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Report of Working Group V (Insolvency Law) on the work of its sixtieth session (New York, 18–21 April 2022)

Contents

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I. Introduction

1. At its sixtieth session, the Working Group approved updates to "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*" and continued deliberations on two new topics referred to it by the Commission (civil asset tracing and recovery and applicable law in insolvency proceedings). Background information on the topics considered at the session may be found in the annotated provisional agenda of the session (A/CN.9/WG.V/WP.177).

II. Organization of the session

2. Working Group V, which was composed of all States members of the Commission, held its sixtieth session from 18 to 21 April 2022.[1] Arrangements were made to enable delegations to participate remotely as well as in person at the United Nations Headquarters in New York. This was in accordance with the decision of the Commission to extend the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex, I) until its fifty-fifth session, in 2022.[2]

3. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Burundi, Cameroon, Canada, Chile, China, Colombia, Croatia, Czech Republic, Dominican Republic, Ecuador, Finland, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Libya, Malaysia, Mali, Mexico, Pakistan, Peru, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

4. The session was attended by observers from the following States: Armenia, Azerbaijan, Bangladesh, Chad, Denmark, Egypt, El Salvador, Eswatini, Greece, Guatemala, Kuwait, Lithuania, Madagascar, Malta, Morocco, Nepal, Netherlands, Oman, Panama, Paraguay, Qatar, Saudi Arabia, Slovakia, Slovenia and Turkmenistan.

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

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

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

(b) *Invited international governmental organizations*: Hague Conference on Private International Law, International Association of Insolvency Regulators (IAIR), International Institute for the Unification of Private Law (Unidroit) and Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS);

(c) *Invited international non-governmental organizations*: Allerhand Institute, American Bar Association (ABA), Barreau de Paris, China Council for the Promotion of International Trade (CCPIT), European Banking Federation (EBF), European Law Institute (ELI), Fondation pour le Droit Continental (FDC), Ibero-American Institute of Bankruptcy Law (IIDC), INSOL Europe, INSOL International, Inter-American Bar Association (IABA), International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International

[1] Shortened by one day. 22 April 2022 fell on the United Nations' floating holiday (Orthodox Good Friday). The General Assembly in its resolutions 53/208, in particular paragraph 11, and 76/237, paragraphs 5 and 6, invites United Nations bodies to avoid holding meetings on the United Nations' floating holidays.

[2] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 248.

Insolvency Institute (III), International Law Institute (ILI), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), New York City Bar (NYCBAR), PRIME Finance Foundation, Union Internationale des Avocats (UIA) and Union Internationale des Huissiers de Justice et officiers judiciaires (UIHJ).

7. According to the decisions made by the UNCITRAL member States (see para. 2 above), the following persons continued their respective offices:

Chairman: Mr. Xian Yong Harold Foo (Singapore)

Rapporteur: Ms. Jasnica Garašić (Croatia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.177);

(b) Note by the Secretariat: civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.178);

(c) Note by the Secretariat: applicable law in insolvency proceedings (A/CN.9/WG.V/WP.179); and

(d) Note by the Secretariat: updates to "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*" (A/CN.9/WG.V/WP.180).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Consideration of legal issues arising from civil asset tracing and recovery in insolvency proceedings.
4. Consideration of the topic of applicable law in insolvency proceedings.
5. Consideration of an update of the publication "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*".
6. Other business.

III. Deliberations

10. The Working Group commenced its work with the review of updates to the publication "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*" proposed in working paper A/CN.9/WG.V/WP.180 with additional changes proposed during the session (agenda item 5). The summary of deliberations of the Working Group on that agenda item may be found in chapter IV below. The Working Group agreed to transmit the proposed updates for consideration by the Commission at its fifty-fifth session.

11. The Working Group continued deliberations of the two topics referred to it by the Commission at its fifty-fourth session (see para. 1 above) on the basis of working papers A/CN.9/WG.V/WP.178 and A/CN.9/WG.V/WP.179. The summary of deliberations of the Working Group on the topic of civil asset tracing and recovery in insolvency proceedings may be found in chapter V below. The summary of deliberations of the Working Group on the topic of applicable law in insolvency proceedings may be found in chapter VI below. The Working Group also addressed other matters summarized in chapter VII below.

IV. Consideration of an update of the publication "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*" (A/CN.9/WG.V/WP.180)

12. The Working Group had before it updates to "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*" (A/CN.9/WG.V/WP.180). As requested by the Commission and in accordance with the mechanism used for the 2013 updates of that publication, the Working Group proceeded with the review of the proposed updates.

13. The Working Group approved the proposed updates listed in working paper A/CN.9/WG.V/WP.180 with the following additional changes proposed by the secretariat during the session:

(a) As relevant to paragraph 30 of working paper A/CN.9/WG.V/WP.180, to expand footnote 135 to paragraph 104 by reference to *Leitzbach*, where the court summarized requisites of the centre of the debtor's main interests (COMI) under Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (EIR) as follows: (i) a person or entity could only have one COMI at any one time; (ii) in the case of an individual it was where they could be contacted and would normally be their habitual residence; (iii) an individual was free to relocate their COMI and the question was whether they had in substance done so or whether the change was illusory; (iv) a debtor was not bound to advertise their COMI but nor could they conceal it; (v) the location of COMI was an objective question of where the debtor carries on the regular administration of his or her affairs in a way that was ascertainable by third parties (the debtor's subjective view not being determinative); (vi) "regular administration" required a degree of continuity and permanence, a sense of normality and a stable link with the forum; and (vii) the motive for a change of COMI might invite the scrutiny of the evidence by the court in examining its genuineness;

(b) As relevant to paragraph 31 of working paper A/CN.9/WG.V/WP.180, to add after paragraph 111 a reference to *LATAM Airlines Group S.A./Technical Latam S.A.*[3] where the court in Chile rebutted the presumption that the debtor, although registered in that jurisdiction, had COMI there, in favour of another jurisdiction where a substantial part of the debtor's business and its reorganization took place and where the shares of the debtor were traded and whose law governed financing obtained by the debtor through the issuance of international bonds;

(c) As relevant to paragraph 32 of working paper A/CN.9/WG.V/WP.180, to expand footnote 152 to paragraph 117 by reference to *NIKI Luftfahrt*, where the court held that social media may be used to help determine whether COMI is ascertainable by third parties;

(d) To expand a new footnote proposed in paragraph 32 of working paper A/CN.9/WG.V/WP.180 with the addition that would read: "In the EU, in *MH v OJ*, the court held that COMI was to be established by an overall assessment of all the objective criteria ascertainable by third parties, and in particular creditors; that in the case of an individual not exercising an independent business or professional activity, the rebuttable presumption was that his or her COMI was the place of habitual residence; and that that presumption was not rebutted merely because their only immovable property was located in a State other than that of their habitual residence";

(e) As relevant to paragraph 35 of working paper A/CN.9/WG.V/WP.180, to add reference to the case of the European Court of Justice (ECJ), *Galapagos BidCo*,[4] in which the ECJ ruled that the court of an EU member State with which a request to open main insolvency proceedings has been lodged, retains exclusive jurisdiction to open such proceedings where COMI is moved to another EU member State after that

[3] Case No. C-8553-2020.

[4] Case No. C-723/20.

request has been lodged, but before that court has delivered a decision on it. Consequently, insofar as Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the EIR (recast)) remains applicable to that request, the court of another EU member State with which another request is lodged subsequently for the same purpose cannot, in principle, declare that it has jurisdiction to open main insolvency proceedings until the first court has delivered its decision and declined jurisdiction;

(f) As relevant to paragraph 41 of working paper A/CN.9/WG.V/WP.180, to add a footnote to paragraph 140 that would note that the concept of "establishment" was also used in the context of value-added tax where there was a well-developed jurisprudence. Reference in that context could be made to *Titanium Ltd v Bundesfinanzgeright Austria*[5] where the court confirmed that an "establishment" was a business characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplied;

(g) To reflect the content of paragraph 54 of working paper A/CN.9/WG.V/WP.180 not in paragraph 21, footnote 30 of the Judicial Perspective, but in the section of the Judicial Perspective on cooperation and coordination and expand that section with the reference to another *LATAM* case,[6] in which, following a suggestion made by the competent authorities of Chile, courts in Cayman Islands, Chile, Colombia and the United States implemented a cooperation protocol to facilitate an adequate and efficient administration of the relevant proceedings. The protocol addressed such procedural aspects as communication channels (phone calls, videoconferences, etc.), joint hearings, translation requirements, safekeeping of confidential documents, submission of progress reports and joint hearings for the explanation of the said reports. Subsequently, the debtor submitted monthly reports before all the concerned courts summarizing the progress made in the United States Chapter 11 proceedings.

14. The Working Group agreed to transmit the updates listed in working paper A/CN.9/WG.V/WP.180 with the above-listed changes to the Commission for its consideration at its fifty-fifth session, in 2022. The Working Group recommended that, should the Commission be satisfied with the proposed updates, the Commission might wish to authorize the secretariat to publish the updated Judicial Perspective in the six languages of the United Nations as soon as possible in the format in which the preceding editions were published and to request the secretariat to keep the publication up to date so that it continued fulfilling its intended purpose. The Working Group underlined that the publication of the updated Judicial Perspective in 2022 would be timely in the light of the twenty-fifth anniversary on 30 May 2022 of the adoption of the UNCITRAL Model Law on Cross-Border Insolvency (1997) (MLCBI).

15. In concluding the consideration of that agenda item, many delegations emphasized that the updated publication would become a valuable guidance tool for States having enacted or considering the enactment of MLCBI. It was therefore considered essential to disseminate it as widely as possible to relevant stakeholders, including through technical assistance, capacity-building and other promotional activities of the secretariat. Some delegations stressed the need to continue broadening the geographical spectrum of cases reported in the Judicial Perspective when future updates of the publication were prepared. A suggestion was made that the updated text could be circulated to States for comment.

[5] Case No. C-931/19.

[6] *LATAM Airlines Group S.A./Technical Training LATAM S.A.*, Case No. C-8553-2020, 20 August 2020.

V. Consideration of legal issues arising from civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.178)

16. The Working Group considered issues raised in a note by the Secretariat (A/CN.9/WG.V/WP.178) in relation to the provisions of UNCITRAL insolvency texts of relevance to civil asset tracing and recovery in insolvency proceedings (ATR). In addition, it heard the status of submissions by States in response to the request circulated by the UNCITRAL secretariat on 29 December 2021 to provide information about ATR tools used in their jurisdictions additional to those already mentioned in the report of the Colloquium on the subject (A/CN.9/1008) and working paper A/CN.9/WG.V/WP.175.

17. The Working Group took note that as of 18 April 2022, 15 States replied, all being civil law jurisdictions, and additional submissions were expected. Most replies referred to tools already mentioned in the report of the Colloquium on the subject (A/CN.9/1008) and working papers A/CN.9/WG.V/WP.175 and A/CN.9/WG.V/WP.178. The Working Group took note that an inventory of ATR tools would be before the Working Group at its sixty-first session in the second half of 2022.

A. The nature, scope and form of a text to be prepared

18. The Working Group was invited to clarify the nature and scope of a text intended to be prepared, in particular, whether the text would purport to provide guidance only to legislators, to practitioners or both. Views varied on that issue, some delegations preferring preparing guidance to legislators, which was expected also to be educational and informational for practitioners, while other delegations considered that a toolkit should be prepared primarily as an educational and informational tool for practitioners. Another view was that, at the first stage of the project, the secretariat should compile all materials on the subject, including on experiences with ATR across borders, which would allow the Working Group to decide about the form and the primary target audience of the text at a later stage.

19. It was emphasized that ATR was complex, involving multiple legal and non-legal issues that could not be all addressed through the enactment of a single law. It was considered that further research would be required in particular on technical aspects involved in ATR so they could be all addressed thoroughly in a future text for the benefit of practitioners. Support was thus expressed for preparing a text that would provide guidance to both legislators and practitioners.

20. While deferring further consideration of the nature and scope of a text, the Working Group found generally acceptable the way materials were presented in working paper A/CN.9/WG.V/WP.178 and the level of detail provided with respect to ATR tools (for a different view on the latter point, see para. 59 below). Suggestions were made to elaborate on “provisional measures” in table 3, in particular by clarifying a link between the assets that could be affected by those measures and the insolvency estate.

B. ATR terms

21. On the understanding that the definitions of well-established and widely used terms found in UNCITRAL insolvency texts should not be amended since otherwise inconsistencies and confusion might be introduced, the following ATR-specific points were raised with respect to some definitions found in those texts. In addition, it was considered that some other definitions found in UNCITRAL insolvency texts might need to be updated in the light of the adoption of subsequent UNCITRAL insolvency texts. It was suggested that an ATR text might introduce those changes as and when

appropriate, in particular depending on the context in which the affected terms would be used. It was also noted that new definitions might need to be added in the light of the needs of the project and all definitions might need to be revisited at later stages.

1. "Assets of the debtor", "asset tracing" and "insolvency estate"

22. The Working Group heard proposals to add in the definition of "assets of the debtor" references to (a) undisclosed or hidden assets, (b) assets that had been transferred free of charge or at an undervalue, (c) assets recovered through avoidance and (d) assets acquired after commencement of insolvency proceedings, in order to clarify that those assets remained part of the insolvency estate. A related proposal was to add the phrase "including assets that may be subject to avoidance in the interest of creditors" at the end of the definition "asset tracing".

23. The Working Group noted a similar proposal made by the secretariat in working paper A/CN.9/WG.V/WP.178 in conjunction with the definition of "insolvency estate". Noting in that context the content of the newly added recommendations 313–314 and recommendation 35 of the UNCITRAL Legislative Guide on Insolvency Law (the Guide), the Working Group agreed that achieving consistency between the definitions and the recommendations and across different definitions would be important.

2. "Cash proceeds"

24. It was suggested to clarify that proceeds would have a broader meaning in the ATR context than currently envisaged in the definition of the term "cash proceeds".

3. "Centre of main interests (COMI)"

25. It was suggested that paragraph 145 of the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency should serve as the basis for updating the definition of COMI.

4. "Claim" and "creditor"

26. Preference was expressed for retaining the text in the second pair of square brackets in the definition of "claim" and deleting the rest of that definition. To align the resulting definition with the definition of "creditor", it was suggested to "replace the word "debtor" with the words "insolvency estate" in the definition of "creditor".

5. "Debtor-in-possession", "insolvency representative" and "independent professional"

27. Concerns were expressed about the definition of the term "debtor-in-possession". It was noted that the definition did not accommodate situations when the debtor-in-possession retained not full but partial control over the business. To accommodate that concern, suggestions were made to delete the word "full" and add the phrase "after commencement of reorganization proceedings" after the word "business". Concerns were also expressed that the definition did not reflect a requirement found in some jurisdictions to appoint an insolvency representative in all cases of the debtor-in-possession. To rectify that, it was considered necessary to replace the words "does not appoint" with the words "could not appoint". Those suggestions received support.

28. In response to some of those concerns, a point was made that a person appointed by the court to assist or supervise the debtor-in-possession would not be the insolvency representative as that term was defined in the table. It was therefore suggested to introduce another term (e.g. an insolvency professional or practitioner) that would be more appropriate in that specific context. Alternatively, it was suggested that the definition of "insolvency representative" could be amended to convey that the functions of the insolvency representative might be limited to assisting or supervising the debtor-in-possession and might not always encompass administration

of the reorganization or the liquidation of the debtor's assets or affairs or acting as a representative of the insolvency proceeding. Views were expressed against such amendments in the light of the well-established understanding of the term "insolvency representative" as defined in UNCITRAL insolvency texts and elsewhere.

29. It was suggested to separate the definition of an "independent professional" introduced in the context of insolvency of micro- and small enterprises (MSE insolvency) from the definition of "insolvency representative", put it in square brackets and assess at a later stage whether it would be required in the ATR context.

6. "Discharge"

30. It was suggested that the definition of the term should more accurately reflect that the discharge would not be granted if the debtor failed to comply with its obligations under insolvency law, including in the ATR context, and for the same reasons, the discharge granted could be revoked. The Working Group recalled its consideration of the same issues when it drafted recommendation 361 for the MSE insolvency text, which in turn was based on recommendation 194 of the Guide. It was agreed that it would be important to ensure consistency of an ATR text with those recommendations.

7. "Judgment" and "court"

31. In the context of the term "judgment", a point was made that the second sentence of paragraph 8 of the Glossary of the Guide established limits to the notion of "court" that would be inappropriate in the ATR context. It was considered that an ATR text should state the reverse, explaining in particular that other authorities and courts would be relevant in the ATR context: their actions might trigger the commencement of insolvency proceedings or influence ATR (e.g. authorities and courts other than those handling insolvency proceedings might adjudicate disputed claims, handle employment entitlements and administer avoidance proceedings).

32. A point was made that in the light of the well-established definition of the term "judgment", it should not be amended but rather the issues raised above could be addressed in the context of the definition of the term "court". The implications of those issues on the definition of both terms "judgment" and "court" were acknowledged.

8. "Non-main proceedings"

33. It was suggested to shorten the definition by capitalizing the word "establishment" and deleting the words that followed it.

9. "Ordinary course of business"

34. It was considered useful to explain in the context of that term that: (a) the dimension and frequency of transactions would, in some jurisdictions, be considered in assessing which of them would fall under the ordinary course of business; and (b) nevertheless, illegal and inappropriate transactions, such as Ponzi schemes, would be excluded.

10. "Party in interest"

35. Concerns were expressed that the second sentence excluded creditors that might have diffuse or remote interests affected by insolvency proceedings but should nevertheless be considered parties in interest (e.g. involuntary creditors sanctioned under environmental law). Views differed on whether the second sentence should be deleted from that definition or other amendments should be introduced to address those concerns (for example, by replacing the last words in the first sentence with "affected third parties", "any other person similarly affected" or "as well as any other person with a legitimate interest in the business of the debtor"). Some delegations considered important to keep the second sentence in the definition since it established

the appropriate limits to the group of persons intended to be covered, in light of the reference in the preceding sentence to "or any other person so affected" that without the second sentence made the scope of the definition excessively broad.

36. Another concern was that the definition should not imply that all persons listed after "including" would be automatically considered parties in interest in all cases. It was in particular pointed out that equity holders would not be considered parties in interest if the debtor was hopelessly insolvent. The other view was that the list was helpful since it pointed out to persons that a priori would be considered parties in interest unless the court decided otherwise.

11. "Parent"

37. It was noted that the definition "enterprise group" referred to both notions "control" and "significant ownership" whereas the term "parent" referred only to the notion of "control". It was considered necessary to ensure consistency between the two definitions by adding both notions in the definition of "parent".

12. "Related person"

38. Recalling the discussion of the same matter at the fifty-ninth session of the Working Group (A/CN.9/1088, para. 52 (a)), support was expressed for providing for an open-ended definition that would allow courts to determine related persons on a case-by-case basis.

13. "Suspect period"

39. It was suggested to elaborate on fraudulent conveyance and transfer of assets. Recalling that a suspect period was relevant in the context of avoidance while ATR would not necessarily involve avoidance, it was suggested to add another term that would refer to the time period for recovery of assets. In addition, it was pointed out that the possibility of adjusting the value of the assets transferred at a value below their fair market value should also be reflected.

C. ATR-related provisions

1. Key objectives

40. In response to concerns expressed with respect to reference to sanctions in the key objectives, it was noted that effective sanctions and liability regimes were indispensable for effective and efficient ATR. Without questioning that, other delegations preferred focusing on avoidance, civil law remedies and amicable rather than coercive measures. In particular criminal law sanctions were considered to be outside the mandate of UNCITRAL and the scope of the project. (See paras. 56–58 below for further consideration of those issues).

2. Eligibility and jurisdiction

41. The Working Group recalled issues in relation to the definitions of the court and judgment considered at the current session (see paras. 31–32 above) and noted their relevance to the ATR-related provisions on eligibility and jurisdiction. It was explained that other proceedings for ATR were often commenced in different courts, both domestically and abroad (for example, in jurisdictions where insolvency estate assets had been transferred). A coordinating role of the court commencing the insolvency proceeding was emphasized in that context. A point was also made that there could be different connecting factors for establishing jurisdiction over ATR actions (e.g. the location of the debtor or related persons to whom assets might have been transferred or conveyed fraudulently).

3. Preventive measures

42. The Working Group agreed to add reference to the debtor's obligations, differentiating those debtor obligations that would arise in the period approaching insolvency from those that would exist under normal business conditions. Examples of specific obligations arising in the period approaching insolvency were provided, including the obligation to maintain detailed itemized lists of transfers made, in particular preferential transfers, together with justifications for making them. It was also agreed to make it clear that the period intended to be covered by preventive measures generally, whether they were related to actions by directors or the debtor, was the period approaching insolvency.

4. Identification of insolvency estate assets and use and disposal of insolvency estate assets

43. In response to a query, it was clarified that reference to unauthorized transactions was to transactions entered by the debtor between application and commencement or after commencement of the insolvency proceedings without authorization of the insolvency representative or the court. As was stated in the Guide, the effect of such transactions was that any property transferred should be returned to the insolvency representative and any obligations created would be unenforceable against the estate. It was noted that such reference might need to appear elsewhere in ATR-related provisions.

44. The Working Group heard that issues raised in the context of the definition of the term "ordinary course of business" (see para. 34 above) would be applicable in the ATR-related provisions where that term appeared.

5. Powers of the insolvency representative

45. Views differed on the extent the insolvency representative might undertake ATR-related actions listed in the table, in particular those in item (e), without court authorization. Views also differed on whether it would be desirable to introduce the insolvency representative's right of "direct access" to confidential or classified information. Some delegations were of the view that such access could be granted since sufficient safeguards already existed for access to and use of that type of information. Other delegations took a more cautious approach citing implications on the debtor, creditors and third parties' rights and privileges.

46. A point was made that safeguards should not inadvertently restrict inherent powers of the insolvency representative with respect to preservation and protection of the insolvency estate, for example to commence avoidance or to obtain business records from the debtor. The corresponding obligations of the debtor and directors to provide information to and cooperate otherwise with the insolvency representative were recalled in that context.

47. In addition, it was emphasized that safeguards should not undermine the effectiveness of ATR. In particular, ex parte and in camera proceedings should be used where necessary to avoid further dissipation of assets.

6. Substantive consolidation

48. While acknowledging that substantive consolidation should be treated cautiously since it raised sensitive issues, including the need to respect the principle of separate legal identity, support was expressed for adding in an ATR text a reference to the other ground for substantive consolidation – intermingled assets or liabilities – listed in recommendation 220 (a) of the Guide. The *Nortel* case was recalled where there was a form of consolidation with respect to some but not all of the assets of the enterprise group members, but no substantive consolidation of the members of the group was involved. In addition to the aspects of intermingled assets or liabilities, it was considered important not to overlook creditor perceptions in dealings with enterprise group members.

49. A comment was made that, where an insolvent member of an enterprise group transferred assets to the solvent member in the group, the substantive consolidation of assets and liabilities of those insolvent and solvent members should be made possible if the test for the substantive consolidation was otherwise met.

7. Avoidance

50. It was suggested that ATR-related provisions on avoidance should be expanded with provisions on improper transfers after commencement of insolvency proceedings. The other view was that avoidance was relevant in the context of transactions that took place prior to the commencement of insolvency proceedings while a different legal regime existed for unauthorized transactions that occurred after the commencement of insolvency proceedings (see para. 43 above).

51. Views differed on whether the right of creditors to commence avoidance should be restricted as envisaged in the table. The approach taken in the Guide on that matter was confirmed.

52. It was considered that, since maximization of the value of the insolvency estate was one of the ATR goals, avoidance should be possible also with respect to transactions that, as a result of a price increase, would be treated as subject to possible avoidance after the commencement of insolvency proceedings.

53. Other suggestions were to clarify mechanisms for covering costs of avoidance of secured transactions and an interaction of provisional measures with avoidance.

8. Actions against directors

54. In response to a query related to the third sentence in the relevant part of the table, the approach taken in part four of the Guide was confirmed. With respect to circumstances that would justify imposition of sanctions on directors in the ATR context, views were expressed that, in order not to discourage individuals to serve as directors, a higher threshold should apply, for example that fault and incompetence would need to be proven. Another view was that no effective ATR would be possible without holding directors accountable for the deliberate failure to comply with their ATR-related obligations.

55. A difference between the approach that should be taken in the ATR context and the approach taken in part four of the Guide on those issues was highlighted in that context. In response, it was observed that taking part four's approach also in the ATR context might be desirable. It was explained that, following that approach, provisions would set out directors' ATR-related obligations, clearly differentiating those that would exist under the normal circumstances (such as keeping detailed, complete and accurate business records) from more onerous obligations that would arise in the period approaching insolvency and during insolvency proceedings. It was considered useful to remind directors that their duties in that latter context would be to creditors and to educate them on the steps that may be taken in that regard.

9. Sanctions

56. Different views were expressed on how the issue of sanctions should be dealt with in an ATR text. On the one hand, it was recognized that sanctions, including criminal ones, facilitated ATR in the domestic and cross-border insolvency contexts (for example, a penalty could be imposed on any person in control or possession of business records of the debtor for each day of delay with delivering those records to the insolvency representative).

57. On the other hand, a majority of delegations agreed that from the viewpoint of creditors, the main purpose of sanctions was to facilitate recovery of the insolvency estate assets and, for that purpose, setting aside was preferable to the imposition of criminal or administrative sanctions on the debtor. The importance of preventive measures (capacity-building, training, awareness-raising, education) was emphasized in that context as well. A view was expressed that, because the location and recovery

of insolvency estate assets would be addressed by the civil procedure law, criminal law aspects should be excluded from the project.

58. Acknowledging that sanctions might take different forms and be imposed under insolvency and non-insolvency law, for example corporate law, administrative law and criminal law, it was considered that the ATR project should deal only with sanctions imposed under insolvency law (e.g. refusal or revocation of discharge, compensation for costs and damages). In addition, it was noted that the term "sanctions" might have criminal law connotations and therefore another term, for example remedies, might be used in the ATR context. It was considered vital to ensure that sanctions and liability regimes did not interfere and undermine effectiveness of ATR. It was also considered important to preserve flexibility for courts to impose targeted and tailored sanctions on a case-by-case basis depending on the circumstances and case at hand. The need to take a broader look at persons who might need to be made subject to sanctions was emphasized.

D. Illustrative list of ATR tools

59. A view was expressed that more detailed guidance on ATR tools would be required and other categories of tools might be added. It was considered particularly useful to introduce those tools that would facilitate and expedite ATR across borders, including through recognition of provisional determination by the court that a particular asset belonged to the insolvency estate.

E. Conclusion

60. The views were reiterated as regards a form of an instrument to be prepared on ATR (see paras. 18–19 above).

61. A suggestion was made that a paper to be prepared for the next session of the Working Group should take the form that would not preclude preparation on its basis of a legislative text or another type of text, such as a practice guide, or the combination of a legislative text and a practice guide. It was noted that, in order not to cause confusion, an overlap with existing UNCITRAL insolvency texts should be avoided.

VI. Consideration of the topic of applicable law in insolvency proceedings (A/CN.9/WG.V/WP.179)

A. Purpose and objectives

62. With respect to paragraph 6 of working paper A/CN.9/WG.V/WP.179, views were expressed that: (a) the main purpose of the legislative provisions would be to enhance certainty and predictability of insolvency proceedings, which in turn would improve their efficiency and effectiveness and prevent abusive forum shopping; (b) if risks of abusive forum shopping still existed despite those measures, they would have to be dealt with at the domestic level; and (c) at later stages of the project, other considerations might need to be added to supplement the stated purpose of the legislative provisions to reinforce the application of *lex fori concursus*, in particular that the legislative provisions would also purport to fill in the gaps as regards the law applicable to insolvency proceedings (APL) in the cross-border insolvency structure envisaged in the UNCITRAL model laws in the area of insolvency.

63. A suggestion to amend item (c) in paragraph 7 of working paper A/CN.9/WG.V/WP.179 to read "preventing selection of a forum that jeopardizes legitimate expectations of creditors" did not receive support. It was noted that prevention of abusive forum shopping and elimination of asset havens were the core

objectives of the project and, for that reason, reference to abusive forum shopping should be retained in the item.

64. The Working Group agreed with the purpose and objectives of the project as stated in paragraphs 5–7 of working paper A/CN.9/WG.V/WP.179, noting that they might need to be supplemented with additional items at later stages of the project.

B. Form of an instrument to be prepared

65. Views differed on the form of an instrument to be prepared. The following possible forms were mentioned: a model law, an annex or a supplement to an existing UNCITRAL insolvency model law, model legislative provisions, a new legislative guide or amendments to the Guide.

66. The prevailing view was to prepare a model law, which was considered to be the most appropriate way to provide APL-related guidance to States and fill in the APL-related gaps in the existing UNCITRAL insolvency texts. Another view was that the Working Group should first identify those gaps and agree on the need and a way to address them. It was suggested that it might turn out that most gaps in the UNCITRAL cross-border insolvency structure could be addressed by amending the commentary in the Guide.

67. Some delegations advocated a gradual approach, commencing with amendments to the Guide. Some other delegations were flexible about the form of an instrument, noting the need to agree first on substantive issues. Envisaging difficulties with reaching agreement on some APL issues at the global level, some other delegations considered that it would be unfeasible to prepare a model law.

C. Scope of application of the legislative provisions

68. The Working Group agreed that, in addition to liquidation and reorganization, the project covered insolvency proceedings commenced at an early stage of financial distress as envisaged in recommendation 294 of the Guide and interim and restructuring proceedings that met the test set out in paragraph 8 of working paper A/CN.9/WG.V/WP.179. As a consequence, it was agreed that out-of-court debt restructuring negotiations held under contract law would be excluded from the scope of the project at this stage of the project. It was requested to clarify which restructuring proceedings, other than reorganization proceedings already included in the UNCITRAL definition of insolvency proceedings, would meet the test set out in paragraph 8 of working paper A/CN.9/WG.V/WP.179, and thus be included within the scope of the project.

D. Default rule: *lex fori concursus*

1. The meaning of *lex fori concursus*

69. The Working Group confirmed the agreement reached at its fifty-ninth session that the term “insolvency law” should be interpreted broadly as encompassing not only insolvency law but also non-insolvency law with sufficient connection to insolvency (A/CN.9/1088, para. 63). A view was expressed that it might be necessary to identify criteria that would help establishing such connection. Another view was that the existence of sufficient connection would need to be assessed on a case-by-case basis.

70. Different views were expressed on whether private international law (PIL) rules were also intended to be captured. The prevailing view was that renvoi should be excluded since it was not conducive to achieving harmonization and certainty. Examples of when PIL rules might nevertheless apply in the insolvency proceedings were provided, including with respect to claims, set-off and labour contracts.

2. Reinforcing the application of *lex fori concursus*

71. With reference to paragraph 18 of working paper A/CN.9/WG.V/WP.179, a suggestion was made to expand the list in recommendation 31 of the Guide with references to related actions (deriving from insolvency law and connected to insolvency proceedings).

3. Constitution and scope of the insolvency estate

72. The Working Group agreed that further discussions would be needed before a firm conclusion could be reached on APL for digital assets, intellectual property rights and licences. The issues of localization of digital assets and issues faced in the *Nortel* case regarding qualification of licences were recalled in that context. Compiling additional information on the treatment of those assets in insolvency proceedings, in consultation with relevant experts and organizations, such as Unidroit and the World Intellectual Property Organization, was considered necessary.

4. Protection and preservation of the insolvency estate

73. The Working Group discussed effects of the opening of insolvency proceedings on: (a) enforceability of arbitration agreements and results of arbitral proceedings completed before the commencement of insolvency proceedings, noting that those issues might already be covered by recommendation 30 of the Guide; and (b) ongoing arbitral proceedings, which under UNCITRAL insolvency texts were to be stayed. Some delegations suggested that explicit APL rules should be included on those aspects. In that context, a view was expressed that the approach taken in article 18 of the EIR (recast) was outdated and inadequate since the seat of arbitration might have a very remote connection to the debtor and the insolvency estate. The opposite view was that the approach in the EIR (recast) was workable in the light of complications arising from application of article 20 of MLCBI in the context of reorganization, in particular when the debtor-in-possession was in place.

5. Avoidance

74. The views expressed at the fifty-ninth session of the Working Group (see A/CN.9/1088, paras. 83–86) were reiterated with reference to the relevant provisions of the EIR (recast) and the Global Rules. It was considered necessary to find a solution in order to reconcile the competing objectives of protecting legitimate expectations of parties to transactions and preserving legal certainty in commercial dealings, on the one hand, and achieving certainty, simplicity and administrative efficiency of insolvency proceedings, on the other hand.

75. At the same time, it was argued that, in the light of the international insolvency law, it should be expected that parties to commercial dealings would know that the law of the COMI would apply to avoidance. It was also argued that the approach taken in the EIR (recast) to avoidance was cumbersome since it required localization of the detrimental act, which might not be easy, especially in the digital world. The extra protection made available under the EIR (recast) for only some creditors was considered unjustified and contrary to the principle of equal treatment of creditors. That regime was contrasted to the safeguards made available to creditors in the UNCITRAL cross-border insolvency texts in the form of public policy exceptions and adequate protection.

76. The Working Group agreed to consider the matter further at a later stage using the approach of the Guide as the starting point.

6. Treatment of contracts

77. The Working Group agreed to include an explicit reference to ipso facto clauses in the list. It deferred the consideration of issues raised by article 11 of EIR (recast), noting preliminary views of some delegations against creating a special regime for immovable property.

7. Treatment of set-off

78. The Working Group agreed to refer to the treatment of set-off and clarify at a later stage which aspects of set-off would fall under *lex fori concursus* and which would fall under other applicable law.

8. Treatment of secured creditors

79. The Working Group agreed to defer the consideration of the matter to a later stage, noting calls for inter-sessional consultations and expert group meetings. It took note of the views of those delegations that were against deviating from the approaches to the matter taken in the UNCITRAL insolvency and secured transactions texts and views of those delegations that considered that paragraphs 33 to 35 of working paper A/CN.9/WG.V/WP.179 could serve as the basis for finding a compromise.

9. Rights and obligations of the debtor; and duties and functions of the insolvency representative

80. The Working Group agreed to defer consideration of issues raised by paragraphs 36 and 37 of working paper A/CN.9/WG.V/WP.179 to a later stage, noting that they would be especially relevant in the context of concurrent proceedings. A view was expressed that an intervention in the procedural framework of States could affect their willingness to adopt the legislative provisions, regardless of the form in which those provisions would be prepared.

10. Treatment of claims

81. After hearing views against adding reference to creditors' rights after the closure of insolvency proceedings to the list, the Working Group agreed not to include such reference.

11. Ranking of claims

82. Noting that the matter was more relevant to concurrent proceedings, the Working Group agreed to defer the consideration of issues raised in paragraph 40 of working paper A/CN.9/WG.V/WP.179 to a later stage. The terms "ordinary claims" and "equivalence" in paragraph 84 of the commentary to recommendations 30–34 of the Guide were found unclear and requiring clarification.

12. Liability of directors of the debtor for actions taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability that could be pursued by or on behalf of the debtor's insolvency estate

83. No agreement was reached on adding item (s *bis*) to the list. Complexities arising in the APL and cross-border contexts as compared to the domestic context in which directors' obligations and liabilities were addressed in part four of the Guide were noted. It was considered necessary to clarify which aspects of directors' obligations and liabilities would fall under the law of registration and incorporation of the debtor (*lex societatis*) and which would fall under *lex fori concursus*. Noting that the latter would not necessarily be *lex fori concursus* of the State in which the debtor has its COMI, it was argued that the law of registration and incorporation should remain the default law, which would not exclude that some limited aspects of directors' obligations and liabilities could fall under *lex fori concursus*.

13. Restructuring

84. Recalling its consideration of the scope of application of the legislative provisions (see para. 68 above), the Working Group agreed not to add item (s *ter*) to the list. It was considered sufficient to clarify the matter in the commentary and explain in that context also the difference between reorganization and restructuring.

14. Environmental damages and liability

85. While agreeing with those delegations that considered that environmental damages and liability were primarily matters of substantive law, some delegations illustrated instances where environmental aspects fell at the intersection of insolvency and non-insolvency law. It was noted that complexities in addressing APL in relation to environmental damages and liability arose because of interconnected issues of public and private law, human rights and criminal law, cross-border nature of damage and claims and competing jurisdictions.

86. The Working Group agreed that item *(s quater)* should not be added in the list of items falling under *lex fori concursus*. It also agreed that, since the goal was to minimize the number of exceptions to *lex fori concursus*, no additional exception to *lex fori concursus* for environment damages and liabilities should be added. At the same time, the Working Group considered it necessary to explore ways of addressing the matter in the legislative provisions, for example in the context of public policy exceptions. The latter was considered relevant in the light of case law pointing to the instances of abusive forum shopping to evade obligations and liabilities under environmental law and, as a consequence, refusal to recognize effects of *lex fori concursus* under a public policy exception.

E. Exceptions to *lex fori concursus*

1. Payment and settlement systems and regulated financial markets

87. While agreeing with paragraphs 48–52 of working paper A/CN.9/WG.V/WP.179, the Working Group also agreed that the scope of the exception should be properly delineated, in particular with reference to the qualifier "regulated", as was noted in paragraph 52 of the paper.

2. Labour contracts

88. The delegations reiterated their views expressed at the fifty-ninth session of the Working Group and reasons for holding them (see A/CN.9/1088, paras. 73–76). The scope of recommendation 33 of the Guide as referring only to rejection, continuation and modification of labour contracts was clarified. That was contrasted with issues of treatment and ranking of employment claims that were considered undoubtedly falling under *lex fori concursus*. It was also clarified that recommendation 33 of the Guide, unlike article 13 (1) of the EIR (recast), contained the word "may", not "shall"; as a consequence; it was not excluded under recommendation 33 that the effects of insolvency proceedings on rejection, continuation and modification of labour contracts might be governed by *lex fori concursus,* the law applicable to the labour contract or both. In a later discussion, a view was expressed that preserving that flexibility might be helpful especially in complex reorganization proceedings where issues of rejection, continuation and modification of labour contracts were more relevant than in liquidation where often only issues of treatment and ranking of employment claims arose. In response, it was observed that the focus should stay on an exception to *lex fori concursus* for labour contracts irrespective of the type of proceeding.

89. It was clarified that reference to the law applicable to the labour contract encompassed the insolvency law (see A/CN.9/WG.V/WP.176, para. 30). The application of the insolvency law to rejection, continuation and modification of labour contracts, whether as *lex fori concursus* or as part of the law applicable to the labour contract, was considered essential for protection of creditors against improprieties that might take place before commencement of insolvency proceedings (e.g. unreasonable remuneration packages as a consequence of modification of labour contracts with chief executive officers or other managers).

90. In the view of some delegations, the matter touched upon delicate aspects of social security and human rights. For those reasons, it was considered important to

reconcile the goals of achieving legal certainty and simplicity in insolvency proceedings with the goal of ensuring the best protection for workers. It was acknowledged that neither *lex fori concursus* nor the law applicable to the labour contract would necessarily always provide such best protection. It was therefore suggested that a legislative provision on an exception to the application of the law of the insolvency proceedings for labour contracts could provide for the default rule of *lex fori concursus* unless better protection was available under the law applicable to the labour contract (if that law happened to be different from *lex fori concursus*).

91. Other delegations questioned the suggestion in the preceding paragraph that the best protection considerations should prevail over considerations of legal certainty and predictability, protection of legitimate expectations and efficient administration of insolvency proceedings. It was considered that the opening of the proceedings should not affect the substance of the rights that existed before insolvency proceedings since otherwise much uncertainty would be introduced and the proper functioning of insolvency proceedings would be jeopardized. It was also considered cumbersome and unreasonable to expect the judge to compare and select the law that ensured the best protection for workers. For those reasons and in the light of the narrow scope of recommendation 33 of the Guide, the prevailing view was that the provisions should unconditionally provide that the grounds on which the labour contract could be rejected, continued or modified ought to be governed by the law applicable to the labour contract. It was explained that insolvency-related aspects, such as whether employment claims were privileged or not, would not be subject to that exception. In response to a comment made that qualification of contracts as labour contracts might vary across jurisdictions, a view was expressed that it was an example of issues falling under *lex fori concursus*.

92. It was acknowledged that different aspects of labour contracts might be subject to laws of different countries. It was also acknowledged that, regardless of the applicable law, neither the labour contract nor the law applicable to the labour contract or *lex fori concursus* (if it happened to be different from the law applicable to the labour contract) would be able to override mandatorily applicable provisions of labour law (e.g., aspects covered by international treaties or constitutional guarantees). An example of the case was provided where those complexities were resolved by opening local insolvency proceedings to ensure that *lex fori concursus* and the law applicable to labour contracts were the same (the *Nortel* case where insolvency proceedings at the location of the debtor's COMI performed mainly a coordinating function and thus *lex fori concursus* had no or very distant connection to employment relationships).

93. It was considered relevant to recall in the legislative provisions the provisions of the UNCITRAL Model Law on Enterprise Group Insolvency (2019) (MLEGI) addressing undertakings on the treatment of foreign claims (articles 28–32) and the provisions of the Guide on the treatment of labour contracts in domestic insolvency proceedings.

F. Public policy and other provisions

94. In the light of the nature of the project and the expected content of the legislative provisions under which States would be expected to give effect to the foreign law on their territories, it was considered essential to include a public policy exception and other safeguards that would ensure respect for sovereignty of States and protection of other interests. In that context, concern was expressed about the manipulative use of insolvency proceedings for attaining political goals. It was noted that, in addition to public policy exceptions, safeguards in the form of relief and adequate protection were found in the UNCITRAL cross-border insolvency framework.

95. Some other delegations considered that for the project and the legislative provisions to be meaningful, the public policy exception ought to be interpreted narrowly and restrictively and invoked only under exceptional circumstances concerning matters of fundamental importance to States, as suggested in the last

sentence of paragraph 55 of working paper A/CN.9/WG.V/WP.179. It was pointed out that the same narrow and restrictive interpretation of that exception should be followed regardless of the case at hand, noting that in some jurisdictions such interpretation was followed only in cases of liquidation but not reorganization.

96. The Working Group agreed to include a public policy exception under those terms.

97. The Working Group held a preliminary exchange of views on provisions of the UNCITRAL insolvency model laws that raised APL issues: (a) deference to the planning proceeding in the enterprise group context, as envisaged in the MLEGI, subject to exceptions and safeguards such as giving an undertaking on the treatment of foreign claims; (b) undertakings on the treatment of foreign claims; (c) the treatment of inconsistent judgments and judgments emanating from concurrent proceedings (article 14 (c) and (d) of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)); (d) the treatment of the non-main proceedings where the commencement of the main proceeding was pending; and (e) issues of comingled assets and control in the enterprise group context. A view was expressed that the Working Group should first address all outstanding issues related to the first stage of the project before embarking into consideration of those additional issues. Another view was that it would be more coherent to address interconnected issues together.

G. Conclusion

98. Views about the form of an instrument to be prepared were reiterated (see paras. 65–67 above). Consequently, those delegations that favoured preparing a model law expressed strong preference for a paper for the next session of the Working Group to take the form of a draft model law. While not opposing the ultimate goal of preparing a model law, other delegations considered that it would be premature to start drafting a model law when some substantive issues were deferred for consideration at the next session of the Working Group and when the Working Group had not yet had a chance to consider APL issues arising from concurrent proceedings, including in the enterprise group context.

99. After discussion and in the light of the progress achieved at the current session, the Working Group requested the secretariat to present materials on which agreement was reached in the form of legislative provisions with accompanying commentary. As regards materials on which agreement was yet to be reached, the Working Group requested the secretariat to present them in a different form that would facilitate their consideration and resolution of outstanding issues. To ensure a coherent and comprehensive discussion, it was considered timely to bring cross-border insolvency issues into discussion.

VII. Other business

100. With respect to the dates of its sixty-first session, the Working Group was informed that the Commission would decide on the dates of future sessions of working groups at its fifty-fifth session but provisionally 12–16 December 2022 were allocated to the sixty-first session of the Working Group and 17–21 April 2023 were allocated to the sixty-second session of the Working Group.

101. The Working Group took note with appreciation of the publication of the Guidance Note on Enacting Two or More of the UNCITRAL Model Laws on Insolvency (2021) and the Consolidated Text of the UNCITRAL Model Laws on Cross-Border Insolvency, Recognition and Enforcement of Insolvency-related Judgments and Enterprise Group Insolvency (2021).[7] It also noted that the publication

[7] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2104338_guidance_note_uncitral_model_laws_on_insolvency.pdf

of the *UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises*, finalized by the Working Group at its fifty-ninth session, as part five of the Guide and as a stand-alone guide as part of the UNCITRAL MSMEs text series, was scheduled for the end of 2022.

102. The Working Group was informed about the events planned for commemoration of the twenty-fifth anniversary of MLCBI, including in conjunction with the fifty-fifth session of UNCITRAL on 15 July 2022 and in conjunction with the sixty-first session of the Working Group in December 2022.

and https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2104338_consolidated_text.pdf.