enforcement of any ensuing judgment. It could also arise where the stay did not permit the commencement or continuation of such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay (and was thus potentially in violation of the stay).[71]

13. Other international texts, such as the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001) (the "Aircraft Protocol"),[72] envisage deference to the lex fori concursus of the foreign main proceeding.]

(e) Use and disposal of assets

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

15. The non-insolvency law provisions of the lex fori concursus may apply to the use and disposal of assets, for example: family law may apply to the use and disposal of assets co-owned by the debtor (an individual entrepreneur) with family members; laws prohibiting or restricting foreign ownership in certain sectors of the economy will determine whether disposal of assets to foreigners is allowed and if so, under which conditions; secured transactions law may apply to the use and disposal of encumbered assets and their methods of sale; and environmental and other law may address conditions for relinquishment of assets (e.g. environmentally dangerous assets or assets hazardous to public health and safety) and who might be entitled to claim the relinquished assets.

[16. Difficulties may arise in enforcing effects of the lex fori concursus on the use and disposal of the insolvency estate across borders, for example immovable property or payments by the debtor in the ordinary course of business, the latter not being understood uniformly across States. As noted above in the context of the protection and preservation of the insolvency estate, States would be expected to cooperate and coordinate in cross-border insolvency cases to the maximum extent possible, including in the administration and supervision of the debtor's assets and affairs.]

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

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

18. The non-insolvency law provisions of the lex fori concursus may apply, for example, to: (i) debt-to-equity conversions; (ii) redundancies, modifications in collective bargaining agreements and involvement of employees and trade unions in insolvency proceedings; (iii) foreign investment and foreign exchange controls; and (iv) protection of confidential or commercially sensitive information.[73]

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

19. Under the legislative provisions, the lex fori concursus determines: (i) types of transaction that can be avoided and types of transaction exempted from avoidance;

[67] GEI, para. 194.
[68] GEI, para. 38.
[69] See e.g. chapter IV of MLCBI and chapter 2 of MLEGI.
[70] GEI, para. 35.
[71] GE, para. 107.
[72] Available at: www.unidroit.org/instruments/security-interests/. See in particular article XXX (4).
[73] General contract law and thus rules outside the scope of these legislative provisions may apply to the implementation of the reorganization plan in those States that provide for the closure of insolvency proceedings after approval (or confirmation where required) of the plan.

(ii) avoidance criteria, including elements to be proven and defences; (iii) the duration of the suspect period and from which date it runs retroactively; (iv) persons eligible to commence avoidance and under which conditions; (v) sources of covering expenses of avoidance actions, including permissibility of third-party funding and conditions and safeguards for raising such funding; (vi) effects of avoidance; (vii) liability of the counterparty to the avoidable transaction and remedies in case of non-compliance; and (viii) permissibility of avoidance in case of conversion of the proceedings and, if it is permitted, extent of avoidance and transactions that may be avoided as well as transactions that are exempted from avoidance in such cases.

20. The legislative provisions envisage an exception to the lex fori concursus with respect to avoidance for payments or transactions that took place in a payment or settlement system or in a regulated financial market. Avoidance in those cases is to be governed by the law applicable to that system or market. Although these legislative provisions provide for an exception to the lex fori concursus with respect to labour contracts, that exception does not encompass avoidance in relation to labour contracts or relationships, for example avoidance of unreasonable remuneration packages negotiated as part of modification of labour contracts before the commencement of insolvency proceedings. The lex fori concursus would remain the governing law in those instances. [However, where the overriding provisions of the otherwise applicable labour law do not allow avoiding actions in relation to labour contracts or relationships generally or in the relevant case, enforcement of effects of avoidance under the lex fori concursus across borders may be problematic.]

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

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

22. The non-insolvency law provisions of the lex fori concursus and international treaties may apply to, for example, qualification of contracts, calculation of damages and treatment of government contracts and arbitration agreements. For example, international commercial arbitration matters in most States will be addressed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[74] (the “New York Convention”) that, among others, requires courts of States parties to give full effect to arbitration agreements and deny the parties’ access to the court in contravention of their agreement to refer the matter to an arbitral tribunal (article II).

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

[74] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. Also available at: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”) | United Nations Commission on International Trade Law.

(i) Treatment of set-off

24. Under the legislative provisions, the lex fori concursus determines whether the set-off is permitted in insolvency proceedings and if so, with respect to which obligations and under which conditions it is permitted, in particular: (i) whether set-off is permitted only with respect to pre-commencement money obligations matured prior to the commencement of insolvency proceedings or also those that would mature after commencement of insolvency proceedings; (ii) whether obligations subject to set-off must arise under a single contract or may arise under multiple contracts (i.e. not necessarily be mutual or related); (iii) whether the stay applies to the exercise of set-off rights or it is effectuated automatically upon commencement of insolvency proceedings; and (iv) how creditors with set-off claims are treated (e.g. as secured creditors or otherwise). The lex fori concursus also governs the treatment of set-off of claims arising after the commencement of insolvency proceedings.

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

26. The item is closely linked to other items on the list, including: item (d) on the protection and preservation of the insolvency estate; item (g) on avoidance; item (h) on treatment of contracts; and item (n) on treatment of claims. [It is also linked to an exception to the lex fori concursus for the law governing the effects of insolvency proceedings on the rights and obligations of the participants and avoidance in a payment or settlement system or in a regulated financial market. Under that exception, the effects of insolvency proceedings on set-off rights and obligations in those systems and markets are governed by the law applicable to those systems and markets.] [*This part may need to be expanded depending on the outcomes of the Working Group's discussions of a proposed exception to the lex fori concursus for close-out netting outside payment and settlement systems and regulated financial markets. See the relevant section below.*]

(j) Treatment of secured creditors

27. Under the legislative provisions, the lex fori concursus governs the treatment of secured creditors in insolvency proceedings.[75] The use of the word "treatment" in the item intends to convey that the lex fori concursus only governs effects of insolvency proceedings on the rights and obligations of secured creditors in insolvency proceedings, for example whether secured creditors are required to submit claims in insolvency proceedings.[76] The item does not intend to refer to the law applicable to the validity and effectiveness of security interests[77] existing at the commencement of

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

[76] Secured creditors may be excepted from the requirement to submit a claim in insolvency proceedings under insolvency laws that do not include encumbered assets in the insolvency estate and allow secured creditors to freely enforce their interests against the encumbered assets. This exception may apply only to the extent that the secured creditor's claim will be met from the value of the sale of the encumbered asset. Where the value of the encumbered asset is less than the amount of the secured creditor's claim, the creditor may be required to submit a claim for the unsecured portion as an ordinary unsecured creditor. Where the value of the sale of the encumbered asset is more than the amount of the secured creditor's claim, the secured creditor would be expected to contribute the difference to the insolvency estate.

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

insolvency proceedings, which will remain to be determined by the generally applicable PIL rules of the State in which insolvency proceedings are commenced.[78] The commencement of insolvency proceedings does not displace those rules.[79]

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

[29. Difficulties may arise with cross-border recognition and enforcement of effects of the lex fori concursus on secured creditors because of public policy considerations involved in designing the domestic regime for secured lending, including the treatment of secured creditors in insolvency proceedings. States may be concerned that intrusion of a foreign law upon those issues may introduce a factor of instability that may lead to the impairment of protections and the value of local security interests and increase the domestic costs of finance. COMI movements, if they bring an unforeseen last-minute radical change in the position of the secured creditor, may exacerbate those concerns. Sufficient assurances of adequate protection of interests of secured creditors in domestic insolvency proceedings may thus be essential for cross-border recognition and enforcement of the effects of the lex fori concursus on secured creditors. [See chapter III of this text.]]

(k) Rights and obligations of the debtor

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

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

32. The non-insolvency law provisions of the lex fori concursus may be applicable to this item, in particular, if the debtor is a natural person (in such case, human rights instruments may address the extent of limitations that may be imposed on the freedom of movement by the debtor, disclosure of the debtor's private correspondence and other personal data protection aspects). There may also be a close interaction of insolvency law with civil and criminal procedure law, for example as regards disclosure, examination, search and seizure warrants. In the cross-border insolvency context, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters may apply.

(l) Duties and functions of the insolvency representative

33. Under the legislative provisions, the lex fori concursus determines: instances when the insolvency representative is to be appointed; the mechanisms for selection, appointment, removal and replacement of the insolvency representative, including

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

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

the insolvency representative appointed on an interim basis; a method of calculating remuneration for insolvency representative services; the role of the court and creditors in oversight of the work done by the insolvency representative; and liability of the insolvency representative. With respect to the latter, the non-insolvency law provisions of the lex fori concursus may apply especially if the insolvency representative is subject to certain professional standards and regulations (e.g. accountants, lawyers, etc.). Apart from general duties, functions and powers of the insolvency representative, the lex fori concursus determines the authority conferred upon the insolvency representative in a specific case, which may include the authority to represent the proceeding across borders (article 5 of MLCBI) or to act in another State in respect of an insolvency-related judgment issued in the State of the opening of insolvency proceedings (article 5 of MLIJ), cooperate and directly communicate with foreign courts and representatives (article 26 of MLCBI) and give undertakings with respect to the treatment of foreign creditors' claims (see articles 28–32 of MLEGI).

[34. In the States that enacted the relevant provisions of UNCITRAL insolvency model laws, the insolvency representative benefit from expedited and direct access to the foreign courts without the need to meet formal requirements such as licences or consular action and without subjecting itself and the foreign proceeding to the jurisdiction of the foreign court for any purpose other than the application (see articles 9 and 10 of MLCBI).[80] The insolvency representative would have standing to request assistance under laws of the enacting State[81] and the commencement of an insolvency proceeding if the domestic conditions for commencing such a proceeding are met (article 11 of MLCBI).[82] Upon application for recognition of the foreign proceeding, the foreign representative can request provisional relief (article 19 of MLCBI). Upon recognition of the foreign proceeding, it may request an extension of that relief or granting additional relief and would have standing also to make petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding (see article 12 of MLCBI). It may also request relief to initiate actions under the law of the recognizing State to avoid or otherwise render ineffective acts detrimental to creditors (article 23 of MLCBI) and to intervene in proceedings instituted by or against the debtor (article 24 of MLCBI). However, those provisions are limited to providing standing and do not vest the insolvency representative with specific powers or rights or govern the fate of actions that the insolvency representative would decide to undertake.[83] These matters would depend on the foreign law and courts (see e.g. articles 5 of MLCBI and MLIJ). For example, if the insolvency representative applies for relief, it is the court in the recognizing State that would decide which relief to grant, and the insolvency representative will be subject to conditions that the court may order in connection with relief granted and the domestic law of the recognizing State (see e.g. articles 19, 21 and 22 of MLCBI). Different types of relief can be granted, not limiting them to those available to a local insolvency representative under their laws.

35. In performing their functions across borders, insolvency representatives are subject to the domestic law of foreign States, including international treaties and other agreements to which those States may be parties, which may impose limitations on the powers that the insolvency representative has under the lex fori concursus. The usual limitations found relate to the use and disposal of immovable property of the debtor located abroad, removal of property from the territory of the recognizing State and the use of coercive measures (e.g. for obtaining evidence, gaining access to business books or records of the debtor). Nevertheless, in some States, the lex fori concursus is seen as the source of the foreign representative's powers recognized, implemented and enforced through the laws of the recognizing State even if some of

[80] GEI, paras. 108–111.
[81] See article 7 of MLCBI and article 6 of MLIJ; GEI, para. 105 and GE, para. 70.
[82] GEI, paras. 112–114.
[83] GEI, paras. 21 (d), 115–117, 197 and 200–208; GE, para. 69.

those powers may be unfamiliar to the law of the recognizing State or that law may be silent about them, as long as those powers are not prohibited by the domestic law, and adequate protection of creditors and other interested persons is ensured. Hence, in those States the domestic law effectively defers to the lex fori concursus as regards duties and functions of the insolvency representative, subject to the usual safeguards. [See chapter III.]]

(m) Functions of the creditors and creditor committee

36. The lex fori concursus governs mechanisms and the level of creditor participation in insolvency proceedings, in particular whether and, if so, when, creditor meetings are to be convened or a creditor committee is to be established and the role of those bodies in the oversight of insolvency proceedings; eligibility to participate in those bodies; the matters that would require creditor approval; a threshold for the approval; and mechanisms for seeking the approval and ascertaining that the approval was obtained.

37. The item is closely linked to the preceding two items that address rights and obligations of the debtor and duties and functions of the insolvency representative.[84] It is also linked to the next item (treatment of claims).[85]

(n) Treatment of claims

38. Under the legislative provisions, the lex fori concursus determines: (i) which creditors should be required to submit claims, types of claim that should be submitted, excluded claims and claims subject to special treatment (e.g. claims by related persons); (ii) the procedure for submission, verification and admission of claims, including the deadline for submission of claims, to whom they should be submitted and formalities for submission of foreign claims;[86] (iii) consequences of failure to submit a claim; (iv) rules for valuation of claims; (v) treatment of disputed claims; (vi) effect of submission and admission of claims; (vii) review of decisions related to claims (e.g. their rejection or special treatment); (viii) treatment of post-commencement claims; (ix) treatment of claims upon conversion; (x) accrual and payment of interest; and (xi) rules for giving undertakings as regards the treatment of foreign claims, including whether the insolvency representative is authorized to give such undertakings to foreign creditors in order to avoid opening parallel proceedings and if so, formal requirements, including the form and language of undertakings, with respect to which claims undertakings could be given and procedures for seeking approval, review and enforcement of those undertakings.[87] Notwithstanding the exception to the lex fori concursus for some aspects of labour contracts and relationships in these legislative provisions, the lex fori concursus determines the status and treatment of labour claims and regulates possible undertakings with respect to them.

39. Non-insolvency law provisions of the lex fori concursus may also be applicable, such as secured transactions law in relation to the treatment of secured creditors' claims. In addition, criminal law may intersect with the insolvency law in relation to the treatment of false claims. International conventions, such as the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (5 October 1961), may apply to submission, verification and admission of foreign claims. Special rules may apply to the treatment of (foreign) public claims

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

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

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

[87] See e.g. articles 28–32 of MLEGI and article 36 of the EIR recast.

and claims emanating from arbitral awards. In most States, the New York Convention will be applicable to the treatment of foreign and non-domestic[88] arbitral awards.

40. This item is linked to the items on the treatment of secured creditors and set-off as well as on the implementation of a reorganization plan.[89] In particular, perspectives of cross-border recognition and enforcement of the effects of insolvency proceedings might impact the treatment of claims of specific groups of creditors, such as workers or secured creditors. [Difficulties may arise in achieving recognition of the effects of the lex fori concursus on the treatment of claims across borders, especially for public claims.][90]

(o) Ranking of claims

41. Under the legislative provisions, the lex fori concursus determines the order in which claims will be satisfied from the estate, including claims of the insolvency representative, claims arising after commencement of insolvency proceedings and administrative costs and expenses. It specifies the classes of creditors that will be affected by the insolvency proceedings and the treatment of those classes in terms of priority and distribution. It specifies also rules for establishing functional equivalence between domestic and foreign claims and consequences of the failure to establish such equivalence.[91] Where subordination is envisaged, the lex fori concursus governs the conditions and limits of subordination. Where giving undertakings as regards the ranking of foreign claims is allowed in order to avoid opening parallel proceedings,[92] the lex fori concursus determines formal requirements, including the form and language of undertakings, with respect to which claims undertakings could be given and procedures for seeking approval, review and enforcement of those undertakings. Notwithstanding the exception to the lex fori concursus for labour contracts and relationships in these legislative provisions, the lex fori concursus determines the ranking of labour claims and regulates possible undertakings with respect to that matter.

42. The non-insolvency law provisions of the lex fori concursus may apply to the priority of claims in insolvency proceedings generally and in any given insolvency proceeding specifically, including labour law (which may encompass international labour conventions for States parties to those conventions),[93] tax law, secured transactions law and tort law. Special rules may apply to the ranking of (foreign) public claims. Perspectives of cross-border recognition and enforcement of the effects of insolvency proceedings might impact the ranking of claims of specific groups of creditors, such as workers and secured creditors. [Difficulties may arise in achieving recognition of the effects of the lex fori concursus on the ranking of claims across borders, especially for public claims.[94]]

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

[89] The plan usually addresses the treatment of creditor claims and may also stipulate the applicable law.

[90] See article 13 (2) of MLCBI and accompanying commentary. **A/CN.9/1133, para. 42 (g), the last sentence.**

[91] As noted in the Guide, the test to apply is whether or not domestic and foreign claims, given their essential content and their function, correspond to each other to the extent that they can be considered as “functionally interchangeable”. If the answer is in the affirmative, the claims would be considered equivalent and receive the same treatment in insolvency proceedings. In the event that equivalence cannot be established, the claim would generally be treated as an ordinary claim. Criteria usually used to assess functional equivalence of claims include the source of the obligation, the nature of creditors and the underlying interest that justify the preferential treatment of the claim. **A/CN.9/1133, para. 42 (f)**.

[92] See e.g. articles 28–32 of MLEGI and article 36 of the EIR recast.

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

[94] See article 13 (2) of MLCBI and accompanying commentary.

(p) Costs and expenses relating to the insolvency proceedings

43. Under the legislative provisions, the lex fori concursus determines criteria relating to the allowance of administrative expenses, assessment of expenses, the role of the court in approval of expenses and distribution of costs and expenses relating to insolvency proceedings, in particular which expenses would be covered from the insolvency estate, which may need to be covered by creditors or other parties in interest and for which the insolvency representative may be personally liable. The lex fori concursus also determines the treatment of debtors whose assets and sources of revenue are insufficient to meet the costs of administering the insolvency proceeding, in particular whether in such cases the application will be denied or alternative mechanisms for covering costs of administering insolvency proceedings will be used and if so, which ones. It also determines rules related to third-party funding.

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

(q) Distribution of proceeds

45. Under the legislative provisions, the lex fori concursus determines rules for distribution of proceeds, which may be different for liquidation and reorganization.[95]

46. This item is closely linked to the other items on the lex fori concursus list, in particular item (n) on treatment of claims and item (o) on ranking of claims. If the lex fori concursus allows giving undertakings as regards the treatment of foreign claims to prevent the opening of parallel proceedings,[96] the affected claims would be treated in accordance with the treatment they would receive in an unopened parallel proceeding, including as regards the distribution of proceeds.

(r) Closure of the proceedings

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

(s) Discharge

48. Under the legislative provisions, the lex fori concursus determines: (i) general conditions for discharge, including debts that are not dischargeable; (ii) procedures and preconditions for discharge, which may be different in different types of proceedings (liquidation, reorganization, standard or simplified proceedings); (iii) the date from which discharge will be effective;[97] and (iv) criteria for denying discharge and revoking discharge granted.[98]

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

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

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

most cases, the lex societatis will continue to apply to them notwithstanding the opening of insolvency proceedings. Item (t) intends to capture specific[99] grounds that may give rise to the liability of directors and causes of action against directors upon commencement of insolvency proceedings under insolvency law. Such grounds include in many States wrongful trading and violation of the duty to file for commencement of insolvency proceedings. Other than in those very few cases closely connected to insolvency law and insolvency proceedings, it will be inappropriate to subject directors' obligations and liability in the period approaching insolvency to the retrospective effect of the lex fori concursus.

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

52. Furthermore, if the lex fori concursus follows a broad interpretation of "directors", as for example recommended in part four of the Guide,[100] different public policy considerations, remedies and enforcement mechanisms, including disqualification, may apply depending on persons found to be in factual control of the debtor's business in the period approaching insolvency. Some directors (e.g. institutional lenders) may not be made subject to the foreign lex fori concursus.

B. Exceptions to the lex fori concursus

1. Labour contracts and relationships

14. At the sixty-second session of the Working Group, no comments were made with respect to the draft legislative provision, whose formulation was agreed upon by the Working Group at its sixty-first session,[101] and its accompanying commentary. The secretariat refined some aspects of the draft commentary.

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

[96] See e.g. articles 28–32 of MLEGI and article 36 of the EIR recast.

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

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

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

[100] Encompassing any person exercising factual control over the debtor (e.g. de facto directors, shadow directors, shareholders, lenders, etc.) (rec. 258 and its accompanying commentary).

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

(a) Draft legislative provision

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

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

(b) Draft commentary

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

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

3. The rationale for the exception to the application of the lex fori concursus found in the legislative provision is that labour contracts and relationships raise many socioeconomic policy considerations. For that reason, States usually devise a special regime for the treatment of issues arising from labour contracts and labour relationships in insolvency. In some insolvency laws, priority is given to maintaining continuity of employment over other objectives of insolvency proceedings, such as maximization of value of the estate for the benefit of all creditors. This may be evidenced by a focus on sale of the business as a going concern with the transfer of existing employment obligations, as opposed to liquidation or reorganization where those obligations may be altered or terminated. Mandatory provisions of law, including those found in international treaties,[102] may: protect workers against unfair dismissal and discrimination; provide for a financial safety net for workers; impose restrictions on the rejection or modification of labour contracts[103] and conditions for implementing redundancies (including an advance notice to relevant State authorities); and ensure workers' rights to be properly informed about all matters arising from insolvency proceedings affecting their employment status and entitlements. Different regimes may apply in liquidation and reorganization. For example, in some States, employees follow the business in case of sale as a going concern in both liquidation and reorganization, in others only in reorganization.

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

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

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

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

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

7. The public policy exception would allow the court to displace the application of a foreign law that would be manifestly contrary to the public policy of its State (e.g. that effectively legitimizes modern slavery, etc.) (see above). Domestic rules would determine the law that would apply in lieu of the displaced one.

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

15. The draft legislative provision and commentary were revised further to the views expressed at the sixty-second session of the Working Group[104] as well as expert consultations and the review of relevant instruments. The narrow scope of the exception was retained, as suggested at the sixty-second session of the Working Group. The exception focuses on payment, clearing and settlement systems, regulated financial markets and other multilateral trading facilities. All of them share the following features: they are multilateral platforms that multiple parties, not

[104] **A/CN.9/1133, paras. 43–46.**

necessarily known to each other, use for the purposes of clearing, settling or recording payments, securities, derivatives or other financial transactions. Such multilateral clearing, settling or recording may be through various techniques, including through bilateral arrangements where a central counterparty interposes itself for the multilateral transactions as the seller to each buyer and the buyer to each seller. For convenience, this note refers to them collectively as "financial market infrastructures" (FMIs).

16. The regulation of FMIs is rapidly evolving, including under influence of digital developments. The suggested revisions try to reflect the status of the current regulation, stay technology neutral and follow the functional approach. Technology neutrality means that, regardless of the technology that FMIs use, FMIs would be covered by the exception if the criteria for applying the exception to them are present. The functional approach entails focusing on the purpose of the exception in the interpretation and application of the exception, which is to protect public interests, reduce systemic risk and ensure participant protection, financial market integrity and financial stability.

17. The secretariat provides explanations of the terms used in the exception in an accompanying glossary. The intention was not to provide the entire glossary of the terms relevant to the exception but only those terms that are helpful for demarcating the scope of the exception. Explanations of those terms were not included in the accompanying commentary because they are evolving. Most recent changes to them were introduced to accommodate rapidly evolving practices in FMIs, such as the use of distributed ledger technologies (DLT). In addition to new elements in the long-existing definitions, new terms have been appearing.

18. The Working Group may wish to consider a link of the envisaged exception for FMIs with a possible exclusion from the application of the legislative provisions (see above). The draft commentary may need to be expanded accordingly. The Working Group may wish to note that the issues arising from the proposal made at the sixty-second session of the Working Group to provide for the same exception for close-out netting arrangements used in other settings[105] are addressed separately, in section 3 below, without prejudice to the Working Group's decision on the treatment of that proposal in the same or separate exception.

(a) Draft legislative provision

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

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

Glossary

The effects of insolvency proceedings	This phrase is taken from recommendation 32 of the Guide. As drafted, it is broad and does not refer to insolvency proceedings of any particular group of persons (participants in FMIs or otherwise).
The rights and obligations	They arise from the rules, procedures and contracts directly relevant to the operation of FMI (e.g. risk control and liquidity-saving mechanisms) regardless of whether the source of those rights and obligations is statutory, regulatory or contractual. They will include the rights and obligations of participants arising from, or related to, settlement and payment

[105] **A/CN.9/1133, paras. 43–46**.

	netting, assumption and discharge of obligations, finality of transfers, novation, open offers or other binding arrangements through which a central counterparty (CCP) becomes a counterparty to trades with market participants, the provision of collateral to cover current and potential future exposures and the provision of various types of guarantees. They may also include the rights and obligations arising from, or related to, contracts directly relevant to FMIs that are entered between the participants or operator of the system or the market and third parties, in particular as regards netting, enforcement of collateral arrangements, credit support arrangements and guarantees and the treatment of ipso facto clauses. The rights and obligations arising from contracts and other transactions linked to FMIs but not directly relevant to their operations remain to be governed by the lex fori concursus. To illustrate, for a payment system, if Party A ordered its Bank B to transfer funds to the account of Party C maintained at Bank D, the exception will apply only to the rights and obligations arising from that funds transfer order between A and B, B and D and D and C but not to the rights and obligations arising from the underlying transaction between A and C that triggered that funds transfer order, which will be subject to the lex fori concursus.
Participants	Participants are persons both (i) identified and recognized as such by an FMI, and (ii) allowed directly or indirectly to effectuate transfers through that FMI. Traditionally, they have included credit institutions, investment firms, public authorities, CCPs, settlement and clearing agents and FMI operators. Most recently, they have been expanded to include other persons, for example, indirect participants and, in DLT-based FMIs, retail investors who may interact in FMI directly, without intermediaries.
A payment system	A set of instruments, procedures and rules for the transfer of funds between or among participants. It is typically based on an agreement between or among participants and the operator, and the transfer of funds is implemented using an agreed-upon operational infrastructure. Narrowly, the term may refer only to interbank funds transfer systems in which all or almost all participants are credit institutions and which facilitate the circulation of money in a country or currency area. More broadly, it may refer to any funds transfer formal arrangements, either based on a private contract or legislation, with multiple membership, common rules and standardized processes, for the transmission, clearing, netting or settlement of monetary obligations arising among its participants. Payment systems may be part of the financial markets or may operate separately according to their own governance structure and operating rules.
A clearing system	A set of rules and procedures that establish the final positions of participants prior to their settlement in the settlement system. They may be part of the settlement systems or may operate separately according to their own governance structure and operating rules.
A settlement system	A set of instruments, procedures and rules that enables funds, assets or financial instruments to be transferred according to predetermined rules. The transfers would become final (i.e. irrevocable and unconditional) in the settlement system. The settlement systems may operate separately according to their own governance structure and operating rules or as part of a CCP or as part of a financial market or a central securities depository.
A regulated financial market	A regularly functioning multilateral marketplace, authorized by a competent authority, operated or managed by a market operator, where multiple buyers and sellers engage in the trading of interests in financial instruments (e.g. stocks, bonds, derivatives, trust units) that are admitted to trading in that market under the rules of that market. It operates under specific laws or regulations and subject to oversight or prudential supervision by the competent authority. Before granting authorization to the market operator and the market to function as a regulated financial market, such authority must be satisfied that the market operator and the market comply with the applicable requirements. Examples of regulated financial markets include stock exchanges, bond and derivative markets. Unlike payment, clearing and settlement systems, each of which may operate separately or be part of the other or the financial market, a regulated financial market represents the complex integrated infrastructure for clearing, settling and recording payments, securities, derivatives or other financial transactions.

Multilateral trading facilities	Electronic platforms that facilitate trading in various types of financial instruments. They may operate as part of, or in addition to, a regulated financial market. They may be regulated or unregulated and operate under discretionary or non-discretionary rules. Those operating on a non-discretionary basis do not exercise discretion over the execution of trades. They match orders from various participants based on pre-defined rules. Those operating on a discretionary basis can exercise discretion over the execution of trades. This allows them to act as counterparties to the trades, providing liquidity and executing client orders. Multilateral trading facilities may specialize in the trading of particular types of financial instruments (e.g. equity (shares, bonds) or non-equity (emission allowances) financial instruments).
The law applicable to a payment, clearing or settlement system, regulated financial market or multilateral trading facility.	It is the law of the State as chosen by the FMI or, failing that, by the participants. In the absence of choice, the law of the location of the system or market would usually apply. A requirement may apply to choose the law of the State in which at least one of the participants has its head office. FMIs often identify the law that will apply to each aspect of their operations in the rules governing their activities. Under some applicable law, they may be required to do so. As a risk mitigation strategy, FMIs are often also under requirement to identify and analyse potential conflict-of-laws issues that would arise from their activities and develop rules and procedures to mitigate those conflict-of-laws risks. The choice of law would be subject to verification by the competent authority. States ordinarily do not permit contractual choices of law that would circumvent their fundamental public policy.

(b) Draft commentary

1. The systems, markets and [facilities] (and their different combinations) intended to be covered by the exception are financial market infrastructures (FMIs) through which multiple parties buying and selling trading interests in financial instruments are able to interact. In those FMIs, the inability of one or more participants to perform as expected will cause other participants to be unable to meet their obligations when due to the other participants and third parties. This “domino” effect is often referred to as systemic risk.

2. All FMIs face risks that their operations may be disrupted. Disruptions may be caused by FMI internal factors (e.g. operational failures or deficiencies or fraud) and external factors, such as insolvency proceedings. Those disruptions may lead to losses and liquidity problems in FMI, to ineffectiveness of measures that FMIs take to reduce their operational risks and to systemic risks. The purpose of the exception is to minimize disruptions that insolvency proceedings cause for the FMI operations. By identifying a single law that would govern effects of insolvency proceedings on FMIs (that is, the law of the system, the market [or the facility]), the exception helps to make disruptions caused by insolvency proceedings more predictable and hence more manageable. Without that exception, in the light of multiplicity of FMI participants and third parties whose insolvency proceedings may affect FMIs, numerous undefined, uncertain and unpredictable lex fori concursus could apply, making the management of FMI operational risks difficult, if not impossible, thereby amplifying systemic risks. The exception does not specify whose insolvency proceedings it covers, inviting the broad interpretation: any insolvency proceeding directly impacting operations in FMIs will be covered.

3. The exception is to be construed narrowly – only the rights and obligations of participants that arise from specific rules, procedures and contracts that govern or impact the functioning of those FMIs are covered. At the same time, the exception should be interpreted and applied flexibly in order to achieve the intended purpose of the exception, which is to protect public interests, contain systemic risk and ensure investor protection, financial market integrity and financial stability. The usual principles of technology neutrality, functional equivalence and non-discrimination are relevant to the interpretation and application of the exception with the result that the

exception is envisaged to apply to all FMIs regardless of technology they use in their operations as long as FMIs meet the criteria for application of the exception.

4. The public policy exception would allow the court to displace the application of a foreign law that would be manifestly contrary to the public policy of its State. The domestic law would be expected to provide rules for determining which other law in lieu of the displaced one would be applicable if that public policy exception is invoked.

3. Close-out netting outside payment and settlement systems and regulated financial markets

19. The Working Group deferred consideration of a proposal that close-out netting arrangements outside FMIs, both bilateral and multilateral, should be covered by an exception to the lex fori concursus similar to the one envisaged for FMIs, i.e. the law applicable to a close-out netting arrangement would govern the effects of insolvency proceedings on the rights and obligations of the parties to that arrangement. The examples of situations provided in the Working Group where the need for the same exception would arise, but where the exception for FMIs found in section 2 above would not apply, included wholesale energy contracts, commodity contracts and trading in non-standardized over-the-counter (OTC) derivatives that might not be eligible for clearing and settlement through FMIs.

20. The other view in the Working Group was that the effects of insolvency proceedings on close-out netting in the context of a bilateral commercial transaction where parties were known to each other should be covered by the lex fori concursus (item (i) on set-off on the lex fori concursus list) because the parties would be in the position to identify and mitigate risks arising from their commercial transaction. It was not excluded that in settings where parties were not known to each other and where systemic or other similar risks arise, the same exception might need to apply. However, it was suggested that the issue should be considered separately from the narrow exception provided for in section 2 above.

21. The Working Group may wish to consider the proposal further, in particular whether an additional exception to the lex fori concursus is needed for the situations described above not covered by the exception in section 2. In considering it further, the Working Group may wish to note that trade close-out netting arrangements are distinguished from settlement or payment netting arrangements to which the exception in section 2 above applies in several respects. In particular, the application of the exception in section 2 above to settlement or payment netting arrangements is dictated by the need to protect public interests, contain systemic risk and ensure investor protection, financial market integrity and financial stability. Trade close-out netting arrangements are used primarily as an instrument of counterparties' individual credit or commercial risk management. They could be used in respect of all mutual contractual relationships the value of which can be expressed in an amount of currency. However, some limitations are suggested for their use (both with respect to eligible parties and eligible obligations), given that close-out netting leads to special treatment of the non-defaulting party in relation to the general creditors in the event of insolvency of the defaulting party.[106] Those limitations include systemic risk, single relationship contracts (i.e. where each contract affects the others)[107] and

[106] See the UNIDROIT Principles on the Operation of Close-Out Netting Provisions, 2013, Principle 4 and accompanying commentary.

[107] This feature is inherent in swaps, repos, securities lending and title transfer collateral agreements. It may be established contractually in other types of agreements in order to deal with a multitude of transactions on a collective basis, the main reason being that it is more efficient for parties to monitor and manage their mutual risk exposure on the basis of an overall assessment of all transactions outstanding between them.

volatility of the value of certain transactions, which would expose parties to considerable market and credit risks.[108]

22. The functional equivalence approach and the general principle that the law should not treat similar situations differently without justification may suggest application of the same exception to the rights and obligations of the participants in systems and markets other than those intended to be covered by the exception in section 2 above where those participants face the same risks because their counterparties are multiple and unknown and, as a result, unpredictable and numerous lex fori concursus may apply. In those situations, commercial risk mitigation strategies usually employed when the counterparties are known to each other, whether in bilateral or multilateral settings (e.g. due diligence, contractual clauses), would not work. Risks of a possible spillover of financial difficulties in those other systems and markets to the systems and markets covered by the exception in section 2 above may need to be considered as well. Where they exist and high, the same considerations of protection of public interests, investors, financial market integrity and financial stability and hence containment measures to reduce systemic risks may apply to those other systems and markets.

23. Since the specific reference to set-off (item (i) on the lex fori concursus list) was made when the proposal was discussed in the Working Group, it is necessary to clarify that, as drafted, item (i) and accompanying commentary may encompass different types of set-off depending on the lex fori concursus. They may include set-off under multiple contracts (i.e. debts that are not necessarily mutual or related) and of matured and not matured obligations.

24. If the Working Group decides to include an exception for close-out netting arrangements outside FMIs, it may wish to define its scope, the governing law and any accompanying conditions and safeguards. Taking into account that the exception would replace the default rule, the lex fori concursus, with the party autonomy rule deferring to the law chosen by the parties, special rules may be needed if the parties did not specify the applicable law or if their choice is deficient. The same considerations may not arise in relation to FMIs where the choice of law is either regulated or standardized, and in any event subject to oversight, control or supervision by a competent authority. The draft legislative provisions and commentary will be revised to reflect the outcomes of deliberations of the Working Group on the matter.

4. Ongoing arbitral proceedings

(a) The draft legislative provision

25. At its sixty-second session, the Working Group considered the following exception to the lex fori concursus: “The effects of insolvency proceedings on ongoing or pending arbitral proceedings shall be governed by the lex arbitri”. Suggestions were made: (a) to clarify to which arbitral proceedings reference is made (domestic or foreign or both, taking place outside the State of opening insolvency proceedings or in the territory of that State or both); (b) to narrow the scope of the exception; (c) to refer only to arbitral proceedings of concern to the insolvency estate; and (d) to specify the meaning of the term “lex arbitri”.[109]

26. In the light of those comments, the exception may be redrafted to read:

> “The effects of insolvency proceedings on [*any limits of the scope of application of this exception, as may be agreed upon by the Working Group*] of ongoing arbitral proceedings concerning the insolvency estate that is administered in that insolvency proceeding shall be governed by the lex arbitri.”

27. In the light of outstanding issues related to this exception, as set out below, the secretariat was not in a position to draft an accompanying commentary. The secretariat’s understanding is that there is no intention to address in the legislative

[108] Often faced by energy traders, airlines and similar businesses.
[109] A/CN.9/1133, para. 49

provision only a particular type or place of arbitration, and that implications of different scenarios could be discussed in an accompanying commentary (in particular, that the lex fori concursus and the lex arbitri may coincide, alleviating many concerns expressed in the Working Group with respect to a proposed additional exception to the lex fori concursus rule for ongoing arbitral proceedings). If, however, the Working Group agrees that the exception should apply only to foreign arbitral proceedings taking place outside the State where the insolvency proceedings have been commenced, that point could be explained in the commentary. That point could also be made clear in the draft legislative provision itself by adding at the beginning or the end of the provision the words "where foreign arbitral proceedings take place in the territory of a State other than the State where insolvency proceedings have commenced".

28. The term "lex arbitri" may be retained in the exception if the term is defined for the purposes of the project as the law of the State where arbitration takes place. Its definition may be added in the Definition section above. It might be beneficial to clarify in that definition or accompanying commentary that that law would encompass not only arbitration law but also insolvency law of the State where arbitration takes place and that the reference to the place of arbitration should be understood as reference to the legal place of arbitration, not the geographical physical venue or an online venue where proceedings may be held.[110]

29. While considering the matter further, the Working Group may wish to note that the parties may agree on the place of arbitration. If the place of arbitration has not been agreed by the parties, typically the arbitral tribunal or the arbitral institution administering the arbitration will have to determine the place of arbitration at the outset of the arbitral proceedings.[111] The place of arbitration is of considerable practical importance since it normally determines the applicable arbitration law that regulates, among others, the appointment of arbitrators, challenges to their appointment, the conduct of arbitral proceedings and grounds on which a party can seek judicial review or setting aside of an arbitral award.[112] In addition, State courts at the place of arbitration are entrusted with functions of supervision and assistance to arbitration.[113]

30. The Working Group may also wish to recall its discussion of factors that influence selection of the place of arbitration. They may be legal and other factors, the relative importance of which varies from case to case. Among the more prominent legal factors are: (i) the suitability of the arbitration law at the place of arbitration; (ii) the law, jurisprudence and practices at the place of arbitration regarding court intervention in the course of arbitral proceedings, the scope of judicial review or of grounds for setting aside an award and any qualification requirements with respect to arbitrators and counsel representation; and (iii) whether the State where the arbitration takes place and hence where the arbitral award will be made is a party to the New York Convention or to any other multilateral or bilateral treaty on enforcement of arbitral awards. When it is expected that hearings will be held at the place of arbitration, other factors may become relevant in selecting the place of arbitration, including: (i) the convenience of the location for the parties and the arbitrators, including travel to the location; (ii) the availability and cost of support services;

[110] The UNCITRAL Model Law on International Commercial Arbitration ("MAL") (article 20), the Explanatory Note to the MAL (para. 14) (the "Explanatory Note") and the UNCITRAL Notes on Organizing Arbitral Proceedings (2016) (the "Notes") (para. 31) explain that the place of arbitration is not necessarily the place where hearings or meetings are held, which may be held at a location different from the place of arbitration, or remotely, but they also acknowledge that holding all hearings outside the place of arbitration may create difficulties at the stage of judicial review, setting aside or enforcement of the arbitral award.

[111] Arbitration rules of some institutions contain a default place of arbitration, applicable where the parties have not chosen one.

[112] See para. 14 of the Explanatory Note and para. 28 of the Notes.

[113] See articles 11, 13, 14, 16, 27 and 34 of the MAL and para. 14 of the Explanatory Note.

(iii) the location of the subject matter in dispute and proximity of evidence; and (iv) any qualification restrictions with respect to counsel representation.[114]

(b) Other outstanding issues

31. The Working Group may wish to agree on whether the exception is needed. Different views were expressed on that matter at the sixty-second session of the Working Group, reiterating the positions expressed at the Working Group's earlier sessions. The issues raised concerned: (i) certainty about the fate of parties' choice of arbitration as a mechanism for resolution of their disputes when one of them becomes insolvent; (ii) implications of that choice on other parties in interest in insolvency proceedings that were not involved when that choice was made; (iii) legitimate expectations that insolvency proceedings, because of the nature of those proceedings and the need to ensure the equal treatment of similarly situated creditors in insolvency proceedings, would interfere with that choice, and, under the international cross-border insolvency framework promoted by UNCITRAL to ensure the orderly administration of insolvency proceedings under control of one proceeding, it should be expected that the lex fori concursus of the COMI State would most likely so interfere; and (iv) rules at the place of arbitration on the effects of insolvency proceedings on ongoing arbitral proceedings may have no significant connection with the parties or their transactions since the place of arbitration is often chosen for reasons of convenience and favourable arbitration framework (see para. 30 above).[115]

32. Furthermore, the Working Group may wish to agree on the scope of the exception if it is to be included. Reference in the Working Group was made to the conduct of arbitration as an example of issues to be covered by the exception. While the law that would govern a stay of ongoing arbitral proceedings upon commencement of insolvency proceedings has so far been in the focus of the discussion of the exception, views were expressed that other matters, such as the law that would govern the effects of insolvency proceedings on the capacity of the debtor to arbitrate, should not be overlooked.

33. In addition, at the sixty-second session of the Working Group, it was reiterated that the law that would govern the effects of insolvency proceedings on ongoing arbitral proceedings should be considered together with the law that would govern the effects of insolvency proceedings on ongoing lawsuits, and that determining different laws that would govern the effects of insolvency proceedings on ongoing lawsuits and ongoing arbitral proceedings would not be justified.[116] It was questioned that the effects of insolvency proceedings on ongoing lawsuits, such as a stay of proceedings, should be governed by the law at the place of a lawsuit. In that context, it was recalled that a stay of proceedings had already been included in the lex fori concursus list, and that other related items on that list were: (h) treatment of contracts; (k) rights and obligations of the debtor; (l) duties and functions of the insolvency representative; (m) functions of the creditors and creditor committee; (n) treatment of claims; and (o) costs and expenses relating to the insolvency proceedings.[117]

34. The Working Group may wish to consider outstanding matters related to the exception. The draft legislative provision and accompanying commentary will be (re)drafted accordingly. A commentary may note that: (i) not all States envisage a stay of ongoing arbitral proceeding, envisaging instead a stay of the enforcement of arbitral awards; (ii) practical difficulties may arise from enforcing a stay of ongoing arbitral proceedings because of relative independence of foreign arbitral proceedings from the legal system of the State where the proceedings take place;[118] (iii) in some States, arbitral awards emanating from the arbitral proceedings that proceeded in defiance of the stay or other rules imposed by the lex fori concursus (e.g. displacement

[114] See paras. 29 and 30 of the Notes.
[115] See also para. 50 of the Explanatory Note.
[116] See article 18 of the EIR recast that covers both.
[117] A/CN.9/1133, paras. 47–53.
[118] GEI, para. 180.

of the debtor from the operation of the business with no capacity to represent the insolvency estate in the arbitral proceedings) are void while in other States they may be recognized and enforced; (iv) limited grounds exist in most States for setting aside or refusing recognition or enforcement of a foreign arbitral award;[119] and (v) the need for recognition and enforcement of the award may not arise, for example where the award is implemented voluntarily, increasing risks of the implementation of the award for the benefit of the wrong person (e.g. the displaced debtor), necessitating a subsequent tracing and recovery action and thereby defeating the objectives of effective and efficient insolvency proceedings.

Chapter III. Applicable law in cross-border recognition and enforcement proceedings

35. At its fifty-ninth session, the Working Group agreed with the approach to the project suggested in paragraph 2 of document A/CN.9/WG.V/WP.176, in particular to focus first on lex fori concursus and exceptions thereto in the context of a simple scenario – an insolvency proceeding with respect to a single debtor – taking up any other issues of applicable law in insolvency proceedings (for example, those arising from cross-border recognition and enforcement of foreign proceedings and coordination of concurrent insolvency proceedings with respect to the same debtor or different members belonging to the same enterprise group) at later stages.[120]

36. At the sixtieth session of the Working Group, to ensure a coherent and comprehensive discussion, it was considered timely to bring cross-border insolvency issues into discussion.[121]

37. At the sixty-first session of the Working Group, with respect to cross-border recognition of effects of the lex fori concursus, a view was expressed that it would be inappropriate to impose the effects of the lex fori concursus, including as regards a stay of proceedings, extraterritorially at the global level. A suggestion was made to include an exception to the lex fori concursus rule that would defer to the law of the recognizing State with respect to a relief to be granted to foreign proceedings. In response, it was recalled that several provisions of the UNCITRAL insolvency model laws gave prominence to the lex fori concursus of the main proceeding vis-à-vis non-main proceedings. It was suggested that the current project should aim at clarifying, supplementing and amplifying that framework, instead of deviating therefrom, for example by giving discretion to the recognizing court to defer to the lex fori concursus of the main proceeding as some courts had already done. It was noted that the EIR recast envisaged the extraterritorial effect of the lex fori concursus of the main proceeding, except for in some matters. Noting a view that the UNCITRAL insolvency model laws attempted to achieve similar results but differently, it was considered necessary to find a solution that would accommodate different recognition regimes.[122]

38. At its sixty-second session, the Working Group heard proposals that the draft text on applicable law in insolvency proceedings found in document A/CN.9/WG.V/WP.187 should be revised to ensure that it comprehensively addressed the governing law also in the context of cross-border recognition under the UNCITRAL insolvency model laws.[123] The need for consequential amendments throughout the draft text was noted. It was specifically suggested to consider the need for adding a public policy exception in the cross-border recognition context and

[119] See article V of the New York Convention and articles 34 and 36 of the MAL.
[120] A/CN.9/1088, para. 56.
[121] A/CN.9/1094, para. 99.
[122] A/CN.9/1126, paras. 69–71.
[123] A/CN.9/1133, para. 27.

including there, like in MLIJ, reference to fundamental principles of procedural fairness.[124]

39. The Working Group may wish to agree and provide guidance to the secretariat on how legislative provisions and accompanying commentary should be drafted. For example, should they provide for recognition of extraterritorial effects of the lex fori concursus of the requesting State, in particular as regards the scope, and the modification or termination, of the stay and suspension (e.g. under article 20 (2) of MLCBI), other relief, avoidance and duties and functions of the insolvency representative, or should they authorize the receiving court to recognize extraterritorial effects of the lex fori concursus of the requesting State on those matters on a case-by-case basis under certain conditions (e.g. under article 19 and 21 of MLCBI) or both? Should similar measures be envisaged in other contexts (e.g. under articles 7 and 27 of MLCBI)? In addition to the public policy exception suggested at the sixty-second session of the Working Group (see the preceding paragraph), which other safeguards would apply (e.g. adequate protection of creditors)?

40. The Working Group may wish to discuss possible different approaches and accompanying conditions and safeguards in some detail, for example, whether such recognition would be envisaged only for foreign main proceedings [125] or, as appropriate and under perhaps additional conditions, also for other proceedings (i.e. foreign non-main or local asset proceedings).[126] In the light of discussions in the Working Group at its sixty-second session,[127] it may also wish to discuss whether additional safeguards would be needed in particular for secured creditors and if so, whether they could include the requirement on the receiving court to ascertain that the lex fori concursus: (a) recognizes a security interest effective and enforceable under the law other than the insolvency law as effective and enforceable in insolvency proceedings as well; (b) applies only a short stay to secured creditors in liquidation proceedings; (c) entitles a secured creditor, upon application to the court, to protection of the value of the assets in which it has a security interest (appropriate measures of protection may include cash payment by the estate and provision of additional security interests); and (d) envisages relief from the stay upon request of a secured creditor to the court on grounds such as that the encumbered asset is not necessary to a prospective reorganization or sale of the debtor's business, or the value of the encumbered asset is diminishing as a result of the commencement of insolvency proceedings and the secured creditor is not protected against that diminution of value, or a reorganization plan is not approved within any applicable time limits.[128]

41. Undertakings of the type envisaged in MLEGI and discussed in relation to several items on the lex fori concursus list above may be considered also relevant. Under MLEGI, where such an undertaking is given and approved by the requesting court, the affected claims would be treated in accordance with the treatment they would receive in an unopened parallel proceeding. Giving such an undertaking, for example as regards the treatment and ranking of foreign creditors' claims in domestic insolvency proceedings, may give assurances to the receiving State that its local creditors would receive the same or similar treatment as they would receive in local proceedings, alleviating possible difficulties with the recognition and enforcement of

[124] Ibid., para. 29 (j).

[125] See, in that context, the approach taken in the Aircraft Protocol, mentioned in para. 7 above and para. 13 of the draft commentary to item (d) on the lex fori concursus.

[126] E.g. MLIJ does not give prominence to foreign main proceedings and judgments originating in those proceedings. E.g. article 14 (e) of MLIJ envisages that recognition and enforcement of an insolvency-related judgment may be refused if this would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in the MLIJ. There could also be cases where foreign main proceedings may never be opened. See an example of such a case in CLOUT 2064.

[127] A/CN.9/1133, paras. 37–41.

[128] See recommendations 4, 49–51 and 317–318 of the Guide.

effects of the lex fori concursus of the requesting State and avoiding the opening of parallel proceedings in the receiving State for the purpose of protecting local interests.

42. By recognizing extraterritorial effects of the lex fori concursus, the recognizing State may recognize the application of the law other than the law of the requesting State, as may be applied by the requesting court. As envisaged in the newly proposed provisions for chapter II of the draft text, that other law could be the lex rei sitae, the law of the State under the authority of which the register is kept or any other law with more connection to the issue at hand than the law of the requesting State. That other law may turn out to be the law of the receiving State.

Chapter IV. Applicable law in concurrent proceedings with respect to the same debtor or different debtors belonging to the same enterprise group

43. The Working Group has not yet discussed approaches to determining the governing law, or coordinating the application of several governing laws, in concurrent proceedings with respect to a single debtor or members of an enterprise group. It may wish to do so taking into account views expressed at its earlier sessions, including that: (a) the project should not address these issues in the context of enterprise group insolvency;[129] (b) no rigid hierarchy between concurrent proceedings should be established so as not to hinder the ability of courts and insolvency representatives to cooperate by way of exercising their discretion under relevant provisions on cooperation and coordination and for other reasons (e.g. there may be no foreign main proceeding opened);[130] (c) MLCBI in its provisions on relief,[131] effects of recognition[132] and the limited scope of the local proceedings after recognition of a foreign main proceeding[133] gives certain pre-eminence to the foreign main proceeding;[134] and (d) in the enterprise group insolvency context, the MLEGI envisages deference to the planning proceeding, subject to exceptions and safeguards, such as giving an undertaking on the treatment of foreign claims.[135] Among other issues identified for discussion were the treatment of inconsistent judgments emanating from concurrent proceedings and issues of comingled assets and control in the enterprise group context. Articles 29 and 30 of MLCBI were also considered raising pertinent issues for determining the governing law, or coordinating the application of several governing laws, in concurrent proceedings.

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[129] A/CN.9/1133, para. 28.
[130] A/CN.9/1126, para. 56.
[131] See e.g. articles 19.4, 21.3, 23.2, 29 (c) and 30 of MLCBI.
[132] Article 20 of MLCBI.
[133] Article 28 of MLCBI.
[134] See e.g. paras. 1, 21, 31, 44, 132–133, 144, 175, 193 and 202 of GEI.
[135] A/CN.9/1094, para. 97.