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Applicable law in insolvency proceedings

Draft guide to enactment of the UNCITRAL Model Law on Applicable Law in Insolvency Proceedings

Note by the Secretariat

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I. Introduction

The provisional agenda of the Working Group's sixty-seventh session (A/CN.9/WG.V/WP.203) provides background on the project of applicable law in insolvency proceedings, referred to the Working Group by the Commission at its fifty-fourth session, in 2021.¹ Following the Working Group's decision at its sixty-sixth session,² chapter II of this note presents a draft guide to enactment of what is expected to become the UNCITRAL Model Law on Applicable Law in Insolvency Proceedings (MLAPL). Footnotes in bold refer to the sources of revisions and outstanding issues in relation to this draft guide. Other footnotes are intended to stay in the final guide.

II. Draft guide to enactment of the UNCITRAL Model Law on Applicable Law in Insolvency Proceedings

Chapter I. Purpose and origin of the Model Law

A. Purpose of the Model Law (preamble)

1. The UNCITRAL Model Law on Applicable Law in Insolvency Proceedings (the Model Law), adopted by the United Nations Commission on International Trade Law (UNCITRAL) in [*the year is to be filled in in due time*], provides States with modern legislation on applicable law in insolvency proceedings. It complements the 1997 UNCITRAL Model Law on Cross-Border Insolvency³ (MLCBI), the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments⁴ (MLIJ) and the 2019 UNCITRAL Model Law on Enterprise Group Insolvency⁵ (MLEGI) (collectively referred to as the “earlier UNCITRAL insolvency model laws”). It also updates⁶ recommendations 31–34 of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide; the Legislative Guide together with the earlier UNCITRAL insolvency model laws and the 2025 UNCITRAL Toolkit and Background Notes on Asset Tracing and Recovery in Insolvency Proceedings; and other explanatory texts on insolvency matters authored by UNCITRAL or by its secretariat are referred to collectively in this Guide as the “other UNCITRAL insolvency texts” and all of them together with the Model Law are referred to as the “UNCITRAL insolvency texts” or the “UNCITRAL insolvency framework”). While complementing, reinforcing and promoting the other UNCITRAL insolvency texts, the Model Law is expected to be of value to all States, regardless of whether they have adopted those texts.⁷

2. As the Model Law's preamble states, the Model Law provides clear, easily incorporated rules for determining the law governing the commencement, conduct, administration and closure of insolvency proceedings and their effects, both domestically and across borders (e.g. in recognition and relief proceedings), for a single debtor or an enterprise group. In some States, domestic law is silent or only partially addresses these matters, leaving courts to decide those matters on a case-by-case basis.

3. States that address these matters generally recognize that the law of the State where insolvency proceedings are commenced (the *lex fori concursus*) governs

¹ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, paras. 215–217.

² A/CN.9/1203, para. 80.

³ United Nations publication, Sales No. E.14.V.2. Available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

⁴ United Nations publication, Sales No. E.19.V.8. Available at <https://uncitral.un.org/en/texts/insolvency/modellaw/mlij>.

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

⁶ A/CN.9/1203, para. 76.

⁷ *Ibid.*

commencement, conduct, administration and closure of insolvency proceedings, i.e. procedural matters. Exceptions to the *lex fori concursus* are often made for determining the law governing the effects of insolvency proceedings, in particular on specific rights and obligations (e.g. rights in rem) and proceedings (e.g. ongoing arbitral proceedings), i.e. substantive matters, with alternative laws determined using different connecting factors.

4. The law and practice giving effect to the *lex fori concursus* across borders are not uniform either. The earlier UNCITRAL insolvency model laws address those matters only partly and not explicitly.

5. This Model Law addresses these gaps by: (a) establishing the general rule that the *lex fori concursus* governs all aspects of insolvency proceedings, subject to limited exceptions; (b) explaining the meaning and scope of the *lex fori concursus* and the scope and application of each exception thereto; (c) enabling recognition of the effects of the *lex fori concursus* and other laws applied by a foreign court; and (d) reinforcing measures found in the earlier UNCITRAL insolvency model laws to minimize or coordinate concurrent proceedings.

6. In doing so, the Model Law complements and expands the other UNCITRAL insolvency texts, enhancing certainty, predictability, efficiency and effectiveness of insolvency proceedings. It also balances competing considerations, such as the benefits of applying the *lex fori concursus* to all issues arising in insolvency proceedings with the need to protect certain relationships and legitimate interests from undue interference of that law.

7. The Model Law does not determine the law governing the validity and effectiveness of rights or claims existing before the commencement of insolvency proceedings. That law remains to be determined by the generally applicable rules of private international law (conflict-of-laws) (henceforth referred to as the “PIL rules”) of the State in which insolvency proceedings are commenced. The provisions of the Model Law do not displace those rules.

B. A model law as a vehicle for the harmonization of laws

8. A model law is a form of text recommended to States for incorporation into their national law through the enactment of legislation. Unlike an international convention, a model law does not require the enacting State to notify the United Nations or other States that may have also enacted the text. However, a General Assembly resolution endorsing an UNCITRAL model law usually invites States that have used the text to advise the Commission accordingly.

9. A model law is inherently flexible, enabling States to make various modifications to the text when enacting it as domestic law. Some modifications may be expected, in particular, when a model law text is closely related to national court and procedural systems, as is the case with this Model Law. Modification means that the degree of, and certainty about, harmonization achieved through a model law may be lower than in the case of a convention.

10. The Model Law is intended to operate as an integral part of the existing law of the enacting State. In incorporating the text of the Model Law into its legal system, a State may modify or elect not to incorporate some of its provisions. The flexibility to introduce modifications in the Model Law should, however, be utilized with due consideration for the need for uniformity in its interpretation and for the benefits to the enacting State of adopting modern, generally acceptable international practices as regards applicable law in insolvency proceedings.

11. In order to achieve a satisfactory degree of harmonization and certainty, States may therefore wish to make as few changes as possible when incorporating the Model Law into their legal systems. Such an approach would not only assist in making national law as transparent and predictable as possible for foreign users. It would also contribute to fostering cooperation between insolvency proceedings as the laws of

different States will be the same or very similar, reducing the costs of proceedings due to greater efficiency in the conduct of insolvency proceedings, and improving consistency and fairness of treatment in those proceedings.

C. Origin of the Model Law – preparatory work and adoption

12. Following its oral proposal on possible future work by UNCITRAL on applicable law in insolvency proceedings at UNCITRAL's fifty-first session,⁸ in 2018, the European Union, on behalf of its member States, submitted at UNCITRAL's fifty-second session in 2019, a formal proposal (A/CN.9/995) for harmonizing applicable law in insolvency proceedings. The proposal noted that the earlier UNCITRAL insolvency model laws did not address the topic and that divergent national approaches undermined consistency and predictability in cross-border insolvency cases, negatively affecting trade and commerce. The Commission acknowledged the importance of the topic and referred it to a colloquium for the development of concrete proposals.⁹ At its fifty-fourth session in 2021, after considering the report of the colloquium,¹⁰ the Commission agreed to refer the topic to Working Group V, with the form of the work to be decided later.¹¹

13. The Working Group considered the topic from its fifty-ninth to [...] session. In addition to States from all regions and with different economic and legal systems, the European Union and many intergovernmental and non-governmental organizations took an active part in deliberations, underscoring the global importance of the topic.

14. Final negotiations on the Model Law took place at the [...] session of UNCITRAL, held in [...] from [...] to [...]. [*to be completed in due course*].

Chapter II. Purpose of the Guide to Enactment

15. The Guide to Enactment is designed to provide background and explanatory information on the Model Law. That information is primarily directed to executive branches of Governments and legislators preparing legislative revisions necessary to enact the Model Law, but also provides useful insight to those charged with interpretation and application of the Model Law as enacted, such as judges and other users of the text, such as practitioners and academics.

16. The Guide is based on the deliberations and decisions of the Working Group on the draft legislative provisions, and, subsequently, on the draft model law on the topic. The draft Guide was considered by Working Group V at its [...] sessions. The Commission adopted the Guide to Enactment of the UNCITRAL Model Law on Applicable Law in Insolvency Proceedings at its [...] session [together with the Model Law].

[Interaction of the Model Law and this Guide with the Legislative Guide and each of MLCBI, MLIJ and MLEGI is to be explained in more detail in this section once related outstanding matters are resolved by the Working Group (see in this context A/CN.9/1203, paras. 48 and 76–80; A/CN.9/WG.V/WP.202, paras. 17 and 18; and relevant draft articles in A/CN.9/WG.V/WP.204.)]

⁸ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 251 and 253.

⁹ *Ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 204–206.

¹⁰ *A/CN.9/1060*.

¹¹ *Ibid.*, *Seventy-sixth Session, Supplement No. 17 (A/76/17)*, paras. 215–217.

Chapter III. Article-by-article remarks

General provisions

Article 1. Scope of application

General

17. The scope of the Model Law is tied to the notions of “insolvency proceedings” and their “commencement”. Under UNCITRAL texts, a proceeding is an insolvency proceeding if it is, cumulatively: (a) collective (judicial or administrative); (b) conducted pursuant to a law relating to insolvency (which includes company law); (c) under control or supervision by a court (which includes the debtor-in-possession); (d) commenced with respect to a debtor (natural or legal person) that is in financial distress or insolvent; and (e) with the goal of liquidating or reorganizing that debtor as a commercial entity.¹²

18. “Insolvency proceedings” encompass: (a) “liquidation” – proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law;¹³ (b) “reorganization” – 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;¹⁴ (c) “expedited reorganization proceedings” – out-of-court voluntary restructuring negotiations and acceptance of a plan, followed by an expedited procedure under the insolvency law for court confirmation of that plan;¹⁵ (d) simplified insolvency proceedings;¹⁶ and (e) other proceedings, including interim, restructuring, business sale prepared during the amicable phase and subsequently approved by the court during the reorganization or liquidation phase and any other proceeding that the court may determine on a case-by-case basis as meeting the cumulative requirements set out in paragraph [17] above.¹⁷

19. Proceedings that do not meet those requirements fall outside the scope of application of the Model Law. For example, debt collection proceedings or receiverships initiated by a particular creditor or group of creditors, or proceedings aimed solely at gathering assets in winding-up or conservation contexts without provision for addressing the claims of all creditors are excluded.¹⁸ Judicial or administrative proceedings concerning a solvent entity that do not seek to restructure the entity’s financial affairs but rather dissolve its legal status are likewise excluded.¹⁹ Financial adjustment measures or arrangements undertaken contractually between the debtor and some of its creditors with respect to certain debts, where the negotiations do not result in the commencement of insolvency proceedings under the insolvency law, also fall outside the scope of the Model Law.²⁰ In addition, proceedings designed solely to prevent dissipation or waste of assets, rather than to liquidate or reorganize the insolvency estate, as well as proceedings aimed primarily at protecting investors rather than all creditors, are excluded.²¹

¹² See Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (GEI), paras. 69–78 and 86 and recommendations 15, 16, 112, 113, 284–286 and 294 of the Legislative Guide.

¹³ The Glossary in the Introduction to the Legislative Guide, term (w).

¹⁴ The Glossary in the Introduction to the Legislative Guide, term (kk).

¹⁵ See the text on the Purpose of legislative provisions preceding recommendation 160 of the Legislative Guide; and GEI, para. 75.

¹⁶ The Legislative Guide, part five.

¹⁷ 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.

¹⁸ GEI, para. 69.

¹⁹ GEI, para. 22; and GEI, paras. 48 and 73.

²⁰ GEI, para. 78.

²¹ GEI, para. 77.

Paragraph 1

20. The Model Law establishes rules for determining the law that governs: (a) jurisdictional, eligibility and procedural aspects of insolvency proceedings; (b) the effects of insolvency proceedings on pre-commencement rights and claims (i.e. how such rights and claims are treated in insolvency proceedings); and (c) post-commencement rights, claims, actions and disputes.

21. Examples of issues covered by item (a) in the preceding paragraph include the commencement, conduct, administration and closure of insolvency proceedings, such as: applicable commencement standards; requirements and procedures for giving notice of commencement of insolvency proceedings and the content of such notice; grounds and procedures for denial of applications or dismissal of proceedings and their consequences; the type of 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.

22. Examples of issues covered by item (b) in paragraph [20] above include: the relative position of claims vis-à-vis one another (i.e. their ranking and priority); avoidance; and restrictions or modifications to which pre-commencement rights and claims may be made subject in order to fulfil the collective aims of insolvency proceedings (e.g. a stay of proceedings²² or subordination).

23. Examples of issues covered by item (c) in paragraph [20] above include: rights and claims arising from the use and disposal of the insolvency estate assets, post-commencement finance and the actions of the insolvency representative²³; challenges to a liquidation schedule, reorganization plan or debt discharge; and the determination and authorization of administrative claims and expenses.

Paragraph 2

24. As stated in paragraph 2 of the article, the Model Law does not displace the PIL rules of the State in which the insolvency proceedings are commenced that determine the law applicable to the validity and effectiveness of rights and claims existing prior to the commencement of insolvency proceedings. To determine that law, the court controlling or supervising the insolvency proceeding will apply the generally applicable PIL rules of its State, including any international conventions or other agreements in force for that State. This approach is reflected in recommendation 30 of the Legislative Guide. For example, the law governing the contract will typically determine whether a contractual claim exists against the debtor and the amount of that claim, while the law of the State where immovable assets are located will determine whether, for example, a security interest in those assets has been created. Nevertheless, insolvency proceedings produce effects on pre-commencement rights

²² “Stay of proceedings”: a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor’s assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate (the Glossary in the Introduction to the Legislative Guide, term (rr)). This encompasses the right to commence or continue an arbitral proceeding and to enforce an arbitral award.

²³ The Glossary in the Introduction to the Legislative Guide defines the term as including a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate (see item (v)). Depending on the context, the term “insolvency representative” may also refer to an “independent professional”: an individual or entity of appropriate qualifications, independent from the debtor, creditors and other parties in interest, appointed by the competent authority to perform one or more tasks related to a simplified insolvency proceeding, subject to appropriate clearances as regards ethical, professional and other requirements and the absence of conflicts of interest (see the Glossary in part five of the Legislative Guide, term (d)).

and claims (see para. [22] above for examples).²⁴ Those effects are governed by the law determined in accordance with the provisions of the Model Law, with the result that the generally applicable PIL rules do not apply to such matters.

25. The Model Law does not establish rules for determining the location of assets, persons or legal acts. Such rules are part of the generally applicable PIL rules and may be found in other instruments.²⁵

26. Likewise, the Model Law does not establish jurisdictional rules. Although jurisdiction is relevant to the matters covered by the Model Law, in particular its cross-border provisions, it is addressed in other texts.²⁶ For example, the Legislative Guide recommends that the insolvency law specify which debtors have a sufficient connection to the State to be subject to its insolvency law, and specifically recommends that the grounds include that the debtor has either the centre of its main interests (COMI)²⁷ or an establishment²⁸ in the State.²⁹

27. Similarly, the Model Law does not establish rules for allocation of assets between or among concurrent proceedings. Those aspects may be addressed in other instruments.

Paragraph 3

28. The Model Law was formulated to apply to any insolvency proceeding meeting the requirements listed in paragraph [19] above, regardless of the sector in which the insolvency proceedings take place and the entities in respect of which such proceedings are opened. Exemptions from the application of the Model Law are generally discouraged. Nevertheless, paragraph 3 of the article was included in recognition that some States may choose to exclude certain insolvency proceedings from the scope of the Model Law. Such exclusions might apply, for example, to entities subject to a special insolvency regime (e.g. financial institutions or entities operating under public law), where different rules for determining applicable law in insolvency proceedings may exist. The paragraph was included to emphasize that, for reasons of transparency, any such exclusions should be clearly specified in the legislation. The paragraph appears in square brackets to convey that exclusions may not be necessary, particularly in light of the special rules and exceptions to the application of the *lex fori concursus* found in the Model Law. Exclusions may also be undesirable, as they could give rise to inadvertent and negative consequences.

Discussion in UNCITRAL and the Working Group

[references to reports of UNCITRAL and the Working Group are to be included in due course]

[A/CN.9/WG.V/WP.176](#), III, B

[A/CN.9/1088](#), paras. 61–64; 68

[A/CN.9/WG.V/WP.179](#), II, B

²⁴ 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 Legislative 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 in the Guide to Enactment of that Model Law (para. 500); and article 14.2 of the International Institute for the Unification of Private Law (UNIDROIT) Convention on Substantive Rules for Intermediated Securities.

²⁵ E.g. articles 90 and 91 of the UNCITRAL Model Law on Secured Transactions.

²⁶ E.g. article 14 (g) of MLIJ and paras. 110–115 of its Guide to Enactment.

²⁷ For the explanation of the term, see paras. 144–149 of GEI.

²⁸ Defined as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services (see e.g. article 2 (f) of MLCBI).

²⁹ 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 Legislative Guide.

- A/CN.9/1094, para. 68
 A/CN.9/WG.V/WP.183, II, B
 A/CN.9/1126, paras. 60–62
 A/CN.9/WG.V/WP.187, II, B
 A/CN.9/1133, paras. 22–26; 29 (c)–(f)
 A/CN.9/WG.V/WP.190, II, Ch. II, B
 A/CN.9/1163, paras. 48–49
 A/CN.9/WG.V/WP.194, II, Ch. I, B
 A/CN.9/1169, paras. 85–87
 A/CN.9/WG.V/WP.198, II, Ch. I, B
 A/CN.9/WG.V/WP.202, II, Ch. I, B

Article 2. Definitions

29. Many of the terms used in this Model Law are the same as those used in other UNCITRAL insolvency texts. This Model Law introduces new definitions, which are explained below.

Lex fori concursus

30. “*Lex fori concursus*” refers to the law of the State in which the insolvency proceedings are commenced. For the purpose of the Model Law, it should be interpreted broadly as encompassing not only the insolvency law of the State of the opening of insolvency proceedings but also other laws of that State relevant to insolvency that may apply as part of the *lex fori concursus* to a particular case. The relevance of laws other than insolvency law will be assessed on a case-by-case basis. Common examples of such laws include: (a) law addressing directors’ obligations and liabilities in the period approaching insolvency in the context of insolvency proceedings; (b) law addressing debt restructuring procedures in pre-insolvency proceedings; (c) secured transactions law that, among other matters relevant to insolvency, address the treatment of pre-commencement secured finance in subsequent insolvency; (d) family law addressing the treatment of jointly owned assets in insolvency proceedings of individual entrepreneurs; (e) law providing for special treatment of certain assets, such as cultural heritage objects, in insolvency; (f) labour law addressing the treatment and ranking of labour claims in insolvency; (g) tax and social security legislation addressing the treatment and ranking of public debts; and (h) foreign investment law imposing restrictions on foreign ownership of certain assets or operations in specific sectors of the economy, which may be relevant, for example, in cases of debt-equity conversions or the sale of the business (or part thereof) as a going concern.

31. References to the *lex fori concursus* are found throughout the Model Law because, under the Model Law, it is the principal law governing the commencement, conduct, administration and closure of insolvency proceedings and their effects (see commentary to article [5] below). Exceptions to the *lex fori concursus* are limited in number and clearly set forth in the Model Law as recommended in the Legislative Guide (rec. 34). The *lex fori concursus* may also apply in circumstances where the law of another State that would or could otherwise govern under the Model Law (e.g. *lex rei sitae* or the law applicable to a labour contract or a regulated market) is not made applicable in a given case (e.g. by virtue of a public policy exception).

Lex rei sitae

32. “*Lex rei sitae*” refers to the insolvency law of the State where an asset is situated. For assets subject to registration, such as ships or aircraft, the *lex rei sitae* should be

understood as the insolvency law of the State under whose authority or supervision the register in which the asset has been registered is maintained, i.e. the State to whose regulation the entity maintaining the register submits its activities. If the entity maintaining the register is not under supervision, the relevant law will be that of the State where the register has its seat (*lex libri siti*). [The location of the asset or the register is to be determined with reference to the date of the commencement of insolvency proceedings.]³⁰

33. References to the *lex rei sitae* appear throughout the Model Law and this Guide in the context of [special rules against unjustified interference by the *lex fori concursus* with rights in rem, such as security rights]. (For the definition of “rights in rem”, see item [(d)] of this article.)

Lex societatis

34. “*Lex societatis*” refers to the law of the State governing the formation, operation and dissolution of business entities and their internal governance matters, including the rights, obligations, responsibilities and liabilities of founders and owners (e.g. with respect to charter capital), decision-making and -taking processes (e.g. governing bodies, shareholder meetings), and mechanisms for resolving internal governance disputes (e.g. disputes between shareholders and management). Those aspects may be regulated differently for different types of business entities (e.g. partnership, joint stock company). These matters are generally addressed in company, corporate, partnership or business association law.

35. There is no uniform approach to determining the *lex societatis*. Some States apply the “incorporation” approach, under which the law of the State of incorporation governs all aspects of governance of a business entity. Others apply the “real seat” approach, under which the law of the State where a business entity has its “real” seat (i.e. its management and control centre) governs. The concept of “real seat” is not uniformly understood. While the connecting factors used to determine the *lex societatis* may overlap with those relevant to determining COMI (see commentary to article [5 (t)] below),³¹ they are not directly relevant to the Model Law. The term is used 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 insolvency proceedings have commenced.

Rights in rem

36. [The outcome of the Working Group’s discussion on articles 5 (j) and 8 will determine whether the definition of “rights in rem” is required and, if so, its formulation and commentary.]

Discussion in UNCITRAL and the Working Group

[A/CN.9/WG.V/WP.179](#), II, C, 1

[A/CN.9/1094](#), paras. 69–70

[A/CN.9/WG.V/WP.183](#), II, C

[A/CN.9/1126](#), paras. 63–65

[A/CN.9/WG.V/WP.187](#), II, C

[A/CN.9/1133](#), para. 29 (g)–(h)

[A/CN.9/WG.V/WP.190](#), II, Ch. I, C

³⁰ See [A/CN.9/1203](#), para. 47.

³¹ See e.g. GEI, paras. 145–147.

[A/CN.9/1163](#), paras. 50–54
[A/CN.9/WG.V/WP.194](#), II, Ch. I, C
[A/CN.9/1169](#), paras. [69]; 88
[A/CN.9/WG.V/WP.198](#), II, Ch. I, C
[A/CN.9/1198](#), paras. 55–56
[A/CN.9/WG.V/WP.202](#), II, Ch. I, C
[A/CN.9/1203](#), paras. 32; 47

Article 3. International obligations of this State

37. Article 3, which expresses the principle of the supremacy of the international obligations of the enacting State over its internal law, is modelled on similar provisions found in other UNCITRAL model laws (e.g. article 3 of the MLCBI, MLIJ and MLEGI). To the extent that the domestic enactment of the Model Law conflicts with obligations of the enacting State arising under a treaty or agreement binding upon it, the requirements of that treaty or agreement will generally prevail.

38. Binding legal obligations issued by regional economic integration organizations for their member States may be treated as obligations arising from an international treaty or agreement. In addition, the provision can be adapted in domestic legislation to refer to binding international instruments with non-State entities, where such instruments apply to matters within the scope of the Model Law.

39. In enacting the article, legislators may wish to consider measures to avoid an unnecessarily broad interpretation of international treaties. For example, precedence might inadvertently be given to treaties, which, although covering matters that overlap with those addressed in the Model Law, were intended to resolve issues different from those that the Model Law seeks to address. Owing to imprecise or broad drafting, such treaties might be misunderstood as extending to matters governed by the Model Law. Such an outcome would compromise the objectives of uniformity and facilitation of cross-border cooperation in insolvency, and would diminish certainty and predictability in the application of the Model Law. To mitigate this risk, the enacting State may wish to provide that, for article 3 to displace a provision of domestic law, a sufficient connection must exist between the treaty concerned and the issue regulated by the relevant provision of domestic law. Such a condition would avoid undue and unintended restrictions on the effect of legislation implementing the Model Law. However, it should not be framed so narrowly as to require that the treaty concerned deal specifically or exclusively with laws applicable in insolvency proceedings.³²

40. In some States binding international treaties or agreements are self-executing. Where this is not the case, it may be inappropriate or unnecessary to enact article 3 or it might be more appropriate to enact it in a modified form.

Discussion in UNCITRAL and the Working Group

[A/CN.9/1094](#), para. 94
[A/CN.9/WG.V/WP.183/Add.1](#), IV, A
[A/CN.9/1126](#), para. 54

³² See e.g. the Cape Town Convention and its Protocols as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (United Nations, Treaty Series, vol. 330, No. 4739, p. 3). **At its sixty-first session, the Working Group requested the secretariat to draft a commentary to this provision that would, inter alia, mention relevant treaties, such as the Cape Town Convention and its Protocols and the New York Convention (A/CN.9/1126, para. 54).**

[A/CN.9/WG.V/WP.187](#), II, D

[A/CN.9/1133](#), para. 29 (i)

[A/CN.9/WG.V/WP.190](#), II, Ch. I, D

[A/CN.9/WG.V/WP.194](#), II, Ch. I, D

[A/CN.9/WG.V/WP.198](#), II, Ch. I, D

[A/CN.9/WG.V/WP.202](#), II, Ch. I, D

[A/CN.9/1203](#), para. 53

Article 4. Interpretation

41. A provision similar to that contained in article 4 appears in a number of private law treaties (e.g. art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)³³). It has been recognized that such a provision is also useful in a non-treaty instrument, such as a model law, on the basis that a State enacting a model law would have an interest in its harmonized interpretation.

42. Article 4 has been modelled on article 8 of MLCBI, article 8 of MLIJ and article 7 of MLEGI. The inclusion of such a provision in the Model Law was considered especially important because application of the Model Law may require the application of foreign law, with the attendant need for its determination and verification and engagement with foreign legal cultures, systems, and concepts. In such situations, there may be a tendency to rely unduly on local concepts and rules. Such tendencies should be avoided to achieve uniform interpretation and application of the Model Law. Where a question concerning a matter governed by the Model Law is not expressly settled therein, it is expected to be resolved in conformity with the general principles on which the Model Law is based. Where necessary, analogous legal rules may be applied to produce the effects intended under the Model Law.

43. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) interpreting conventions and model laws developed by UNCITRAL. (For further information about the system, see chapter IV of this Guide.)

44. In the Model Law and the Guide: “or” is not intended to be exclusive; use of the singular also includes the plural; “include”, “including”, “such as” and “for example” are not intended to indicate an exhaustive list; “may” allows courts discretion to apply a particular law in appropriate cases, “should” expresses a presumption in favour of applying a particular law but permits deviations, and “shall” imposes a mandatory rule; and references to “persons” should be interpreted as including both natural and legal persons.

45. In addition, references to foreign law in the Model Law should be understood as references only to that State’s substantive internal law, not its private international law rules, i.e. renvoi is not envisaged. This approach, consistent with other international texts,³⁴ promotes certainty. Such references also exclude the foreign State’s public law, i.e. law relating to the exercise of sovereign powers. Nevertheless, the court may address the treatment and ranking of foreign public claims (e.g. tax and social security claims).³⁵ Similarly, references do not extend to foreign procedural law, since courts apply their own procedural law and disregard rules they classify as procedural. Some matters (e.g. set-off, or limitation periods) may be classified differently across legal systems. The court differentiates substantive from procedural

³³ United Nations, *Treaty Series*, vol. 1489, No. 25567.

³⁴ See e.g. references to the “internal law” in articles 5, 6 and 11 of the Convention on the Law Applicable to Agency.

³⁵ See e.g. article 13 (2) of MLCBI and its footnote b, as well as GEI, paras. 119–120.

matters under the law of its own State, e.g. the *lex fori concursus* in insolvency proceedings.

Discussion in UNCITRAL and the Working Group

[A/CN.9/WG.V/WP.183/Add.1](#), IV, B

[A/CN.9/1126](#), para. 55

[A/CN.9/WG.V/WP.187](#), II, F

[A/CN.9/WG.V/WP.190](#), II, Ch. I, F

[A/CN.9/WG.V/WP.194](#), II, Ch. I, E

[A/CN.9/WG.V/WP.198](#), II, Ch. I, E

[A/CN.9/WG.V/WP.202](#), II, Ch. I, E

Law governing the commencement, conduct, administration and closure of domestic insolvency proceedings and their effects

46. Chapter II of the Model Law provides States with private international law rules to determine the law governing the commencement, conduct, administration and closure of domestic insolvency proceedings and their effects. Such rules are often lacking, creating uncertainty and unpredictability, particularly where foreign elements in insolvency proceedings are involved. Foreign elements may include: (a) assets of the insolvency estate located abroad; (b) creditors or other parties in interest in foreign States; (c) a shift of the COMI from one State to another; or (d) concurrent local and foreign proceedings concerning the same debtor or an enterprise group.

47. Chapter II seeks to mitigate these issues by: (a) establishing the default rule (*lex fori concursus*) and exceptions to it; (b) allowing courts to defer to foreign law where necessary, for example, to secure relief in aid of domestic proceedings – such as turnover of assets located abroad to the insolvency estate administered in the domestic insolvency proceedings or empowering the insolvency representative to pursue avoidance actions abroad; and (c) promoting coordination of, or preventing, parallel proceedings.

48. Chapter II does not address recognition of foreign proceedings in receiving States. Those issues are covered in chapter III of the Model Law. Nevertheless, chapter II is relevant in that context, as it facilitates recognition and enforcement of effects of the *lex fori concursus* and other laws applied in the originating State. In addition, it provides rules for laws applicable in insolvency proceedings that may guide courts in receiving States when they consider requests for relief from foreign courts.

49. [Provisions of Chapter II apply regardless of whether a domestic proceeding is: (a) a main proceeding (commenced at the COMI), (b) a non-main proceeding (commenced at an establishment), or (c) another type of proceeding (commenced where assets are located in the absence of a COMI or establishment).]³⁶ Many courts need not classify proceedings at commencement, though some States require it. Classification usually becomes necessary when seeking recognition abroad or when coordinating with concurrent foreign proceedings.

Article 5. *Lex fori concursus*

50. Article 5 applies the *lex fori concursus* to all aspects of the commencement, conduct, administration and closure of insolvency proceedings. This includes: (a) procedural matters (e.g. notices, meetings, quorums, voting rules, deadlines for claims); and (b) post-commencement rights, obligations and claims (e.g. actions

³⁶ Views differed on the intended scope of chapter II of the draft (see [A/CN.9/1203](#), para. 43).

against the insolvency representative, post-commencement finance, realization of assets, distribution of proceeds). Some matters – such as set-off or limitation period – may be classified as procedural in some States and substantive in others. The court determines their characterization under the law of its State, e.g. the *lex fori concursus*.

51. Subject to special rules in articles 6 to 9, exceptions in article 10 and cross-border cooperation provisions in article 11 of the Model Law, article 5 extends the application of the *lex fori concursus* also to the effects of the insolvency proceedings. Those effects may include a stay of proceedings, avoidance or subordination of claims, invalidation or a stay on enforcement of some contractual clauses (e.g. ipso facto clauses (see rec. 70 of the Legislative Guide), set-off), an insolvency regime for the treatment of contracts, including their assignment despite contractual restrictions (see rec. 83 of the Legislative Guide), and sales of assets free and clear of encumbrances (see recs. 52–62 of the Legislative Guide).

52. Article 5 provides an illustrative list of matters governed by the *lex fori concursus*. Some, such as jurisdiction and commencement standards (items (a) and (b)), always fall under that law. Others, such as avoidance, set-off and [secured creditors][rights in rem] (items (g), (i) and (j) respectively), are subject to special rules in articles 6 to 9 of the Model Law, or may be made subject to a foreign law under article 11 of the Model Law to facilitate cross-border cooperation. Each item listed in article 5 is explained below with references to related provisions.

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

53. This item addresses eligibility, jurisdiction and related issues, including: which debtors have sufficient connection to the State to be subject to its insolvency law; and which insolvency regime (e.g. standard or simplified) applies to the debtor based on factors such as sector, business, 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

54. This item addresses commencement standards – whether based on the balance sheet test, cash flow test or other criteria. It also covers: (i) circumstances under which a particular type of insolvency proceeding may be commenced; (ii) who may apply (the debtor, creditors or other parties); (iii) procedural requirements for applicants (e.g. number or value of creditor claims); (iv) grounds for denial or dismissal; and (v) rules for notices of application and commencement. The item may also address cases where the debtor’s assets are insufficient to cover costs of administering insolvency proceedings, including whether applications are denied or alternative funding mechanisms are used.

(c) Constitution and scope of the insolvency estate

55. This item covers the debtor’s assets included in the insolvency estate, the timing of constitution of the insolvency estate, and treatment of post-commencement assets (e.g. newly acquired or recovered through avoidance). Law other than the insolvency law may apply as part of the *lex fori concursus* in the context of this item, including property, secured transactions, family, civil procedure, tort and human rights law. It may address asset characterization (tangible or intangible, movable or immovable), ownership and other property rights, and treatment of encumbered,³⁷ third-party, jointly owned and foreign assets.

³⁷ Defined in the Legislative Guide as an asset in respect of which a creditor has a security interest (see the Glossary in the Introduction to the Legislative Guide, term (o)). A “security interest” is defined as a right in an asset to secure payment or other performance of one or more obligations (ibid., term (pp)).

56. This item is closely linked to item (j), as encumbered assets may or may not be part of the insolvency estate, and to article 3 on primacy of international obligations, since treaty-based regimes may govern whether an asset is included in the insolvency estate and in which insolvency proceeding it should be administered in cases of concurrent proceedings.

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

57. This item covers 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). This includes 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.

58. The item explicitly refers to a stay of proceedings, which is defined in the Legislative Guide as 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 types of individual action referred to in this definition include both actions in the courts and actions before an arbitral tribunal. The impact of such actions on the insolvency estate – in terms of claims, liabilities, assets, and costs – and the fact that this impact would be assessed and managed by the insolvency representative and the court in charge of the insolvency proceeding, justify that the *lex fori concursus* should govern the effects of insolvency proceedings on those actions. This is consistent with the other items of this article and aligns with the goal of this Model Law to prevent unnecessary interference of other laws in the administration of insolvency proceedings.³⁸

59. At the same time, bearing in mind the particularities of arbitration, it might not always be possible to implement the effects of the *lex fori concursus* on arbitral proceedings (e.g. a stay of arbitral proceedings taking place in a State other than the State in which insolvency proceedings are commenced). Nevertheless, in some States, an arbitral award resulting from proceedings commenced or continued in disregard of the mandatory effects of the *lex fori concursus*, such as a stay of proceedings, may be considered void. In some States, such an award may be set aside by a court, including when the court finds that the award conflicts with the public policy of that State. In some States, such an award may be refused recognition and enforcement. Grounds for refusing recognition and enforcement of awards are provided in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)³⁹ (the "New York Convention").⁴⁰

³⁸ At the sixty-sixth session of the Working Group, it was suggested to expand this commentary to include litigation and mediation aspects, and to convey that the instrument accords the same treatment to all dispute resolution mechanisms (A/CN.9/1203, para. 56). The secretariat notes that, as drafted, the text already covers litigation. As regards mediation, the Working Group has not yet considered that dispute settlement mechanism and may wish to do so at its sixty-seventh session. The results of that discussion will inform the content of this and other paragraphs of the draft guide.

³⁹ United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. Also available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.

⁴⁰ At the sixty-sixth session of the Working Group, it was suggested that the commentary should explicitly recommend that States impose a stay on ongoing proceedings as a matter of substantive insolvency law (A/CN.9/1203, para. 63). The Working Group has not yet agreed on that suggestion.

(e) Use and disposal of assets

60. This item covers: (i) the 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) the terms and limits for the use and disposal of 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, as well as causes of action against a counterparty to an unauthorized transaction; and (iv) notions such as "ordinary course of business" and "related persons".

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

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

62. This item covers issues such as the nature and form of a reorganization plan; when it is to be proposed; who is permitted to prepare such a plan; its content; its approval by creditors; treatment of dissenting creditors; whether court confirmation of the plan is required; the effect of the plan; and its implementation.

63. Law other than the insolvency law may apply as part of the *lex fori concursus* in the context of this item, for example, to: (i) debt-to-equity conversions; (ii) the involvement of employees and trade unions in the preparation of a reorganization plan; (iii) foreign investment and foreign exchange controls; and (iv) the protection of confidential or commercially sensitive information.⁴¹

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

64. This item covers (i) types of transaction that can be avoided and types of transaction exempted from avoidance; (ii) avoidance criteria, including elements to be proven and defences; (iii) the duration of the suspect period and from which date it runs retroactively; (iv) persons eligible to commence avoidance and under which conditions; (v) funding 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, the extent of avoidance and transactions that may be avoided, as well as transactions that are exempted from avoidance in such cases. In the context of insolvency proceedings, "avoidance" means actions taken in accordance with the provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.⁴²

⁴¹ 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.

⁴² See the Glossary in the Introduction to the Legislative Guide, term (c); and also, the Glossary in part five of the Legislative Guide, term (a).

65. The Model Law envisages an exception to the *lex fori concursus* with respect to avoidance of payments or transactions in regulated systems, markets or facilities (see article [10 (2)]). Avoidance in those cases is to be governed by the law applicable to those systems, markets or facilities, like other matters related to such systems, markets and facilities falling under the same exception to the *lex fori concursus*.

66. In comparison, although most other aspects related to labour contracts or relationships (e.g. their rejection or continuation) fall under the law applicable to the contract or relationship as an exception to the *lex fori concursus* (see article [10 (1)]), the *lex fori concursus* remains the law that governs 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.

67. [Similarly, no exception to the *lex fori concursus* is envisaged for avoidance in relation to close-out netting arrangements (see article [10 (3)]), although other matters related to close-out netting arrangements fall under the law applicable to the arrangement as an exception to the *lex fori concursus*.]

68. Article [6] of the Model Law sets out special rules for the law applicable to avoidance. It provides that the court [may] [should] [shall] apply, instead of the *lex fori concursus*, the insolvency law of the State where the debtor had the centre of its main interests at the time of conclusion of the transaction giving rise to avoidance. This is on the condition that deference to that law is necessary to protect the legitimate interests of the parties to the transaction.

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

69. This item covers: (i) qualification of contracts; (ii) the treatment of contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, in particular the power of the insolvency representative to decide whether to continue performance of those contracts, or to 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”), including in labour contracts, or whether they are left to be addressed under general contract or labour 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].⁴³

70. Law other than the insolvency law may apply as part of the *lex fori concursus* in the context of this item, including treaties binding on the State where insolvency proceedings have commenced. It may be relevant, for example, to: qualification of contracts; calculation of damages; treatment of government contracts; and the treatment of arbitration agreements].⁴⁴

71. Under the Model Law, the *lex fori concursus* does not determine the treatment of certain types of contracts in insolvency proceedings (e.g. contracts in the systems, markets or facilities covered by exception of article 10 (2)) and the treatment of most aspects of labour contracts (e.g. their rejection or continuation, but not necessarily ipso facto clauses and avoidance) and close-out netting arrangements [(excluding

⁴³ At the sixty-fifth and sixty-sixth sessions of the Working Group, views differed on whether this sub-item should be retained in this illustrative list. The Working Group agreed to consider the matter further at its next session (A/CN.9/1198, para. 54, and A/CN.9/1203, para. 67). It was noted that different considerations would arise in the discussion of these references compared with those arising from a stay of arbitral proceedings (A/CN.9/1203, para. 67).

⁴⁴ Ibid.

avoidance)] in insolvency proceedings. (See the immediately preceding item for avoidance aspects.)

(i) Treatment of set-off

72. This item covers only how creditors with set-off claims are treated in insolvency proceedings (e.g. as secured creditors or otherwise). It does not cover, for example, the creation, validity and effectiveness of set-off rights and claims, nor the law that applies in that context.⁴⁵

73. The set-off regime under this item is mandatorily applicable and displaces any set-off arrangements contractually agreed by the parties. The word “treatment” in this item intends to convey that meaning. Under the Model Law, the *lex fori concursus* determines whether set-off⁴⁶ is permitted in insolvency proceedings and, if so, with respect to which obligations and under which conditions, in particular: (i) whether set-off is permitted only with respect to pre-commencement monetary obligations matured prior to the commencement of insolvency proceedings or also those that would mature after commencement; (ii) whether obligations subject to set-off must arise under a single contract or may arise under multiple contracts or related obligations (i.e. not necessarily be mutual or related); and (iii) whether the stay applies to the exercise of set-off rights, or whether set-off is effectuated automatically upon commencement of insolvency proceedings. This item also covers the treatment of set-off of claims arising after the commencement of insolvency proceedings.

74. This item is closely linked to other items in this article, 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 exceptions to the *lex fori concursus* set out in article [10, paragraphs 2 and 3]. Under those exceptions, the effects of insolvency proceedings on set-off rights and obligations in the covered systems, markets and facilities are governed by the law applicable to those systems, markets and facilities, and the effects of insolvency proceedings on close-out netting arrangements under eligible financial contracts outside the covered systems, markets and facilities are governed by the law applicable to those arrangements.

75. The court of an enacting State [may][should][shall] avail itself of special rules set out in article [7] of this Model Law. [*To be completed after agreement on the content of article 7 is reached*].

(j) [Treatment of secured creditors, subject to adequate protection] [Treatment of rights in rem in respect of the debtor’s assets, subject to adequate protection]

[*To be completed after agreement on the content of this item and article 8 is reached.*]

(k) Rights and obligations of the debtor

76. This item covers issues such as: (i) whether the debtor-in-possession regime or the total or limited displacement of the debtor will be in place in insolvency proceedings; (ii) the rights and obligations of the debtor, including its directors, under each of these regimes generally and in a specific case; and (iii) conditions for converting one regime into another. It is linked to item (e) on the use and disposal of assets, and in that context to the definition of “ordinary course of business” and treatment of unauthorized transactions.

77. Law other than the insolvency law may apply as part of the *lex fori concursus* in the context of this item, in particular if the debtor is a natural person. Such law may include international human rights instruments binding on the enacting State (e.g. regarding freedom of movement and the right to privacy), data protection rules,

⁴⁵ A/CN.9/1203, para. 51.

⁴⁶ Defined in the Legislative Guide as “where a claim for a sum of money owed to a person is applied in satisfaction of reduction against a claim by the other party for a sum of money owed by that first person” (see the Glossary in the Introduction to the Legislative Guide, term (qq)).

and civil and criminal procedure laws (e.g. regarding disclosure, examination, and search and seizure orders related to the debtor and its assets). Treaties, such as on mutual legal assistance, the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Service Convention”) and the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Evidence Convention”), as well as other international instruments binding on the enacting State, may apply as part of the *lex fori concursus* for any actions concerning the debtor, its assets, or business records located abroad.

(l) Duties and functions of the insolvency representative

78. This item covers, in addition to duties and functions of the insolvency representative generally and in a specific case: (i) conditions and mechanisms for the selection, appointment, removal and replacement of the insolvency representative, including the insolvency representative appointed on an interim basis; (ii) remuneration for services rendered by the insolvency representative; (iii) oversight by the court and creditors; and (iv) liability of the insolvency representative.

79. Law other than the insolvency law may apply in the context of this item, such as professional standards and regulations. The Service or Evidence Convention or mutual legal assistance and other international frameworks binding on the enacting State may apply to the exercise of the insolvency representative’s powers abroad (e.g. to represent the proceeding or to act in respect of an insolvency-related judgment in a foreign State).

(m) Role of the creditors and creditor committee

80. This item covers mechanisms and the level of creditor participation in insolvency proceedings, in particular: (i) whether and, if so, when, creditor meetings are to be convened or a creditor committee is to be established; (ii) the role of those bodies in the oversight of insolvency proceedings; (iii) eligibility to participate in those bodies; (iv) the matters that would require creditor approval; (v) thresholds for approval; and (vi) mechanisms for seeking approval and ascertaining that it was obtained. In the context of insolvency proceedings, “creditors” are any natural or legal persons that have a claim against the debtor that arose on or before the commencement of the insolvency proceedings,⁴⁷ and a “creditor committee” is a representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law.⁴⁸ As a general rule, creditors encompass both creditors in the forum State and foreign creditors.⁴⁹

81. This item is closely linked to the preceding two items, which address the rights and obligations of the debtor and the duties and functions of the insolvency representative.⁵⁰ It is also linked to the next item, which addresses the treatment of claims.⁵¹

(n) Treatment of claims

82. This item covers: (i) which creditors must submit claims (e.g. whether secured creditors are included), the types of claims to be submitted, and claims excluded or subject to special treatment (e.g. by related persons); (ii) the procedure for

⁴⁷ Ibid., term (j).

⁴⁸ Ibid., term (k).

⁴⁹ Ibid., para. 10.

⁵⁰ 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 Legislative Guide and accompanying commentary.

⁵¹ 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 Legislative Guide and accompanying commentary.

submission, verification and admission of claims, including deadlines, the competent authority to receive claims, and formalities for foreign claims;⁵² (iii) consequences of failing to submit a claim; (iv) valuation of claims; (v) treatment of disputed claims; (vi) effect of submission and admission; (vii) review of decisions (e.g. rejection or special treatment); (viii) post-commencement claims; (ix) treatment of claims upon conversion; (x) accrual and payment of interest; and (xi) undertakings concerning claims that could otherwise be brought in insolvency proceedings in another State, including whether the insolvency representative may give such undertakings and, if so, in relation to which claims, under what conditions, and subject to which requirements (e.g. form, language, approval, review, and enforcement). Notwithstanding the exception to the *lex fori concursus* for labour contracts and relationships in this Model Law, the *lex fori concursus* determines the status and treatment of labour claims and regulates possible undertakings concerning them.

83. In insolvency proceedings, “claims” means a right to payment from the insolvency estate, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent. Some jurisdictions recognize the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim.⁵³

84. Law other than insolvency law may apply as part of the *lex fori concursus* in the context of this item, for example secured transactions law in relation to the treatment of secured claims or criminal law in relation to false claims. International conventions (e.g. the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents), and other instruments binding on the State where insolvency proceedings have been commenced may also apply as part of the *lex fori concursus* to the submission, verification and admission of foreign claims. Special rules may govern the treatment of (foreign) public claims⁵⁴ and claims arising from arbitral awards.⁵⁵

85. This item is linked to item (g) on avoidance, item (i) on set-off, item (j) on the [secured creditors] [rights in rem] and articles 6 to 8 of the Model Law. It is also linked to the item (f) on reorganization plans, which typically address creditor claims and may stipulate the law applicable to their treatment.

(o) Ranking of claims

86. This item covers: (i) the order of satisfaction of claims from the insolvency estate, including claims of the insolvency representative, post-commencement claims, and administrative claims or expenses (for the meaning of the latter, see item (p)); (ii) the classes of creditors affected by the insolvency proceedings and their treatment in terms of priority and distribution; (iii) rules for establishing functional equivalence between domestic and foreign claims and the consequences of failing to do so;⁵⁶ (iv) subordination of claims; and (v) undertakings concerning the ranking of claims that could otherwise be brought in insolvency proceedings in another State. Notwithstanding the exception to the *lex fori concursus* for labour contracts and relationships (see article 10 (1) of the Model Law), this item covers the ranking of labour claims and possible undertakings regarding them.

⁵² See articles 13 and 14 of MLCBI and accompanying commentary in paras. 118–126 of GEI.

⁵³ See the Glossary in the Introduction to the Legislative Guide, term (g).

⁵⁴ See article 13 (2) of MLCBI and accompanying footnote and commentary in para. 120 of GEI.

⁵⁵ In most States, the New York Convention will apply in that context.

⁵⁶ As noted in the Legislative 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.

87. Law other than insolvency law may apply as part of the *lex fori concursus* in the context of this item, including international labour conventions binding on the enacting State,⁵⁷ as well as tax, secured transactions and tort law. Special rules may also apply to the ranking of public claims.

(p) Costs and expenses relating to the insolvency proceedings

88. This item covers criteria for the allowance of administrative claims and expenses. In insolvency proceedings, “administrative claims and expenses” include costs and expenses of the proceedings, such as remuneration of the insolvency representative and engaged professionals, expenses for the continued operation of the debtor, debts arising from the insolvency representative’s functions and powers, costs of continued contractual and legal obligations and costs of ongoing proceedings.⁵⁸ The item covers the assessment of claims and expenses, the court’s role in approving and allocating costs and expenses and distribution rules (e.g. which costs and expenses are borne by the insolvency estate, which by creditors or other parties in interest, and which may give rise to the personal liability of the insolvency representative). Rules on third-party funding may also apply.

89. This item is linked to all other items on the *lex fori concursus* list. For example, costs and expenses may arise from the insolvency representative’s participation in proceedings affecting the insolvency estate, such as litigation or arbitration over disputed claims or avoidance actions.

(q) Distribution of proceeds

90. This item covers rules for distribution of proceeds in liquidation and reorganization and is closely linked to item (n) on treatment of claims and to item (o) on the ranking of claims. In reorganization, general contract law may apply where the proceedings close after approval (or, where required, confirmation) of the plan and distribution follows the rules set out in that plan.

(r) Closure of the proceedings

91. This item covers rules for the conclusion and closure of insolvency proceedings, both generally and in specific cases, including prerequisite applicable procedures (e.g. who may apply for closure, whether the application and decision must be publicized, and whether creditors may be heard). It may also address the effects of conversion, in particular whether the converted proceeding is deemed closed.

(s) Discharge

92. This item covers: (i) general conditions for discharge, including non-dischargeable debts; (ii) procedures and preconditions for discharge in different types of proceedings (liquidation, reorganization, standard, or simplified); (iii) the effective date of discharge; and (iv) criteria for denying or revoking discharge. In insolvency proceedings, “discharge” means the release of a debtor from claims addressed in the proceedings.⁵⁹ Reference to “their effects” in the chapeau of article 5 of the Model Law is intended to cover both discharge granted during the proceedings and after their closure.

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

93. This item is a catch-all provision intended to cover actions not specifically named in article 5 that nevertheless arise from, or are materially associated, with insolvency proceedings. Their effects should therefore be governed by the *lex fori concursus*. Examples include: (i) insolvency-related adjustments leading to special

⁵⁷ E.g. the ILO Protection of Workers’ Claims (Employer’s Insolvency) Convention, 1992 (No. 173).

⁵⁸ See the Glossary in the Introduction to the Legislative Guide, term (a).

⁵⁹ See the Glossary in the Introduction to the Legislative Guide, term (m).

treatment of claims by or against related persons; and (ii) actions under insolvency law to hold directors liable for causing or contributing to insolvency.

94. Under item (k), directors' obligations and liabilities arising during insolvency proceedings are governed by the *lex fori concursus*. In comparison, under this item, the same does not apply to all directors' obligations and liabilities in the period approaching insolvency. In most cases, the *lex societatis* continues to apply, notwithstanding the opening of insolvency proceedings. Item (t) intends to capture specific insolvency law grounds for liability and related causes of action against directors, such as wrongful trading or breach of a statutory duty to file for commencement of insolvency proceedings. Those grounds are triggered by commencement of insolvency proceedings. Except in such limited cases closely connected to insolvency law, it would be inappropriate to subject directors' pre-insolvency obligations and liabilities to the retrospective effect of the *lex fori concursus*.

95. For example, in some States, directors incur criminal liability for failing to file for insolvency within a prescribed period after specified events. In other States, no such duty applies and directors may instead be encouraged to pursue out-of-court restructuring. A limited interpretation of item (t) ensures that directors in the latter group are not exposed to unexpected liability and obligations that apply to the first group. Risks of exposure may vary depending on whether insolvency proceedings are opened in the State of: (i) the debtor's COMI that coincides with its place of registration or "real seat"; (ii) a COMI different from the debtor's place of registration or "real seat"; (iii) the debtor's establishment; or (iv) the debtor's assets. These risks are higher where insolvency proceedings are commenced by creditors in a non-COMI State. In other cases, the assessment of the *lex societatis* may align with that of the COMI with the result that the *lex societatis* will most likely be the same as the *lex fori concursus*.

96. Law other than insolvency law may apply as part of the *lex fori concursus* in the context of this item, particularly where a broad notion of "directors" is adopted (as recommended in part four of the Legislative Guide⁶⁰). Depending on who is found to be in factual control of the debtor in the period approaching insolvency (e.g. a regulated institutional lender, auditor, or legal advisor), other applicable laws (e.g. laws and regulations applicable to certain professions) may govern disqualification, other remedies, and enforcement mechanisms available against those persons.

Discussion in UNCITRAL and the Working Group

[A/CN.9/WG.V/WP.176](#), III, C and IV

[A/CN.9/1088](#), paras. 65–67; 69

[A/CN.9/WG.V/WP.179](#), II, C, 2

[A/CN.9/1094](#), paras. 71–86

[A/CN.9/WG.V/WP.183](#), II, E

[A/CN.9/WG.V/WP.183/Add.1](#), III, A and B

[A/CN.9/1126](#), paras. 38–52; 67–74

[A/CN.9/WG.V/WP.187](#), II, G

[A/CN.9/1133](#), paras. 29–42

[A/CN.9/WG.V/WP.190](#), II, Ch. II, A

[A/CN.9/1163](#), paras. 61–67

⁶⁰ Encompassing any person exercising factual control over the debtor (e.g. de facto directors, shadow directors, shareholders, lenders, etc.) (see rec. 258 and its accompanying commentary).

[A/CN.9/WG.V/WP.194](#), II, Ch. II, A

[A/CN.9/1169](#), paras. 43–55; 82–84

[A/CN.9/WG.V/WP.198](#), II, Ch. II, A

[A/CN.9/1198](#), paras. 34–48

[A/CN.9/WG.V/WP.202](#), II, Ch. II, A

Article 6. Special rules for avoidance

97. Article 6 establishes a special rule to the application of article 5(g).

98. Generally, avoidance matters are governed by the *lex fori concursus*. Article 6 recognizes that transactions subject to avoidance may involve parties and assets in other jurisdictions, and that exclusive reliance on the *lex fori concursus* could unfairly disrupt legitimate expectations. To address this and enhance predictability and fairness, the article [allows] [requires] the court to defer to the avoidance rules of the State where the debtor had its COMI at the time of the transaction. This approach assumes that counterparties typically rely on the law of the debtor's COMI when entering transactions and aligns with widely recognized PIL principles emphasizing party expectations and the law most closely connected to the transaction.

99. Article 6 applies only where necessary to protect the legitimate interests of the parties to the transaction, safeguarding against excessive displacement of the *lex fori concursus*.

100. While promoting cross-border cooperation and reducing the risk of conflicting avoidance outcomes, the article presupposes that courts can: (a) determine the debtor's COMI at the time of the transaction and the avoidance rules that were in effect there at that time; and (b) compare those rules with the *lex fori concursus* to assess which of them better protect the legitimate interests of the parties to the transaction. States may need to provide additional guidance to courts on balancing predictability, fairness and protection of party interests with the efficiency of insolvency proceedings when applying this article.

Discussion in UNCITRAL and the Working Group

[A/CN.9/1088](#), paras. 78; 83

[A/CN.9/WG.V/WP.183/Add.1](#), III, B, 3, (a) and (b)

[A/CN.9/1126](#), para. 43

[A/CN.9/WG.V/WP.187](#), II, G

[A/CN.9/1133](#), paras. 30–36

[A/CN.9/1163](#), para. 74

[A/CN.9/WG.V/WP.194](#), II, Ch. II, A

[A/CN.9/1169](#), paras. 58–61

[A/CN.9/WG.V/WP.198](#), II, Ch. II, A

[A/CN.9/1198](#), paras. 39–44

[A/CN.9/WG.V/WP.202](#), II, Ch. II, A

[A/CN.9/1203](#), paras. 49–50

Article 7. Special rules for set-off

[To be completed after agreement on the content of this article is reached.]

Article 8. Special rules for [treatment of secured creditors, subject to adequate protection] [treatment of rights in rem in respect of the debtor's assets, subject to adequate protection]

[To be completed after agreement on the content of this article is reached.]

Article 9. Special rules for foreign litigation and arbitration

[To be completed after agreement on the content of this article is reached.]

Article 10. Exceptions to the *lex fori concursus*

Paragraph 1 – labour contracts and relationships

101. Under article [10 (1)], the effects of insolvency proceedings on labour contracts and relationships are governed by the law applicable to those contracts and relationships. That law includes labour, insolvency and any other law relevant to labour contracts or relationships.

102. The treatment and ranking of labour claims in insolvency proceedings are not covered by this exception. The *lex fori concursus* (if different from the law applicable to the labour contract or labour relationship, hereafter “foreign *lex fori concursus*”) continues to apply. This also applies to the 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 in the period approaching insolvency). However, where the *lex fori concursus* allows undertakings regarding labour claims that could otherwise be brought in another State (see commentary to article 11), such claims may be treated as they would be in an unopened proceeding.

103. The rationale for this exception is that labour contracts and relationships raise significant socioeconomic considerations. States often create special regimes for labour issues in insolvency. Some insolvency laws prioritize continuity of employment over other objectives of insolvency proceedings, such as maximizing the value of the insolvency estate, by emphasizing sale of the business as a going concern with the transfer of labour obligations to the purchaser, as opposed to other forms of reorganization or liquidation where labour obligations are altered or terminated. Mandatory provisions, including international treaties,⁶¹ may: (a) protect workers against unfair dismissal and discrimination; (b) provide a financial safety net for workers; (c) restrict rejection or modification of labour contracts⁶² and regulate redundancies (including an advance notice to relevant State authorities); and (d) ensure workers are informed about matters affecting their employment and entitlements. Different rules may apply in liquidation as compared to reorganization. For example, in some States, employees follow the business as a going concern in both liquidation and reorganization; in other States this happens only in reorganization.

104. The exception reduces the risk of uncertainty or inconsistency in treatment of labour contracts and relationships in insolvency. Providing certainty and consistency is justified because workers typically have weaker bargaining power than employers, particularly in the absence of collective bargaining agreements. Workers may be unfamiliar with insolvency procedures and protections accorded to them in case of financial difficulties of their employers and may remain uninformed and unaware of plans related to their employment status. Insolvency proceedings may be used to erode their protections, for example, by eliminating onerous employment contracts to increase a sale price for the business as a going concern, or to relieve the debtor of labour obligations.

105. The approach taken in the Model Law may reduce flexibility needed to maintain business operations, preserve employment and guarantee salaries, especially in reorganization. In addition, where the debtor's workforce is subject to different labour regimes, it may complicate insolvency administration, as courts would need to assess

⁶¹ See e.g. the ILO Termination of Employment Convention, 1982 (No. 158).

⁶² See recommendation 71 of the Legislative Guide and accompanying commentary.

multiple regimes. This includes cases where the debtor has workers in different States and the local labour law is mandatorily applicable to labour contracts or relationships in those States. This also includes cases where parties to a labour contract or relationship are free to choose the applicable law, subject to safeguards protecting workers from adverse consequences of coerced or uninformed choices. Such safeguards are not uniform across States (for example, with respect to non-competition clauses), but they often prevent workers being deprived of protections that cannot be derogated from under the law that, in the absence of choice, would have been applicable, either because it has more connection with the labour contract or relationship or for other reasons. In many States, international labour treaties and constitutional guarantees apply.

106. Without this exception, the effects of insolvency proceedings on labour contracts and relationships could be governed by the law of a State with little or no connection to labour contracts or relationships (e.g. the law of the COMI State outside the location of most workers of the debtor), which increases risks of uncertainty or inconsistency for workers. In addition, reconciling protections for workers under the foreign *lex fori concursus*, any chosen law, and mandatorily applicable law could significantly complicate insolvency proceedings. While combining or ranking applicable laws may preserve flexibility, it could hinder efficient administration of insolvency proceedings, as courts would need to compare multiple regimes. Although some such complexities may arise also when applying article 10 (1), on balance, the approach in article 10 (1) is preferable.

107. The public policy exception (see article 12 of the Model Law) allows the court not to apply a foreign law if doing so would be manifestly contrary to the State's public policy (e.g. legitimizing modern slavery). In such cases, the *lex fori concursus* or the labour law of another State more closely connected to the labour contract or relationship may apply.

Discussion in UNCITRAL and the Working Group

[A/CN.9/WG.V/WP.176](#), III, D, 2; IV, 33 (d)

[A/CN.9/1088](#), paras. 73–77

[A/CN.9/WG.V/WP.179](#), II, D, 3

[A/CN.9/1094](#), paras. 88–93

[A/CN.9/WG.V/WP.183](#), II, F

[A/CN.9/1126](#), paras. 75–79

[A/CN.9/WG.V/WP.187](#), II, H, 1

[A/CN.9/1133](#), para. 31

[A/CN.9/WG.V/WP.190](#), II, Ch. II, B, 1

[A/CN.9/1163](#), para. 70

[A/CN.9/WG.V/WP.194](#), II, Ch. II, B, 1

[A/CN.9/1169](#), paras. 77–78

[A/CN.9/WG.V/WP.198](#), II, Ch. II, B, 1

[A/CN.9/WG.V/WP.202](#), II, Ch. II, B, 1

[A/CN.9/1203](#), para. 81

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

108. Article 10 (2) creates an exception to the *lex fori concursus* for the effects of insolvency proceedings on the rights and obligations of participants in a payment, clearing or settlement system, a regulated financial market or another multilateral

trading facility (together referred to as the “covered system(s), market(s) and/or facility(ies)” in this Guide). It also covers the finality of payments or transactions in the covered systems, markets or facilities (e.g. avoidance). These matters are governed by the law applicable to the system, market, or facility, not by the *lex fori concursus* unless it is the same law that applies to the system, market, or facility.

109. For this exception:

(a) “Payment system” is a set of instruments, procedures and rules enabling transfers of funds among participants (see (f) below for the explanation of the term “participants”). Narrowly, it refers to interbank systems facilitating circulation of money; more broadly, it refers to formal multi-party arrangements for funds transfer, clearing, netting or settlement, based on a private contract or legislation;

(b) “Clearing system” is a set of rules and procedures establishing the participants’ final positions before settlement;

(c) “Settlement system” is a set of instruments, procedures and rules enabling transfers of funds, assets or financial instruments, where they become final (irrevocable and unconditional);

(d) “Regulated financial market” is an authorized multilateral marketplace (e.g. stock exchange) where multiple buyers and sellers trade financial instruments under applicable laws and regulations and subject to supervision. Unlike payment, clearing and settlement systems, which may be separate or integrated, a regulated financial market is an infrastructure for trading, clearing, and settlement;

(e) “Multilateral trading facility (MTF)” is an electronic trading platform, often self-regulated, that may operate with or without discretion over execution of trades. It may specialize in particular instruments and operate as part of, or in addition to, a regulated financial market;

(f) “Participants” in the covered systems, markets and facilities are persons recognized by the relevant system, market, or facility and authorized to effect transfers there. They include banks, investment firms, central counterparties (CCPs), clearing agents and operators.

110. Insolvency of any participant in the covered systems, markets and facilities can trigger a “domino effect,” creating systemic risk. Such risks are exacerbated when different *lex fori concursus* apply, making outcomes unpredictable. The exception mitigates this by identifying a single applicable law.

111. The exception does not interfere with the general insolvency law of the debtor’s State. It does not displace the law governing the commencement, conduct, administration, or closure of insolvency proceedings, whether those proceedings are commenced for participants, their clients or customers or any other person whose transactions happened to be processed through the covered system, market or facility. For example, if a participant in a market governed by State B’s law becomes insolvent in State A, State A’s law governs commencement and conduct of proceedings, but State B’s law governs the effects of those proceedings on transactions in the market.

112. Nor this exception displaces the law governing the effects of insolvency proceedings outside the scope of this exception. For instance, insolvency’s effect on an underlying sale contract is governed by the debtor’s insolvency law, not by the law of the payment system through which the payment under that contract is transferred.

113. The exception covers effects of any insolvency proceeding, not only those commenced for participants, insofar as they affect participants’ rights and obligations. For example, if insolvency measures (e.g. a stay) are imposed on a non-participant, their impact on payments of that non-participant processed through a covered system is governed by the law of that system, not the *lex fori concursus*.

114. Participants’ rights and obligations may arise from statutory or regulatory rules (e.g. risk controls) or from contracts central to the operation of the system, market or facility (e.g. netting, novation, collateral, credit support). Contracts linked to, but not

essential to, the operation of a covered system, market or facility remain subject to the *lex fori concursus*.

115. The law of the covered system, market or facility also governs the finality of payments, instructions, transfers, and other acts processed within it. “Finality” means those acts are irrevocable and unconditional and cannot be unwound, even if insolvency intervenes. The system’s rules, consistent with its governing law, determine when finality occurs. Like the rest of this exception, its second sentence does not extend to underlying transactions that generate acts processed within the covered systems, markets or facilities. Such transactions remain subject to the *lex fori concursus* as applicable to the insolvent party.

116. The law applicable to the covered systems, markets and facilities may be: (a) the law of the State where the system, market or facility is located; (b) the law chosen by the covered system, market or facility itself; or (c) if no such choice is made, the law chosen by its participants. Some States, however, do not allow any choice of law, and instead mandate application of the law of the location of the covered system, market or facility. Other States permit such choice by the system, market or facility, or by its participants, but often subject it to restrictions. For example, the choice may be limited to the law of a State where at least one participant has its head office, or it may require approval by a competent authority, which may reject a choice that circumvents the State’s fundamental public policy. In the absence of a permissible or valid choice, the law of the location of the system, market or facility generally applies.

117. The covered systems, markets and facilities typically specify their governing law in their rules. Under some laws, they may be required to do so. As a risk mitigation strategy, they are also often required to identify and mitigate potential conflict-of-laws risks.

118. The exception should be applied flexibly to achieve its purpose: protecting public interests and investors, containing systemic risk, and safeguarding market integrity and financial stability. The exception applies regardless of the technology used in the operation of the covered systems, markets or facilities.

119. Courts may invoke the public policy exception (see article 12 of the Model Law) if application of a foreign law under this provision would be manifestly contrary to the forum State’s public policy. The *lex fori concursus* will govern the determination of what alternative law applies in such cases.

Discussion in UNCITRAL and the Working Group

[A/CN.9/WG.V/WP.176](#), III, D, 1; IV, 33 (d)

[A/CN.9/1088](#), paras. 70–72

[A/CN.9/WG.V/WP.179](#), II, D, 2

[A/CN.9/1094](#), para. 87

[A/CN.9/WG.V/WP.183/Add.1](#), III, C

[A/CN.9/1126](#), para. 53

[A/CN.9/WG.V/WP.187](#), II, H, 2

[A/CN.9/1133](#), paras. 43–46

[A/CN.9/WG.V/WP.190](#), II, Ch. II, B, 2

[A/CN.9/1163](#), para. 71

[A/CN.9/WG.V/WP.194](#), II, Ch. II, B, 2

[A/CN.9/1169](#), paras. 79–81

[A/CN.9/WG.V/WP.198](#), II, Ch. II, B, 2

A/CN.9/1198, paras. 32–33

A/CN.9/WG.V/WP.202, II, Ch. II, B, 2

A/CN.9/1203, para. 74

Paragraph 3 – Close-out netting under eligible financial contracts outside the covered systems, markets and facilities

120. Article 10 (3) creates an exception to the *lex fori concursus* for close-out netting arrangements under eligible financial contracts, subject to safeguards. The exception provides that the effects of insolvency proceedings on the operation of such arrangements are governed, as a general rule, by the law applicable to those arrangements. That law may be chosen by the parties (e.g. through a choice-of-law contractual clause) or determined by the court under applicable PIL rules.

121. The arrangements covered by the exception permit termination of underlying contracts upon occurrence of a predefined event (e.g. commencement of insolvency proceedings with respect to any party to the arrangement), either automatically or at the initiative of any party to the arrangement. This termination (close-out) is followed by valuation of the mutual obligations under the terminated contracts and determination of a single net amount due (netting).⁶³ Although similar in some respects to payment or settlement netting in the covered systems, markets and facilities, close-out netting differs from them in several respects, in particular because of its contractual basis and flexibility under freedom of contract. It also differs from set-off under article 5 (i) of the Model Law. While both involve aggregation, close-out netting also accelerates obligations, making them immediately due upon the predefined triggering event, such as commencement of an insolvency proceeding with respect to any party to the close-out netting arrangement. The obligations accelerated and terminated under these arrangements are not necessarily connected or mutual in the sense usually required for set-off.

122. Close-out netting arrangements are increasingly used in bilateral and multilateral and domestic and cross-border contexts, for example: in enterprise group cash-pooling; wholesale energy contracts; commodities contracts; mining; trading in non-standardized over-the-counter derivatives not eligible for clearing and settlement through the covered systems, markets or facilities; and sectors like airlines where prices and currencies fluctuate rapidly. Effective close-out netting substantially reduces credit and commercial risks (e.g. hedging against price volatility⁶⁴), mitigates systemic risks by preventing cascading defaults and enhances credit availability by allowing lending against net rather than gross exposures.⁶⁵

123. Treatment of close-out netting differs across jurisdictions. In some States, particularly those with an enabling legal framework or where contractual freedom prevails, enforceability close-out netting upon insolvency is recognized. In others, it is not. Contracting parties typically assess enforceability in relevant jurisdictions before entering arrangements and tailor choice-of-law clauses accordingly. Standard master agreements recommended by international bodies also include favourable choice-of-law provisions. Despite this, uncertainties remain regarding enforceability of close-out netting in insolvency.

124. The exception seeks to address these uncertainties and preserve the benefits of close-out netting, which may be undermined if different laws – some not recognizing netting – apply. At the same time, safeguards are included to mitigate concerns about

⁶³ See the Glossary in the Introduction to the Legislative Guide, terms (z) and (aa) (“netting” and “netting agreement”, respectively); para. 210 in the financial contracts and netting section of part two of the Legislative Guide (Chapter II, section H); and the UNIDROIT Principles on the Operation of Close-Out Netting Provisions, Principle 2 and para. 19 of the accompanying explanation and commentary.

⁶⁴ See e.g. para. 211 in the financial contracts and netting section of part two of the Legislative Guide (Chapter II, section H).

⁶⁵ See e.g. *ibid.*, para. 209.

undermining insolvency law objectives, such as equitable treatment of creditors, restrictions on ipso facto clauses, and the insolvency representative's power to continue or reject contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations (see commentary to article 5 (h)). A further concern is the potential negative impact of netting enforcement on rescue and reorganization prospects.

125. Safeguards include limiting the exception to close-out netting under eligible financial contracts. These include securities, commodities, derivatives, forwards, options, swaps, repurchase agreements, and master netting agreements. Recognizing that the definition of "eligible financial contracts" evolves and differs across jurisdictions, States may expand the illustrative list, provided additional contracts have a genuine financial or risk-management purpose. A simple supply contract settled at market price, for example, should not qualify. States expanding the list should also ensure consistency with articles 1 (3), 5 (i) and 10 (2) of the Model Law.

126. Another safeguard allows the court in the State of commencement of insolvency proceedings to displace the chosen law if it lacks a substantial relationship to the parties or the arrangement. In such cases, the *lex fori concursus* or another law with a closer connection (e.g. the *lex rei sitae* if linked to an encumbered asset) may apply. A public policy exception (see article 12 of the Model Law) may also override the chosen law where its application would be manifestly contrary to public policy.

127. [An additional safeguard preserves application of the *lex fori concursus* to avoidance of a close-out netting arrangement and a stay of proceedings relating to close-out netting arrangements. However, avoidance is subject to special rules under article 6 of the Model Law, i.e. the *lex fori concursus* may be displaced by the law that was the COMI State's law at the time of conclusion of the close-out netting arrangement. Taken together, these safeguards prevent abusive law shopping, such as choosing a law that shields transactions from avoidance or a stay of proceedings.]

Discussion in UNCITRAL and the Working Group

[A/CN.9/WG.V/WP.190](#), II, Ch. II, B, 3

[A/CN.9/1163](#), para. 72

[A/CN.9/WG.V/WP.194](#), II, Ch. II, B, 3

[A/CN.9/1169](#), paras. 62–63

[A/CN.9/WG.V/WP.198](#), II, Ch. II, B, 3

[A/CN.9/1198](#), paras. 26–31

[A/CN.9/WG.V/WP.202](#), II, Ch. II, B, 3

[A/CN.9/1203](#), para. 75

Article 11. Coordination of concurrent proceedings

128. The Model Law envisages that, beyond the situations addressed in articles 6 to 8 and the exceptions to the *lex fori concursus* in article 10, a court in an enacting State may need to apply foreign law in domestic insolvency proceedings even where article 5 would otherwise make the *lex fori concursus* applicable. Unlike the exceptions to the *lex fori concursus* in article 10, such a need may arise on a case-by-case basis. For example, the court may choose to apply the law of the State where recognition and enforcement of the effects of domestic insolvency proceedings are most likely to be sought, in order to secure such recognition and enforcement. The court may also apply foreign law to reduce the likelihood of parallel foreign proceedings concerning the same debtor or enterprise group, or to facilitate the treatment and ranking of claims in domestic insolvency proceedings that creditors might otherwise pursue abroad. Such situations most commonly concern the claims of workers and secured creditors.

Paragraph 1

129. This paragraph is consistent with articles 28–32 of MLEGI. To reflect reported practices,⁶⁶ it has been broadened to cover both cases involving multiple debtors in the same enterprise group and cases involving a single debtor.

130. The provision enables the originating court, where necessary, to apply the law of a foreign State, for example, to ensure adequate protection of secured creditors. This flexibility can be indispensable but may also complicate the administration of insolvency proceedings. The court must therefore weigh the advantages and disadvantages of applying foreign law in each case. The provision highlights that the benefits of doing so may outweigh the drawbacks, for instance, where applying foreign law minimizes the risks of parallel foreign proceedings concerning the same debtor or enterprise group. By aligning the treatment and ranking of claims in domestic proceedings with the treatment and ranking they would receive in a foreign proceeding if it were to be opened, the court can facilitate coordination of the applicable law and reduce the need for creditors to initiate foreign proceedings.

[*To be completed after agreement on the content of the remaining parts of this article is reached.*]

Discussion in UNCITRAL and the Working Group

[A/CN.9/WG.V/WP.190](#), II, Ch. II, A, 1

[A/CN.9/1163](#), paras. 68–69

[A/CN.9/WG.V/WP.194](#), II, Ch. II, A, 1

[A/CN.9/1169](#), paras. 56–57

[A/CN.9/WG.V/WP.198](#), II, Ch. II, A, 1

[A/CN.9/WG.V/WP.202](#), II, Ch. II, A, 1

[A/CN.9/1203](#), para. 70

Article 12. Public policy exception

131. The public policy exception permits courts to decline to apply foreign law otherwise designated as applicable under this chapter (for example, the law governing a labour contract or relationship, or the law of the covered system, market or facility). The exception may be invoked only where application of that law would be manifestly contrary to the public policy of the court’s State.

132. Because the notion of public policy is rooted in national law, it varies across States and cannot be uniformly defined. For the Model Law, it should be interpreted and applied very narrowly, more restrictively than domestic public policy. Therefore, the exception may be invoked only in exceptional circumstances involving matters of fundamental importance to the State where insolvency proceedings are commenced. This intent is conveyed by the qualifier “manifestly” in the article. Such exceptional matters include security, sovereignty, fundamental justice and basic State values. Exceptional circumstances may also arise where applying the designated foreign law would effectively legitimize unlawful schemes or practices, such as evasion of mandatory obligations (e.g. environmental, human rights or other social responsibilities), or the pursuit of politically motivated objectives.

133. Public policy implications of applying the designated foreign law must be assessed case by case, but the narrow interpretation of the exception applies regardless of the type of proceeding (liquidation or reorganization). The consequences of refusing to apply otherwise applicable foreign law on public policy grounds are determined by the *lex fori concursus*. Depending on connecting factors, either the *lex*

⁶⁶ See para. 196 of the Guide to Enactment of MLEGI.

fori concursus itself or another law with a closer connection may apply in lieu of the displaced foreign law.

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[A/CN.9/WG.V/WP.176](#), part IV, para. 33 (g).

[A/CN.9/1088](#), paras. 86, 90

[A/CN.9/WG.V/WP.179](#), II, E

[A/CN.9/1094](#), paras. 94–97

[A/CN.9/WG.V/WP.183](#), II, D and F (para. 20)

[A/CN.9/1126](#), para. 66

[A/CN.9/WG.V/WP.187](#), II, E

[A/CN.9/1133](#), paras. 29 (j)–(k)

[A/CN.9/WG.V/WP.190](#), II, Ch. I E

[A/CN.9/1163](#), paras. 55–58

[A/CN.9/WG.V/WP.194](#), II, Ch. II, C

[A/CN.9/1169](#), para. 72

[A/CN.9/WG.V/WP.198](#), II, Ch. II, C

[A/CN.9/WG.V/WP.202](#), II, Ch. II, D

Recognition of the effects of the *lex fori concursus* and other laws applied by the foreign court

134. UNCITRAL insolvency texts expect States to cooperate and coordinate in cross-border insolvencies to the maximum extent possible.⁶⁷ Means of achieving such cooperation and coordination include granting relief, including provisional relief, to assist foreign proceedings and foreign representatives.⁶⁸

135. Chapter III of the Model Law reflects those aims by enabling the receiving court to give effect to the *lex fori concursus* or another law applied by the foreign court. For example, a foreign representative seeking to enforce a stay of proceedings imposed under the *lex fori concursus* may need to obtain relief in other States to halt individual actions against the debtor’s assets. Courts in those States may prefer to rely on their own laws rather than the *lex fori concursus* when determining possible relief (see e.g. article 20 (2) and 21 (1) (g) of MLCBI). Where domestic law does not impose a stay of proceedings in the relevant case, the provisions of chapter III of the Model Law allow courts in the receiving State to give effect to the *lex fori concursus* stay (including its scope, modification or termination) in the receiving State.

136. Chapter III thus supplements existing provisions on relief and additional assistance in the MLCBI, MLIJ and MLEGI, much as article X of the MLIJ supplements the MLCBI with respect to recognition and enforcement of foreign judgments. It also complements article 15 of the MLIJ, which provides that a recognized or enforceable judgement is to be given the same effect it has in the originating State or would have had if issued domestically, and where relief is not

⁶⁷ See e.g. chapter IV of MLCBI and chapter 2 of MLEGI.

⁶⁸ GEI, para. 35. “Foreign representative” is defined as a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding (see e.g. article 2 (d) of MLCBI). The definition is sufficiently broad to include the debtor-in-possession (see para. 86 of GEI; for the definition of the “debtor-in-possession”, see footnote 73 above).

available under the domestic law, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 13. Relief in the form of giving effect to the law(s) applied by the foreign court

137. Article 13 is drafted broadly to allow relief not only with respect to the *lex fori concursus* but also with respect to another law applied by the foreign court, such as the *lex rei sitae* or any other law with a closer connection to the matter at issue. In some cases, that law may be the law of the receiving State.

138. The increasing convergence of substantive insolvency rules should facilitate granting the relief envisaged by this article. In some States, it may also be required to grant it under certain circumstances, including by applicable treaties.⁶⁹

139. The article does not provide for automatic effect of the *lex fori concursus* or other law upon recognition of the foreign proceeding, either main or non-main. This is unlike article 20 of MLCBI, which sets out certain automatic consequences, subject to exceptions, upon recognition of a foreign main proceeding.

140. Granting relief under this article is subject to the safeguards of the public policy exception and adequate protection of creditors.⁷⁰ Under the public policy exception, nothing would prevent the domestic court from refusing to grant the relief if granting it would be manifestly contrary to the public policy of its State. Adequate protection considerations usually arise in the context of protection of the interests of creditors located in the receiving State, such as local workers and secured creditors.⁷¹ States may be concerned that giving effect to foreign law could disrupt domestic regimes governing labour, secured lending or property rights, undermine socioeconomic protections, reduce the value of security interests or raise domestic financing costs. Last-minute COMI shifts exacerbating local creditor disadvantage may heighten such concerns. However, if the foreign proceeding provides sufficient assurances of adequate protection, there should be no obstacle to giving effect to the *lex fori concursus* and another law applied by the foreign court. For example, assurances may include that the foreign court: (a) recognized a security interest valid under non-insolvency law as valid in the insolvency proceeding; (b) ensured protection of the value of encumbered assets; and (c) lifted the stay on enforcement of security interests where appropriate. The receiving court may also be reassured where the foreign court applied the same law the receiving court would have applied in the case.

141. As with other forms of relief, coordination and cooperation are essential where concurrent proceedings take place, whether with respect to a single debtor or multiple debtors that are members of the same enterprise group. Under the UNCITRAL framework, relief may be refused if it would interfere with the administration of a foreign main proceeding. Relief granted to a foreign non-main proceeding must be consistent with the foreign main proceeding, and the receiving court must review, modify or terminate relief that is inconsistent.

142. Relief may not be granted to a foreign non-main proceeding if it would affect assets that, under domestic law, should not be administered in that proceeding, or information not required in that proceeding. Where multiple non-main proceedings

⁶⁹ See, for example, the Cape Town Convention framework at www.unidroit.org/instruments/security-interests/, e.g. article XXX (4) of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001) (the “Aircraft Protocol”), that envisages deference to the *lex fori concursus* of the foreign main proceeding. A similar provision is found in other Protocols to the Cape Town Convention.

⁷⁰ See e.g. articles 6, 21 (2) and 22 of MLCBI and articles 6 and 27 of MLEGI.

⁷¹ Public policy considerations involved in designing the domestic regime for labour contracts and relationships, secured lending, including the treatment of secured creditors in insolvency proceedings, and property rights are discussed in the relevant contexts in chapter II of this Guide.

take place, the receiving court must grant, review, modify or terminate relief as needed to facilitate coordination.

143. Additional considerations arise under MLEGI. Relief may not be granted to a foreign planning proceeding if it would affect the assets or operations of an enterprise group member not subject to insolvency proceedings, unless proceedings were not commenced to minimize the commencement of insolvency proceedings.⁷²

[Further commentary will be added depending on the outcome of the Working Group's consideration of additional provisions in the draft model law.]

Discussion in UNCITRAL and the Working Group

[A/CN.9/WG.V/WP.190](#), II, Ch. III

[A/CN.9/1163](#), paras. 75–80

[A/CN.9/WG.V/WP.194](#), II, Ch. III

[A/CN.9/1169](#), paras. 73–76

[A/CN.9/WG.V/WP.198](#), II, Ch. III

[A/CN.9/1198](#), paras. 49–52

[A/CN.9/WG.V/WP.202](#), II, Ch. III

[A/CN.9/1203](#), paras. V, A and D

Chapter IV. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

144. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, PO Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: uncitral@un.org; Internet home page: uncitral.un.org).

B. Information on the interpretation of legislation based on the Model Law

145. The Case Law on UNCITRAL Texts (CLOUT) information system is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL, including the Model Law. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The Secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.

[Annexes with a decision of UNCITRAL adopting the Model Law and a resolution by the General Assembly endorsing the text will be included in due course.]

⁷² See articles 20, 22 and 24 of MLEGI and the commentary under article 20 of MLEGI.