American Bankruptcy Institute
International Caribbean Insolvency Symposium

Recent Border Crossings by Bankrupts: An International Insolvency and Chapter 15 Update

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Re Aubit International [4 October 2023] The Grand Court of the Cayman Islands dismissed a petition for the appointment of restructuring officers under s.91 B Companies Act. Care must be taken to ensure that the restructuring officer regime is not abused. It should only be used for proper purpose, namely to provide a regime whereby restructuring officers may be appointed to facilitate and finalise a financial restructuring. It is not intended to provide a mechanism whereby the restructuring officers' main role is to recover assets, data, documentation and records of the company (if need be, by commencing legal proceedings) and to undertake a forensic investigation into the affairs of the company.

In the Matter of Holt Fund SPC (Unreported, 26 January 2024). First occasion where an application has been made to appoint Restructuring Officers (**RO**) under section 91(B) of the Companies Act over certain portfolios of a segregated portfolio company. An issue arose as to when an SPC is unable to pay its debts for the purpose of appointing an RO. The Grand Court found that the insolvency of one or more of several segregated portfolios could be attributed to an SPC for the purposes determining solvency and exercising the Court's winding up jurisdiction under the Act.

In the Matter of Kingkey Financial International (Holdings) Limited (Unreported 12 April 2024). The Grand Court allowed the appointment of a Provisional Liquidator under section 104(3) of the Companies Act for the purpose of facilitating a restructuring, rather than using the tailor-made Restructuring Officer provisions under section 91(B). The Application made on basis that a PL allows the Court to remove all powers of the Board of Directors, whereas the RO regime does not and (ii) there may be difficulties in obtaining recognition of ROs, whereas these difficulties would be lessened if a PL was appointed.

In the matter of Bridge Global Absolute Return Fund SPC [2024] HKCFI 1160 Provided for the Recognition of a Cayman Liquidator in Hong Kong and implementation of COMI test. Orders made for the fund's auditors and advisers to hand over documents. Arguments by the former auditor that production of documents should be dealt with in the Cayman Courts dismissed.

In the Matter of Farfetch Limited (In Liquidation) and the Cross Border Insolvency Regulations [2024] 3340 EWHC (Ch) Cayman Liquidators seeking relief in the English High Court pursuant to Article 21 of the UNCITRAL Model Law on Cross-Border Insolvency for oral examinations and the production of documents. The decision allows for written confidentiality obligations, guidance on when oral examination will be permitted and the dangers of oppression in requiring a person suspected of wrongdoing to prove the case against him on oath before proceedings have been brought.

Kireeva v Bedzhamov [2024] UKSC 39 As a matter of common law, a foreign trustee in bankruptcy has no interest in or right to a bankrupt's immovable property. However, s.426 Insolvency Act 1986 and Cross-Border Insolvency Regulations 2006 empower the English Court to give assistance to a

foreign Court as regards any interest in land situated in England. Decision confirms that the principle of modified universalism is subject to local law and local public policy, including the immovables rule

Published Chapter 15 Cases in 2024

In re Fairfield Sentry Ltd., No. 10-13164 (JPM), 2024 WL 4345574, at *1 (Bankr. S.D.N.Y. Sept. 30, 2024)

Holding that the prior voluntary dismissal with prejudice did not establish res judicata effect in the consolidated case and thus does not bar the plaintiffs from asserting the same claim in the consolidated case.

Int'l Petroleum Prod. & Additives Co., Inc. v. Black Gold S.A.R.L., 115 F.4th 1202, 1206 (9th Cir. September 16, 2024)

Finding an order that denies a petition for recognition does not retroactively trigger the automatic stay to the date when the petition was denied if the denial order is later reversed.

Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd., 112 F.4th 284, 287 (5th Cir. August 9, 2024)

Holding that the district court did not have the requisite personal jurisdiction to bind the Joint Liquidators with its bar order.

In re Fairfield Sentry Ltd., 662 B.R. 443, 450 (Bankr. S.D.N.Y. August 7, 2024)

Holding that plaintiffs were not precluded from arguing investor had contacts with forum by arguing that redemption transfers were foreign for purposes of extraterritoriality. Concluding, after a personal jurisdiction analysis, that investor had sufficient contacts with the U.S., that claims arose from investor's contacts with the forum, and exercising personal jurisdiction was reasonable.

Note: There are 10 other published Fairfield opinions on personal jurisdiction in the last year. They all reach the same holding and largely mirror each other.

In re Nexgenesis Holdings Ltda., 662 B.R. 406, 408 (Bankr. S.D. Fla. July 31, 2024)

The Court denied recognition and enforcement of a Brazilian Ex Parte Order finding such relief is inconsistent with the principles of comity, is not relief which a bankruptcy trustee could obtain, and would be manifestly contrary to U.S. public policy.

In re Sabadash, 660 B.R. 304 (Bankr. C.D. Cal. May 14, 2024)

Finding the foreign representatives still had standing to seek recognition despite the Russian appellate court reversing an order that was an alternative basis for the Bankruptcy Court's earlier finding they had standing. Further finding that recognition of Russian insolvency proceeding as debtor's COMI was proper, but that recognition had to be limited so as not to be "manifestly contrary to the public policy of the United States" in sanctioning Tavrichesky Bank.

In re Goli Nutrition Inc., No. 24-10438 (LSS), 2024 WL 1748460, at *3 (Bankr. D. Del. Apr. 23, 2024)

Finding that the issuance of stock in a debtor company was not a sale transaction under 11 U.S.C. § 363, that 11 U.S.C. 1520(a)(2) did not apply to a transfer in an interest in property outside the territorial jurisdiction of the United States, and that for property outside of the United States to be affected the foreign representative would be required to commence a case under another chapter of title 11.

In re Al Zawawi, 97 F.4th 1244, 1247 (11th Cir. April 3, 2024)

Holding that foreign debtors seeking recognition under Chapter 15 are not required to meet the eligibility requirements that apply to debtors under 11 U.S.C. § 109(a).

In re Silicon Valley Bank (Cayman Islands Branch), 658 B.R. 75, 77 (Bankr. S.D.N.Y. February 22, 2024)

Dismissing Chapter 15 petition and finding that SVB Cayman was not eligible to be a debtor in a Chapter 15 case because it possessed no separate legal existence outside of the Bank, which was indisputably U.S.-incorporated and ineligible for bankruptcy relief pursuant to section 109(b)(2).

In re Sunac China Holdings Ltd., 656 B.R. 715, 731 (Bankr. S.D.N.Y. January 30, 2024)

Analyzing debtor's COMI and holding debtor's COMI is Hong Kong, and that recognition of the Hong Kong proceeding as a foreign main proceeding was appropriate.

In re SAM Industrias S.A., 655 B.R. 245, 248 (S.D. Fla. December 6, 2023)

Holding that the Bankruptcy Court's order compelling production of privileged documents under the crime-fraud exception is not a final, appealable order. Also holding that an interlocutory appeal of the Bankruptcy Court's order is not appropriate, and that no alternative grounds exist under the collateral order doctrine or Perlman exception for appealing the Bankruptcy Court's non-final order.

In re Ascentra Holdings, Inc., 657 B.R. 339, 344 (Bankr. S.D.N.Y. December 5, 2023)

Denying foreign representatives' motion, which was construed as a protective order, and finding that the proposed deposition cannot be precluded because the pending dispute was a contested matter that triggered discovery entitlements and obligations. Also finding that although comity considerations cannot preclude the taking of all depositions, if raised on a more targeted basis, might require limiting the scope of the deposition subpoena.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
Black Press Ltd., *et al.*,[1]	Case No. 24-10044 (MFW)
Debtors in a Foreign Proceeding.	(Jointly Administered)
	Re: D.I. Nos. 10, _____

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECOGNITION OF CANADIAN PROCEEDINGS AS FOREIGN MAIN PROCEEDINGS AND GRANTING RELATED RELIEF

Upon consideration of the Official Form 401 [D.I. 1] ("Petition") and *Verified Petition for (i) Recognition of Foreign Main Proceedings, (ii) Recognition of Foreign Representative, and (iii) Related Relief under Chapter 15 of the Bankruptcy Code* [D.I. 4] ("Verified Petition" and together with the Petition, the "Chapter 15 Petition") and the *Motion of the Foreign Representative for Chapter 15 Recognition and Final Relief* [D.I. 10] ("Motion") and accompanying *Memorandum of Law in Support of Motion of the Foreign Representative for Chapter 15 Recognition and Final Relief* [D.I. 11] filed by Black Press Ltd. ("BP Holdco") in its capacity as the duly-appointed foreign representative ("Foreign Representative") of the above-captioned debtors (collectively, the "Debtors"), in voluntary restructuring proceedings in Canada ("Canadian Proceedings") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended, the "CCAA"), pending before the Supreme Court of British Columbia ("Canadian Court"), as well as upon consideration of the (a) *Declaration of Christopher Hargreaves in Support of Debtors' Verified Petition for (i) Recognition of Foreign Main Proceedings, (ii) Recognition of Foreign*

[1] The Debtors in these chapter 15 cases, along with the last four digits of each Debtor's federal tax identification number (or BN as applicable), include: Black Press Group Ltd. (BN 8464); Sound Publishing Inc. (TIN 6047); The Beacon Journal Publishing Company (TIN 5666); Black Press Ltd. (BN 4084); Sound Publishing Holding Inc. (TIN 6047); 311773 BC Ltd. (BN 3265); Sound Publishing Properties, Inc. (TIN 6047); Oahu Publications, Inc. (TIN 3529); San Francisco Print Media Company (TIN 0940); Central Web Offset Ltd. (BN 5111); 0922015 B.C. Ltd. (BN 4906); and WWA (BPH) Publications, Inc. (TIN 7876). The location of the Debtors' corporate headquarters and service address is: 15288 54a Ave #208, Surrey, British Columbia, Canada V3S 5X7.

Representative, and (iii) Debtors' Motion for Certain Provisional Relief [D.I. 8] ("Hargreaves Declaration"), (b) *Declaration of Jeremy Bornstein as Canadian Counsel to the Debtors in Support of the Debtor's Chapter 15 Petitions and Requests for Certain Related Relief Pursuant to Chapter 15 of the Bankruptcy Code* [D.I. 9] ("Bornstein Declaration"), (c) *Supplemental Declaration of Jeremy Bornstein as Canadian Counsel to the Debtors in Support of the Debtor's Chapter 15 Petitions and Requests for Certain Related Relief Pursuant to Chapter 15 of the Bankruptcy Code* [D.I. 40] ("Supplemental Bornstein Declaration"), (d) *Limited Objection of the Pension Benefit Guaranty Corporation to the Foreign Representative's Motion for Recognition* [D.I. 52] ("Limited Objection"), (e) *Second Supplemental Declaration of Jeremy Bornstein as Canadian Counsel to the Debtors in Support of the Debtors' Chapter 15 Petitions* [D.I. 58] ("Second Supplemental Bornstein Declaration"), (f) *Supplemental Declaration of Christopher Hargreaves in Support of Debtors' Verified Petition for Recognition of Foreign Main Proceedings* [D.I. 59] ("Supplemental Hargreaves Declaration" and together with the Hargreaves Declaration, the Bornstein Declaration, the Supplemental Bornstein Declaration, and the Second Supplemental Bornstein Declaration, the "Declarations"), (g) *Foreign Representative's Reply to PBGC's Limited Objection to Motion for Chapter 15 Recognition and Final Relief* [D.I. 60] ("Reply"), and (h) *Joinder of Canso Investment Counsel Ltd. to Debtors' Motion for Recognition and Reply in Support Thereof* [D.I. 64] ("Joinder"), and all documents attached to the Declarations (collectively, the "Petition and Relief Documents"), and upon consideration of the argument and evidence presented at the hearing on the Motion held on February 8, 2024 ("Hearing"),[2]

THE COURT FINDS AND CONCLUDES AS FOLLOWS:

A. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 & 1334.

[2] Capitalized terms not defined herein shall have the same meaning as defined in the Petition and Relief Documents, as applicable.

B. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

C. Venue is proper in this district under 28 U.S.C. § 1410.

D. This Court may enter a final order consistent with Article III of the United States Constitution.

E. Notice of the hearing on the Motion was sufficient under the circumstances and no further or other notice of or hearing on the Motion is necessary or required.

F. These chapter 15 cases were properly commenced and in accordance with 11 U.S.C. §§ 1504, 1509, & 1515.

G. The Chapter 15 Petition meets all requirements of 11 U.S.C. § 1515.

H. The Foreign Representative is a "person" within the meaning of 11 U.S.C. § 101(41) and is the duly appointed foreign representative of the Debtors within the meaning of 11 U.S.C. §§ 101(24) & 1517(a)(2).

I. The Canadian Proceedings are foreign proceedings under 11 U.S.C. § 101(23).

J. The Canadian Proceedings are pending in Canada, which is the location of the center of main interests of Debtors Black Press Group Ltd.; The Beacon Journal Publishing Company; Black Press Ltd.; Sound Publishing Holding Inc.; 311773 BC Ltd.; San Francisco Print Media Company; Central Web Offset Ltd.; 0922015 B.C. Ltd.; and WWA (BPH) Publications, Inc. (collectively, the "Foreign Debtors"), and, therefore, the Canadian Proceedings are foreign main proceedings within the meaning of 11 U.S.C. § 1502(4) solely as to the Foreign Debtors.

K. For the reasons stated on the record at the Hearing, the center of main interests as to Debtors Sound Publishing Inc.; Sound Publishing Properties, Inc.; and Oahu Publications, Inc. (collectively, the "U.S. Debtors"), respectively, is in the United States, and the Canadian

Proceedings are not foreign main or foreign nonmain proceedings under 11 U.S.C. §§ 1502(4) and 1502(5), respectively, as to the U.S. Debtors.

L. The Canadian Proceedings solely with respect to the Foreign Debtors are entitled to recognition as foreign main proceedings because they meet the requirements of 11 U.S.C. § 1517.

M. Recognition of the Canadian Proceedings solely with respect to the Foreign Debtors as foreign main proceedings is not contrary to the public policy of the United States.

N. The Foreign Representative and the Foreign Debtors are automatically entitled to all of the relief available under 11 U.S.C. § 1520, without limitation.

O. The Foreign Representative, the Foreign Debtors, and non-debtors Black Press (Barbados) Ltd.; Whidbey Press (Barbados) Inc.; Black Press Delaware LLC; and Black Press Group Oregon LLC (collectively, the "Non-Debtor Stay Parties") are entitled to additional relief available under 11 U.S.C. § 1521.

P. In accordance with the findings made in the Provisional Relief Order and for the reasons stated on the record at the Hearing, any loans made by the DIP Lender in accordance with the DIP Loan Agreement prior to the entry of this Order were extended in "good faith" as contemplated by sections 363(m) and 364(e) of the Bankruptcy Code, such that the validity of DIP Loans, and the priority of the DIP Lenders' Charge in respect of the Debtors' property located within the territorial jurisdiction of the United States shall not be affected by entry of this Order or any reversal or modification of this Order on appeal.

Q. In accordance with the findings made in the Provisional Relief Order and for the reasons stated on the record at the Hearing, the stay granted in the *Order Granting Provisional*

Relief pursuant to Section 1519 of the Bankruptcy Code ("Provisional Relief Order") with respect to the U.S. Debtors is extended through and including February 15, 2024.

R. All relief granted in this Order is necessary to effectuate the purpose of chapter 15 of title 11 of the United States Code and to protect the assets of the Debtors and the interests of their creditors.

S. All creditors and other parties in interest, including the Debtors, are sufficiently protected in the grant of the relief ordered hereby in compliance with 11 U.S.C. § 1522(a).

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The Chapter 15 Petition and the Motion are **GRANTED IN PART AND DENIED IN PART** as provided in this order (the "Order").

2. The Limited Objection is **SUSTAINED**.

3. The Canadian Proceedings solely with respect to the Foreign Debtors are hereby recognized as foreign main proceedings in accordance with 11 U.S.C. § 1517 and given full force and effect.

4. Upon entry of this Order, the Canadian Proceedings with respect to the Foreign Debtors and all prior orders of the Canadian Court shall be and hereby are granted comity and given full force and effect in the United States and, all relief authorized by 11 U.S.C. § 1520 and certain relief authorized by 11 U.S.C. § 1521 shall apply throughout the duration of these proceedings or until otherwise ordered by this Court, including, without limitation, the automatic stay authorized by 11 U.S.C. § 362. The relief granted in this paragraph shall specifically include, but not be limited to, the following provisions:

i. No person or entity may: (a) commence or continue any legal proceeding (including, without limitation, any judicial, quasi-judicial, administrative, or regulatory proceeding or arbitration) or action against the Foreign Debtors or the Non-Debtor Stay Parties, their assets located in the United States, or the proceeds

thereof; (b) enforce any judicial, quasi-judicial, administrative or regulatory judgment, assessment or order or arbitration award against the Foreign Debtors or the Non-Debtor Stay Parties; (c) commence or continue any legal proceeding or action to create, perfect, or enforce any lien, setoff, or other claim against the Foreign Debtors, the Non-Debtor Stay Parties or against any of their assets located in the United States or the proceeds thereof; and (d) exercise any control over the Foreign Debtors' or the Non-Debtor Stay Parties' assets located in the United States except as authorized by the Foreign Debtors in writing.

ii. The Foreign Representative is hereby granted the rights, powers, protections, privileges, and immunities of a trustee in a bankruptcy in the United States during these chapter 15 cases. No action taken during such period by the Foreign Representative, or its agents, representatives, advisors, or counsel, in preparing, disseminating, applying for, implementing, or otherwise acting in furtherance of or in connection with the Canadian Proceedings, this Order, these chapter 15 cases, any adversary proceeding, or any further proceeding commenced in these chapter 15 cases shall be deemed to constitute a waiver of the immunity afforded such person under 11 U.S.C. §§ 306 or 1510.

iii. 11 U.S.C. §§ 363(m) and 364 are applicable with respect to each of the Foreign Debtors and the Property (as defined in the *Order Made after Application* entered in the Canadian Proceedings) of the Foreign Debtors or the Non-Debtor Stay Parties that is within the territorial jurisdiction of the United States. For the avoidance of doubt and without limiting the generality of the foregoing, this Order, without limitation:

(a) Shall grant liens and security interests in the Foreign Debtors' Property located within the territorial jurisdiction of the United States pursuant to 11 U.S.C. § 364(d)(1) in respect of, and in accordance with, the Administration Charge, Directors' Charge, and DIP Lender's Charge; and

(b) Finds any loans made by the DIP Lender pursuant to an order entered in the Canadian Proceedings are extended in "good faith" as contemplated by 11 U.S.C. § 364(e), such that the validity of DIP Loans, and the priority of the DIP Lenders' Charge in respect of the Foreign Debtors' Property located within the territorial jurisdiction of the United States, as contemplated by 11 U.S.C. § 363(m), shall not be affected by any reversal or modification of this Order on appeal or the entry of any other order.

iv. Notwithstanding any provision in the Bankruptcy Rules to the contrary, (i) this Order shall be effective immediately and enforceable upon entry, (ii) the Foreign Representative is not subject to any stay in the implementation, enforcement, or realization of the relief granted in this Order, and (iii) the Foreign Representative is authorized and empowered, and may, in its discretion and without further delay, take any action and perform any act necessary to implement and effectuate the terms of the Order.

5. The provisions of 11 U.S.C. §§ 363, 364, 549, and 552 apply to a transfer of an interest of the Foreign Debtors in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of the estate.

6. The right to transfer, encumber, or otherwise dispose of the Foreign Debtors' or the Non-Debtor Stay Parties' assets absent the express written consent of the Foreign Debtors is hereby suspended.

7. The Foreign Representative is entrusted with the right to operate the Foreign Debtors' business, exercise the rights and power of a trustee, and is entitled to administer and realize all or part of the Foreign Debtors' assets within the territorial jurisdiction of the United States.

8. The banks and financial institutions with which the Foreign Debtors maintain bank accounts or on which checks are drawn or electronic payment requests made in payment of prepetition or postpetition obligations are authorized and directed to continue to service and administer the Foreign Debtors' bank accounts without interruption and in the ordinary course and to receive, process, honor and pay any and all such checks, drafts, wires and automatic clearing house transfers issued, whether before or after the Petition Date and drawn on the Foreign Debtors' bank accounts by respective holders and makers thereof and at the direction of the Foreign Representative or the Foreign Debtors, as the case may be.

9. Effective nunc pro tunc to the Petition Date, 11 U.S.C. § 364 is applicable with respect to each of the Debtors and the Property of the Debtors and the Non-Debtor Stay Parties that is within the territorial jurisdiction of the United States. For the avoidance of doubt and without limiting the generality of the foregoing, the Court recognizes the Canadian Court's approval of any loans made by the DIP Lender in accordance with the DIP Loan Agreement prior to the entry

of the this Order as extended in "good faith" as contemplated by 11 U.S.C. §§ 363(m) and 364(e), which the Court grants relief under as part of this Order, such that the validity of DIP Loans, and the priority of the DIP Lenders' Charge in respect of the Debtors' property located within the territorial jurisdiction of the United States shall not be affected by entry of this Order.

10. Upon entry of this Order, the stay granted in the Provisional Relief Order with respect to the U.S. Debtors is extended through and including February 15, 2024. The relief granted in this paragraph shall specifically include, but not be limited to, the following provisions:

i. The commencement or continuation of any action or proceeding in the United States against the U.S. Debtors should be enjoined pursuant to 11 U.S.C. §§ 105(a) and 1519 to permit the expeditious and economical administration of the Canadian Proceedings, and such relief will either (a) not cause an undue hardship to other parties in interest or (b) any hardship to parties is outweighed by the benefits of the relief requested.

ii. Consistent with findings by the Canadian Court and relief granted under the Initial Order, unless a temporary stay is issued with respect to the U.S. Debtors and their assets, and to the same extent provided in the Initial Order, there is a material risk that the U.S. Debtors' and Foreign Debtors' creditors or other parties-in-interest in the United States could use the Canadian Proceedings and these chapter 15 cases as a pretext to exercise certain remedies with respect to the U.S. Debtors.

iii. Such acts would (i) interfere with the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code, (ii) interfere with and cause harm to the U.S. Debtors' and Foreign Debtors' efforts to administer the Canadian Proceedings, (iii) interfere with the U.S. Debtors' and Foreign Debtors' operations, and (iv) undermine the U.S. Debtors' and Foreign Debtors' efforts to achieve an equitable result for the benefit of all of the U.S. Debtors' and Foreign Debtors' creditors.

11. Nothing in this Order shall enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, to the extent set forth in 11 U.S.C. §§ 362(b) and 1521(d).

12. Notice of this Order shall be served in accordance with this Court's *Order (a) Scheduling Hearing on Recognition of Chapter 15 Petitions, (b) Specifying Form and Manner of Service of Notice, and (c) Authorizing Redaction of Certain Personally Identifiable Information of*

Individual Stakeholders [D.I. 38], as may be amended. Service in accordance with this Order constitutes adequate and sufficient service and notice for all purposes.

13. The Petition and Relief Documents shall be made available by the Foreign Representative upon request in writing to its counsel, Blank Rome LLP, 1201 N. Market Street, Suite 800, Wilmington, Delaware 19801 (Attn: Stanley B. Tarr, Esq. [stanley.tarr@blankrome.com]), and Thompson Hine LLP, Two Alliance Center, 3560 Lenox Road NE, Suite 1600, Atlanta, Georgia 30326-4266 (Attn: Sean A. Gordon, Esq. [sean.gordon@thompsonhine.com] and Austin B. Alexander, Esq. [austin.alexander@thompsonhine.com]) and Thompson Hine LLP, 300 Madison Avenue, 27th Floor, New York, New York 10017-6232 (Attn: Curtis L. Tuggle, Esq. [curtis.tuggle@thompsonhine.com] and Alexander J. Andrews, Esq. [alexander.andrews@thompsonhine.com]).

14. Notwithstanding any provision in the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") to the contrary including, but not limited to Bankruptcy Rules 7062 and 1018: (a) this Order shall be effective immediately and enforceable upon its entry; (b) the Foreign Representative is not subject to any stay in the implementation, enforcement, or realization of the relief granted in this Order; and (c) the Foreign Representative and the Debtors are authorized and empowered, and may in their discretion and without further delay, take any action and perform any act necessary to implement and effectuate the terms of this Order.

15. This Court shall retain jurisdiction with respect to any matters, claims, rights, or disputes arising from or related to the Motion, the Chapter 15 Petition, or the implementation of this Order.

Dated: February 14th, 2024
Wilmington, Delaware

MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

United Nations A/CN.9/WG.V/WP.198

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Working Group V (Insolvency Law)
Sixty-fifth session
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Applicable law in insolvency proceedings

Note by the Secretariat

Contents

V.24-16470 (E)

I. Introduction

1. The provisional agenda of the sixty-fifth session of the Working Group (A/CN.9/WG.V/WP.195) provides background information about the project on applicable law in insolvency proceedings referred to the Working Group by the Commission at its fifty-fourth session, in 2021.[1] It notes that the Working Group, at its sixty-fourth session (New York, 13–17 May 2024), considered the draft legislative provisions and accompanying commentary contained in document A/CN.9/WG.V/WP.194 and agreed on revisions to some parts of that text and on the need to consider further other parts of the text.

2. The secretariat sets out a revised draft of legislative provisions and commentary in chapter II of this note. The footnotes in bold accompanying the draft legislative provisions and commentary indicate the source for the most recent revisions and outstanding issues. Other footnotes accompanying those materials are intended to be kept in the final text, if and as appropriate depending on its final form.

3. At the sixty-third session of the Working Group, it was recalled that the Working Group had not yet agreed on the final form of the text on the topic.[2] It was also recalled that, at an earlier session, the Working Group had agreed to proceed on a working assumption that the text would take the form of a model law.[3] Provisionally, the secretariat continues referring in this note to the legislative provisions on the understanding that they will be replaced in due course by references appropriate for the agreed form of the instrument. Other revisions would be required throughout the text depending on the final form of the text and on how the text will relate to other UNCITRAL texts in the area of insolvency law. The Working Group may wish to decide on those issues at its sixty-fifth session.

II. Draft legislative provisions with accompanying commentary

Chapter I. General provisions

A. Purpose and objectives

1. Draft legislative provision

Preamble

The purpose of these legislative provisions is to provide clear guiding rules for determining the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects, including in recognition and relief proceedings and in proceedings concerning enterprise groups, so as to achieve the key objectives of effective and efficient insolvency proceedings, including legal certainty and predictability.

2. Draft commentary

1. The legislative provisions contain simple and clear guiding rules, which States can incorporate in their domestic law, to determine the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects, both domestically and across borders (e.g. in recognition and relief proceedings), with respect to a single debtor[4] or several debtors members of an

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 215–217.
[2] Ibid., para. 41.
[3] A/CN.9/1126, para. 80.
[4] "Debtor": the person with respect to whom or which insolvency proceedings have been

enterprise group.[5] The law in some States may be silent on those matters while the law in some other States may address them only partly, with the result that courts are left to determine the law that governs those matters on a case-by-case basis.

2. Those States that address the matters covered by the legislative provisions generally accept that the law of the State where insolvency proceedings are commenced (the *lex fori concursus*) governs the procedural aspects of insolvency proceedings, such as commencement, conduct, administration and closure of insolvency proceedings. However, they introduce exceptions to the *lex fori concursus* for the law that governs the effects of insolvency proceedings on certain rights and obligations (e.g. rights in rem) and proceedings (e.g. ongoing arbitral proceedings), and they use different connecting factors for determining alternative laws.

3. The law and practice with giving effect to the *lex fori concursus* across borders is not uniform either. The 1997 UNCITRAL Model Law on Cross-Border Insolvency[6] (MLCBI), the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments[7] (MLIJ) and the 2019 UNCITRAL Model Law on Enterprise Group Insolvency[8] (MLEGI) address those matters only partly and not explicitly.

4. The main purpose of these legislative provisions is to fill in those gaps by: (a) establishing a general rule that the *lex fori concursus* governs all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects, with some exceptions; (b) explaining the meaning and scope of that law; (c) providing for a limited number of exceptions to that rule; (d) delineating the scope of each exception and specifying when each of them applies; (e) envisaging the possibility of granting a relief to a foreign proceeding in the form of recognition of effects of the *lex fori concursus* and other laws applied by the foreign court in that proceeding; and (f) reinforcing measures aimed at minimizing the commencement of concurrent proceedings and, where they have been commenced, coordinating the relief granted to them under these legislative provisions.

5. As such, the legislative provisions complement, supplement and expand other UNCITRAL texts in the area of insolvency law, enhancing certainty and predictability for parties affected by insolvency proceedings and increasing efficiency and effectiveness of those proceedings. While doing so, they also balance competing considerations, such as the benefits of applying the *lex fori concursus* to all issues arising in the insolvency proceedings with the need to protect certain relationships and expectations from unexpected and unjustified interference of the *lex fori concursus*.

6. The legislative provisions do not deal with rules for determining the law applicable to 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 "PIL rules") of the State in which insolvency proceedings are commenced. The legislative provisions do not displace those rules.

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commenced or initiated (the explanation of the term draws from the Glossary in part five of the UNCITRAL Legislative Guide on Insolvency Law (the "Guide"), term (g)).

[5] "Enterprise group": two or more enterprises that are interconnected by control or significant ownership. "Enterprise": any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law. See the Guide, part three, terms (a) and (b) in the Glossary; and article 2 (a) and (b) of the UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI).

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

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

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

B. Scope of application of the legislative provisions

1. Draft legislative provision

Scope of application

1. The legislative provisions provide [guidance][rules][9] for determining the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects, including in recognition and relief proceedings and in proceedings concerning enterprise groups.

2. The legislative provisions do not displace the general private international law rules of the State where the insolvency proceedings are commenced that determine the law applicable to the validity and effectiveness of the rights and claims existing before the commencement of insolvency proceedings.

[3. The legislative provisions do not apply to [*any exclusion from the application of these legislative provisions is to be specified, for example insolvency proceedings concerning financial and other entities that are subject to a special insolvency regime*]].

2. Draft commentary

General

1. The scope of application of the legislative provisions is linked to the notions of "insolvency proceedings"[10] and "commencement of insolvency proceedings".[11] UNCITRAL insolvency texts set out a cumulative list of requisites that a proceeding must meet in order to be considered an "insolvency proceeding": (a) collective proceeding (judicial or administrative);[12] (b) pursuant to a law relating to insolvency (which includes company law);[13] (c) under control or supervision by a court (which includes the debtor-in-possession);[14] (d) with respect to a debtor (natural or legal person) that is in financial distress or insolvent;[15] and (e) with the goal of liquidating or reorganizing that debtor as a commercial entity.[16]

2. "Insolvency proceedings" encompass: (a) "liquidation", defined as proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law;[17] (b) "reorganization", defined as the process by which the financial well-being and viability of a debtor's business can be restored and the business can

[9] **A/CN.9/1169, para. 85.**

[10] See the Glossary in the Introduction to the Guide, terms (s) and (u), to be read together and also with the explanation provided in the Guide, part one, para. 2; the Guide to Enactment of the MLIJ (GE), paras. 22, 48 and 49; and the Guide to Enactment and Interpretation of MLCBI (GEI), paras. 48–51 and 65–80.

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

[12] GEI, paras. 69–72.

[13] GEI, para. 73.

[14] Recommendations 112 and 113 of the Guide, and GEI, paras. 71, 74–76, and 86.

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

[16] GEI, paras. 77–78.

[17] The Glossary in the Introduction to the Guide, term (w).

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; [18] (c) "expedited reorganization proceedings" that combine voluntary restructuring negotiations and acceptance of a plan with an expedited procedure conducted under the insolvency law for court confirmation of that plan; [19] (d) simplified insolvency proceedings;[20] and (e) interim proceedings, restructuring proceedings, the business sale procedure 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 ascertain on a case-by-case basis as meeting the cumulative list of the requisites set out above.[21]

3. Any other proceedings that do not meet the requisites set out above fall outside the scope of application of the legislative provisions. For example, a debt collection proceeding or receivership initiated by a particular creditor or group of creditors or gathering up assets in winding-up or conservation proceedings that do not also include provision for addressing the claims of other creditors are excluded.[22] A judicial or administrative proceeding for a solvent entity that does not seek to restructure its financial affairs but rather to dissolve its legal status is also excluded.[23] Financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt, where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law, are also outside the scope of the legislative provisions.[24] In addition, proceedings that are designed solely to prevent dissipation and waste of assets, rather than to liquidate or reorganize the insolvency estate, as well as proceedings designed to prevent detriment to investors rather than to all creditors, are also excluded.[25]

Paragraph 1

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

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

6. Examples of issues covered by (b) include: the relative position of claims vis-à-vis each other (i.e. the ranking and priorities); avoidance; and restrictions and modifications to which the pre-commencement rights and claims may become subject

[18] The Glossary in the Introduction to the Guide, term (kk).
[19] See the text on the Purpose of legislative provisions preceding recommendation 160 of the Guide; and GEI, para. 75.
[20] The Guide, part five.
[21] 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.
[22] GEI, para. 69.
[23] GE, para. 22; and GEI, paras. 48 and 73.
[24] GEI, para. 78.
[25] GEI, para. 77.

in order to fulfil the collective aims of insolvency proceedings (e.g. a stay of proceedings[26] or subordination).

7. Examples of issues covered by (c) include: rights and claims arising from the use and disposal of the insolvency estate assets, post-commencement finance and insolvency representative's [27] actions; challenges to a liquidation schedule, reorganization plan or debt discharge; and determination and authorization of administrative claims and expenses.

Paragraph 2

8. As stated in paragraph 2 of the legislative provision, the legislative provisions do not displace the PIL rules of the State where the insolvency proceedings have been commenced that determine the law applicable to the validity and effectiveness of the rights and claims existing before the commencement of insolvency proceedings. To determine that law, the court that controls or supervises 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 UNCITRAL Legislative Guide on Insolvency Law[28] (the "Guide"). For example, typically, the law governing the contract will determine if a contractual claim exists against the debtor and the amount of that claim; and the law of the State where immovable assets are located will determine if, for example, a security interest in those assets has been created. Nevertheless, insolvency proceedings produce effects on pre-commencement rights and claims (for examples of such effects, see para. 6 above).[29] Those effects are governed by the law determined according to these legislative provisions, with the consequence that the generally applicable PIL rules do not apply to those matters.

9. The legislative provisions do not establish rules for localization of assets. Those rules are part of the generally applicable PIL rules and may be found in other international instruments.[30]

10. Likewise, the legislative provisions do not establish jurisdictional rules. Although relevant to the matters covered by these legislative provisions, in particular cross-border aspects, jurisdictional rules are addressed in other texts.[31] For example, the Guide recommends that the insolvency law should specify which debtors have

[26] "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 Guide, term (rr)). This encompasses the right to commence or continue an arbitral proceeding and to enforce an arbitral award. **(See A/CN.9/1169, para. 69, for an amendment made in this footnote)**.

[27] The Glossary in the Introduction to the 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 Guide, part five, section two, para. 25 (d)).

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

[29] For examples of UNCITRAL and other international instruments that recognize effects of insolvency proceedings on pre-commencement rights and claims, see e.g. recommendations 3 and 88 of the Guide; recommendation 223 of the UNCITRAL Legislative Guide on Secured Transactions and the commentary to article 94 of the UNCITRAL Model Law on Secured Transactions; and article 14.2 of the UNIDROIT Convention on Substantive Rules for Intermediated Securities.

[30] E.g. articles 90 and 91 of the UNCITRAL Model Law on Secured Transactions.

[31] E.g. article 14 (g) of MLIJ and paras. 110–115 of GE.

sufficient connection to the State to be subject to its insolvency law, specifically recommending that the grounds upon which a debtor can be subject to the insolvency law should include that the debtor has either the centre of its main interests (COMI)[32] or an establishment[33] in the State.[34]

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

Paragraph 3

12. The legislative provisions were formulated to apply to any insolvency proceeding meeting the requirements listed in paragraph 1 of the commentary above regardless of the sector where insolvency proceedings take place and regardless of entities with respect to which insolvency proceedings are opened. Exemptions from the application of these legislative provisions are discouraged. Nevertheless, paragraph 3 was included in recognition that some States may decide to exclude certain insolvency proceedings from the application of the legislative provisions. They may decide to do so, for example, with respect to entities subject to a special insolvency regime (e.g. financial institutions or entities operating under public law) that may provide for their own rules for determining applicable law in insolvency proceedings, different from those found in these legislative provisions. The paragraph was included to indicate that, for transparency, any exclusions from the application of the legislative provisions should be clearly specified in the legislative provision. The paragraph appears in square brackets to convey that exclusions may not be necessary, especially in the light of the exceptions to the *lex fori concursus* envisaged in this text, and desirable since they may produce inadvertent and undesirable consequences.

C. Definitions

4. Although the Working Group deferred consideration of the definitions section to a later stage of the project, it heard suggestions for amending some definitions included in the previous version of this paper. Those suggestions have been reflected in the draft definitions below. The secretariat did not add other possible definitions and commentary to some definitions listed below pending the final agreement of the Working Group on substantive provisions, which will inform the need for definitions, their location in the text and the content of an accompanying commentary.

[32] For the explanation of the term, see paras. 144–149 of GEI.

[33] 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).

[34] See recommendation 10 and its accompanying commentary. A footnote to that recommendation notes that other grounds, such as presence of assets, are used in some States, but are not recommended in the Guide.

1. Draft legislative provision

[Definitions

For the purposes of these legislative provisions:

(a) "*Lex arbitri*" means [the law of the State that governs the arbitral proceedings] [the law chosen by the parties to govern arbitral proceedings] [the law at the [place] [seat][35] of arbitration];[36]

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

(c) "*Lex loci arbitri*" means the law that governs arbitration [matters] in the State where the arbitration has its [place] [seat];[37]

(d) "*Lex rei sitae*" means the law of the State where the asset is situated;

(e) "*Lex societatis*" means the law of the State that governs the formation, operation and dissolution of business entities and their internal governance issues;

(f) "Rights in rem" means property rights enforceable against all.]

2. Draft commentary

[*Lex arbitri and Lex loci arbitri*

[*To be added if those terms are to be retained in the Definitions section*].

[35] **A/CN.9/1169, para. 69. It was noted at that session that UNCITRAL uses the term "place of arbitration", not the term "seat of arbitration" in the meaning of the legal place of arbitration as compared to the place where actual arbitral hearings may take place (which could be online or in a physical place different from the legal place of arbitration or in multiple places). Nevertheless, some delegations preferred using the term "seat of arbitration" in this text for more clarity.**

[36] **Ibid., paras. 64 and 69. The second bracketed text is the alternative proposed at the sixty-fourth session of the Working Group, which is sufficiently broad to encompass rules of arbitral institutions chosen by the parties to govern the arbitral procedure. However, it does not reflect that (1) parties may fail to choose a law that would govern their arbitral procedure and (2) where any of institutional rules chosen by the parties is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision prevails (see article 1 (3) of the UNCITRAL Arbitration Rules). The wording in the first set of square brackets is narrower since it excludes reference to the rules of arbitral institutions. At the same time, it is broader since its does not refer only to the law of the State chosen by the parties: in the absence of an explicit choice by the parties, the arbitral tribunal or the relevant court may determine such a law. The third alternative emanates from the secretariat's internal consultations and intends to convey that the place/seat of arbitration, whether agreed by the parties or established otherwise, determines the law applicable to the arbitral proceedings. It is thus the same as the definition in (c) – *lex loci arbitri*. Indeed, *lex arbitri* and *lex loci arbitri* are often the same and, in turn, may be the same as the law governing the arbitration agreement but some experts suggest that they may be different. The Working Group may wish to consider whether these issues of arbitration law are at all relevant to this project and whether there is a need to retain this definition in the light of discussions held at the sixty-fourth session of the Working Group and the apparent compromise that emerged (A/CN.9/1169, chapter V, section E).**

[37] **See footnote 35 above. In addition, as with the definition of "*lex arbitri*", the Working Group may wish to consider whether there is a need to retain this definition. The secretariat's internal consultations indicate that the definitions in (a) and (c) may mean the same thing depending on the alternative chosen in (a) and the understanding of *lex arbitri* (see the preceding footnote). If that definition is to be retained, the Working Group may wish to consider whether the word "matters" should be kept there and whether the definition is intended to encompass laws other than arbitration law, including the insolvency law, at the seat of arbitration, and, if so, whether the definition, as drafted, already encompasses them.**

Lex fori concursus

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

2. References to the *lex fori concursus* are found throughout the legislative provisions because, under these legislative provisions, it is the main law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects (see [a *cross-reference to the relevant provision is to be inserted at a later stage*] below). Exceptions to the *lex fori concursus* are limited in number and clearly set forth in these legislative provisions as recommended in the Guide (rec. 34). The *lex fori concursus* may be applicable also by default if the law of another State deferred to under these legislative provisions (e.g. *lex rei sitae*, *lex societatis*) is not made applicable in a given case (e.g. by virtue of application of the public policy exception).

Lex rei sitae

3. "*Lex rei sitae*" is defined as the law of the State where the asset is situated. [For assets subject to registration, such as ships or aircraft, the *lex rei sitae* should be understood as referring to the law of the State under whose authority or supervision the register in which the asset has been registered is maintained, i.e. to whose regulation the entity maintaining the register submits its activities, and if the entity maintaining the register is not under supervision, the State where the register has its seat (*lex libri siti*).][38]

4. References to the "*lex rei sitae*" appear throughout the legislative provisions and accompanying commentary in the context of a [possible] exception to the *lex fori concursus* for certain type of property, such as real estate, and rights in rem, such as security rights. (For the definition of the term "rights in rem" and its accompanying commentary, see term [(f)] and the commentary below.)

Lex societatis

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

6. There is no uniform approach to determining the *lex societatis*. Some States follow the "incorporation" approach, while other States follow the "real seat" approach with the understanding of the latter not being uniform either. Under the "incorporation" approach, the law of the State in which the company is formed or incorporated applies to all aspects of governance of that company; under the "real seat" approach, the law of the country where the company has its "real" seat (i.e. its management and control centre) governs those matters. While similar and linked to the factors relevant to the determination of COMI (see the commentary to item (t) on the *lex fori concursus* below),[39] different connecting factors used for determining the *lex societatis* are not directly relevant to these legislative provisions. The term is used in the legislative provisions simply to convey the principle that the application of the *lex societatis* to the debtor's internal governance matters would remain unaffected by the commencement of insolvency proceedings except for very limited aspects of directors' obligations in the period approaching insolvency arising under insolvency law after the commencement of insolvency proceedings.

Rights in rem

7. The term "rights in rem" is used to indicate rights that are enforceable against the world at large, as opposed to "rights in personam" that are rights enforceable only against specific persons. Rights in rem are closely connected to the concept of "secured claims".[40] A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. States may use another term or terms for expressing those concepts.

8. While leaving characterization of a right as a right in rem to the national law, some texts provide for an illustrative list of rights in rem referring in particular to: (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from proceeds of or income from those assets, in particular by virtue of a lien or mortgage; (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee; (c) the right to demand assets from, or require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; (d) a right in rem to the beneficial use of assets; and (e) the right, recorded in a public register and enforceable against third parties, based on which a right in rem of creditors or third parties may be obtained.[41]]

D. Primacy of international obligations

5. At the Working Group's sixty-third session, no comment was made with respect to the approach suggested by the secretariat to drafting the relevant provision.[42] The secretariat will draft the provision accordingly once the form of the final instrument on the topic and the corresponding need for the provision are confirmed.

[38] **See A/CN.9/WG.V/WP.190, para. 6. No views as regards the added part in square brackets were expressed at the Working Group's sixty-third and sixty-fourth sessions. The secretariat will consider the proposed addition acceptable in the absence of contrary views in the Working Group.**

[39] See e.g. GEI, paras. 145–147.

[40] The Guide defines a secured claim as a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default (see the Glossary in the Introduction to the Guide, term (nn)). A secured interest is defined as a right in an asset to secure payment or other performance of one or more obligations (ibid., term (pp)).

[41] See article 8 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "EIR recast").

[42] See A/CN.9/WG.V/WP.190, para. 7.

E. Interpretation

6. At the Working Group's sixty-third session, no comment was made with respect to the approach suggested by the secretariat to drafting the relevant provision.[43] The secretariat will draft the provision accordingly once the form of the final instrument on the topic and the corresponding need for the provision are confirmed. At that stage, the secretariat may also include the rules of interpretation usually included in UNCITRAL texts, i.e.: "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" indicates permission and "should" indicates instruction; and references to "persons" should be interpreted as including both natural and legal persons.

Chapter II. The law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects

Chapter II contains [guidance] [rules][44] for determining the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects. It is intended to apply to any type of insolvency proceeding where the insolvency estate asset(s), creditors or other parties in interest[45] are located in different States. The proceedings could be: the main proceedings, i.e. commenced in the State where the debtor has COMI; non-main proceedings, i.e. an insolvency proceeding, other than a main proceeding, commenced in a State where the debtor has an establishment; or other proceedings, e.g. commenced in a State where the debtor has assets. Those proceedings, because of the presence of a foreign element, may create uncertainty in determining the law that should govern the insolvency proceedings and their effects. Provisions of chapter II are aimed at eliminating such uncertainties or at least reducing them.

[Chapter II is supplemented by chapter III that suggests mechanisms for giving effect across borders to the law that was determined in the State of commencement of insolvency proceedings to be the law that governs the commencement, conduct, administration and closure of insolvency proceedings and their effects. That law could be the *lex fori concursus* or the other law established in accordance with exceptions to the *lex fori concursus* found in this chapter.][46]

[43] Ibid., para. 7.

[44] **A/CN.9/1169, para. 84.**

[45] "Parties in interest": any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest (the Glossary in the Introduction to the Guide, term (dd)).

[46] **A/CN.9/1169, para. 84.**

A. The main law: the *lex fori concursus*

1. Draft legislative provision

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

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

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

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

(c) Constitution and scope of the insolvency estate;

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

(e) Use and disposal of assets;

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

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

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

(i) Treatment of set-off;

[(j) Treatment of secured creditors [subject to adequate protection]];[47]

(k) Rights and obligations of the debtor;

(l) Duties and functions of the insolvency representative;

(m) Role of the creditors and creditor committee;[48]

(n) Treatment of claims;

(o) Ranking of claims;

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

(q) Distribution of proceeds;

(r) Closure of the proceedings;

(s) Discharge; and

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

2. To minimize the commencement of foreign insolvency proceedings with respect to the same debtor or enterprise group or to facilitate the treatment and ranking of claims in domestic insolvency proceedings that could otherwise be brought by a creditor in foreign insolvency proceedings, the court may choose to apply the law of

[47] **Ibid., para. 55.**
[48] **Ibid., para. 83.**

another State to accord to those claims the treatment and ranking that they would have received in a foreign insolvency proceeding if it were to be opened.[49]

[3. Notwithstanding paragraph 1 (g) of this legislative provision, where the person who benefited from an act detrimental to all the creditors provides proof that the act is subject to the law other than the *lex fori concursus*, and that other law does not allow any means of challenging that act in the relevant case, that law [may] [should] [shall] apply unless it has no substantial relationship to the act and there is no other reasonable basis for applying it.][50]

[4. Notwithstanding paragraph 1 (i) of this legislative provision, where the law applicable to the [debtor's claim] [debt] provides for the right of creditors to demand the set-off of their claims against the claims of the debtor in the relevant case, that law [may] [should] [shall] apply [unless it has no substantial relationship to the [claim] [debt] and there is no other reasonable basis for applying it].][51]

2. Draft commentary

General

1. Under these legislative provisions, the *lex fori concursus* governs all aspects of insolvency proceedings and their effects unless explicitly stated otherwise.

2. The legislative provisions make the *lex fori concursus* applicable to all aspects of the commencement, conduct, administration and closure of insolvency proceedings. Those aspects cover: (a) procedural matters (such as serving notices, convening meetings, establishing the quorum, ascertaining voting rules or specifying deadlines for submission of claims);[52] and (b) all post-commencement rights, obligations and claims, i.e. those arising from the insolvency proceedings, such as claims against the insolvency representative or in relation to post-commencement finance, realization of the insolvency estate or distribution of proceeds.

3. The legislative provisions extend the application of the *lex fori concursus* also to the effects of the insolvency proceedings, including on rights, claims and obligations that existed before the commencement of insolvency proceedings. For example, the *lex fori concursus* may subject those rights or claims to a stay of proceedings, avoidance or subordination. It may also prohibit enforcement of some contractual clauses (e.g. ipso facto clauses (rec. 70 of the Guide)) and give some discretion to insolvency representatives as regards the treatment of contracts, including their assignment notwithstanding restrictions in the contract (rec. 83 of the Guide), and as regards the use and disposal of assets, including their sale free and clear of encumbrances and other interests (recs. 52–62 of the Guide).

Paragraph 1

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

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

[49] **Ibid., para. 57.**
[50] **Ibid., para. 60.**
[51] **Ibid.**
[52] Some matters that are considered procedural in some States (e.g. set-off or limitation period) may be considered substantive in other States. The court makes this determination in accordance with the law of its State, e.g. the *lex fori concursus* in insolvency proceedings.

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

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

(c) Constitution and scope of the insolvency estate

6. Under the legislative provisions, the *lex fori concursus* determines which assets of the debtor[53] are to be included in the insolvency estate[54] and the time of constitution of the insolvency estate. It also governs the treatment of post-commencement assets (e.g. assets acquired after commencement of insolvency proceedings and assets recovered through avoidance or other actions).

7. Law other than the insolvency law may apply as part of the *lex fori concursus* in the context of this item, including property law, human rights obligations, secured transactions law, family law, civil procedure law and tort law. It may address characterization of an asset (tangible or intangible, movable or immovable) and rights thereto (property or contractual), determination of ownership and other property rights as well as the treatment of encumbered assets,[55] third-party-owned assets, jointly owned assets and foreign assets.

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

(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

9. Under the legislative provisions, the *lex fori concursus* governs all issues related to measures for protection and preservation of the insolvency estate, including provisional measures and measures upon commencement of insolvency proceedings (e.g. a stay of proceedings,[56] a total or limited displacement of the debtor or the

[53] Defined broadly as property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third-party-owned assets (see the Glossary in the Introduction to the Guide, term (b)).

[54] The Guide defines the insolvency estate as assets of the debtor that are subject to the insolvency proceedings (see the Glossary in the Introduction to the Guide, term (t)).

[55] Defined in the Guide as an asset in respect of which a creditor has a security interest (see the Glossary in the Introduction to the Guide, term (o)). For the definition of a "security interest", see footnote 40 above.

[56] For the definition of this term, see footnote 26 above.

debtor-in-possession[57] regime). Those issues include types of measures that can be imposed, conditions for imposing those measures, their duration and scope as well as grounds and procedures for seeking and granting relief from the measures and other protections.

10. Subparagraph (d) explicitly refers to a stay of proceedings, which is defined in UNCITRAL insolvency texts 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.[58] The types of individual action referred to in this definition cover both actions in the courts and actions before an arbitral tribunal. The impact that such actions would have for the insolvency estate in terms of claims, liabilities, assets and costs, and because that impact would be assessed and managed by the insolvency representative and the court in charge of insolvency proceedings, justify that the *lex fori concursus* would be the law governing effects of insolvency proceedings on those actions. This is coherent with the other items on the *lex fori concursus* list and with the goal of this text to prevent unnecessary interference of other laws in the administration of insolvency proceedings.

11. At the same time, bearing in mind the particularities of arbitration, it might not always be possible to implement 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, any arbitral award resulting from the arbitral proceedings commenced or continued in disregard of mandatory effects of the *lex fori concursus*, such as a stay of proceedings, would be considered void. In some States, such an award may be set aside by the court at the place of arbitration, including when the court finds that the award is in conflict with public policy of that State. In some States, such an award might be refused recognition and enforcement. Grounds for refusing recognition and enforcement of awards are found in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[59] (the "New York Convention").

(e) Use and disposal of assets

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

13. 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 will 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)

[57] Defined in the Guide as a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative (see the Glossary in the Introduction to the Guide, term (l)).

[58] See footnote 26 above.

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

and persons that might be 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

14. Under the legislative provisions, the *lex fori concursus* determines 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.

15. The laws other than the insolvency law may apply as part of the *lex fori concursus*, for example, to: (i) debt-to-equity conversions; (ii) involvement of employees and trade unions in preparation of a reorganization plan; (iii) foreign investment and foreign exchange controls; and (iv) protection of confidential or commercially sensitive information.[60]

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

16. Under the legislative provisions, the *lex fori concursus* determines: (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, 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.[61]

17. The legislative provisions envisage an exception to the *lex fori concursus* with respect to avoidance of payments or transactions that took place in a payment, clearing or settlement system or in a regulated financial market or other multilateral trading facility. Avoidance in those cases is to be governed by the law applicable to that system or market like other matters related to such systems, markets and facilities falling under the same exception to the *lex fori concursus*. 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*, 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. Similarly, no exception to the *lex fori concursus* is envisaged for avoidance in relation to close-out netting arrangements 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*.

[*This part may need to be elaborated depending on the decision of the Working Group with respect to paragraph 3 of the draft legislative provision*.

[60] 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.

[61] See the Glossary in the Introduction to the Guide, term (c); and also, the Guide, part five, section two, term (a).

In addition, the Working Group may wish to recall that it deferred consideration of a proposal to add in the paragraph above reference to digital assets and electronic securities.][62]

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

18. Under the legislative provisions, the *lex fori concursus* determines: (i) qualification of contracts; (ii) the treatment of contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, in particular the power of the insolvency representative to decide whether to continue performance of those contracts or reject or assign them, the time when those decisions should be made, and the time from which rejection will be effective retroactively; (iii) whether the insolvency law overrides automatic termination and acceleration clauses (also known as "ipso facto clauses"), including in labour contracts, or 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;[63] (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].[64]

19. Law other than the insolvency law may apply as part of the *lex fori concursus*, including international 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].[65]

20. Under the legislative provisions, the *lex fori concursus* does not determine the treatment of certain types of contracts in insolvency proceedings (e.g. contracts in a payment, clearing and settlement system or in a financial market) and the treatment of most aspects of labour contracts (e.g. their rejection or continuation but not necessarily ipso facto clauses[66] and avoidance) and close-out netting arrangements (excluding avoidance) in insolvency proceedings. (See the immediately preceding item for avoidance aspects.)

(i) Treatment of set-off

21. Under the legislative provisions, the *lex fori concursus* determines whether set-off[67] 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 money obligations matured prior to the commencement of insolvency proceedings or also those that would mature after commencement of insolvency proceedings; (ii) whether obligations subject to set-off must arise under a single contract or may arise under multiple contracts or related obligations (i.e. not necessarily be mutual or related); (iii) whether the stay applies to the exercise of set-off rights, or set-off is effectuated automatically upon commencement of insolvency proceedings; and (iv) how creditors with set-off claims

[62] **A/CN.9/1163, para. 61.**

[63] **Ibid., paras. 78 and 82.**

[64] **No comments were made in the Working Group with respect to this sub-item. However, some experts question references to arbitration agreements under this item on the *lex fori concursus* list. The Working Group may wish to confirm whether this sub-item should be kept in this illustrative list, and refer in this context to, inter alia, article II (3) of the New York Convention. Pending that confirmation, the secretariat put the sub-item and the relevant parts in the next paragraph in square brackets.**

[65] **Ibid.**

[66] **A/CN.9/1169, paras. 78 and 82.**

[67] Defined in the 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 Guide, term (qq)).

are treated (e.g. as secured creditors or otherwise). The *lex fori concursus* also governs the treatment of set-off of claims arising after the commencement of insolvency proceedings.

22. Item (i) refers to mandatorily applicable insolvency set-off that would apply irrespective of any contractual arrangements between contracting parties. The word "treatment" in that item intends to convey that meaning, [and also that the *lex fori concursus* governs the treatment of set-off in insolvency proceedings irrespective of the law that governs the validity and effectiveness of set-off rights and claims existing before the commencement of insolvency proceedings.][68] [The item does not cover close-out netting [under eligible financial contracts], [69] which is subject to an exception to the *lex fori concursus*.][70]

23. The item is closely linked to other items on the list, including: item (d) on the protection and preservation of the insolvency estate; item (g) on avoidance; item (h) on treatment of contracts; and item (n) on treatment of claims. It is also linked to an exception to the *lex fori concursus* for the law governing the effects of insolvency proceedings on the rights and obligations of the participants and avoidance in payment, clearing and settlement systems, regulated financial markets and other multilateral trading facilities. Under that exception, the effects of insolvency proceedings on set-off rights and obligations in those systems and markets are governed by the law applicable to those systems and markets. [The item is also linked to an exception to the *lex fori concursus* for the law governing the effects of insolvency proceedings on close-out netting arrangements [under eligible financial contracts] outside payment, clearing and settlement systems, regulated financial markets or other multilateral trading facilities because of resemblance of those arrangements to set-off. Under that exception, the effects of insolvency proceedings on close-out netting arrangements [under eligible financial contracts] will be governed by the law applicable to that arrangement. As noted above, those arrangements are outside the scope of this item.][71]

[*This part may need to be amended depending on the outcomes of the Working Group's discussions of paragraph 4 of the draft legislative provision.*]

[(j) Treatment of secured creditors [subject to adequate protection]

24. Under the legislative provisions, the *lex fori concursus* governs the treatment of secured creditors in insolvency proceedings.[72] "Secured creditor" in the context of insolvency proceedings means a creditor holding a secured claim.[73]

[68] **The part put in square brackets may need to be amended depending on the outcomes of the Working Group's discussions of paragraph 4 of the draft legislative provision.**

[69] **The term "financial contract" is defined in the Guide as "any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, or any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above" (see the Glossary in the Introduction to the Guide, term (r)). The Working Group may wish to consider whether that definition is suitable for "eligible financial contracts" envisaged to be covered by the exception for close-out netting arrangements.**

[70] **At an earlier session of the Working Group, the link of this item to the proposed exception for close-out netting arrangements was highlighted (A/CN.9/1163, para. 72). The Working Group has not yet discussed that link and how the different scopes of both provisions should be delineated, and it may wish to do so at its sixty-fifth session.**

[71] **Ibid.**

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

[73] For the definition of a "secured claim" found in the Glossary in the Introduction to the Guide, see footnote 40 above.

25. The words "treatment of secured creditors" in item (j) encompass both (i) the treatment of claims of secured creditors in insolvency proceedings and (ii) effects of the commenced insolvency proceedings on enforcement and execution of existing security interests,[74] whether created before or after commencement of insolvency proceedings.

26. The item does not deal with the law according to which the validity and effectiveness of existing security interests created before the commencement of insolvency proceedings are determined. The generally applicable PIL rules of the State where insolvency proceedings are commenced remain applicable in that context,[75] and the commencement of insolvency proceedings does not displace those rules.[76]

27. Consistent with item (n) on the list that deals with the treatment of claims generally, item (j) covers the treatment of claims of secured creditors in insolvency proceedings, including whether secured creditors are required to submit claims in insolvency proceedings.[77] Consistent with other items on the *lex fori concursus* list, such as items (b) and (m), the item also covers issues such as whether secured creditors can initiate insolvency proceedings, participate in the creditor committee, vote and request the annulment of decisions of creditors' meetings. The application of the *lex fori concursus* on these matters ensures an orderly administration of insolvency proceedings.

28. In addition, the *lex fori concursus* governs all issues arising from security interests created after commencement of insolvency proceedings (e.g. in the context of post-commencement finance). The *lex fori concursus* also governs the effects of the commenced insolvency proceedings on security interests created before commencement of insolvency proceedings subject to adequate protection that aims at providing sufficient assurances to secured creditors as regards enforcement and execution of their security interests.

29. An adequate protection safeguard in item (j) is important because, at the time of entering into a secured transaction with the debtor, a secured creditor might not and could not have foreseen that the *lex fori concursus*, instead of the *lex rei sitae* where it is different from the *lex fori concursus*, would be the law applicable to enforcement and execution of its security interests in case of the debtor's insolvency. Although it is arguable that a secured creditor in its dealings with a debtor whose COMI is in a foreign State should have expected that the law of that State will apply in case of the debtor's insolvency under the internationally accepted cross-border insolvency framework promoted by UNCITRAL, that law might be unpredictable if COMI shifts shortly before commencement of insolvency proceedings.

30. Different standards may apply across jurisdictions for adequate protection of secured creditors. In addition, specifics of such protection will depend on a case, including the need to achieve balance between protection of interests of secured and unsecured creditors. They may also depend on an asset (e.g. immovable as opposed to movable).

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[74] For the definition of a "security interest" found in the Glossary in the Introduction to the Guide, see footnote 40 above.

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

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

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

31. According to the UNCITRAL insolvency framework, minimal standards for protection of secured creditors include: (i) recognition of a security interest effective and enforceable under the law other than the insolvency law as effective and enforceable in insolvency proceedings;[78] (ii) application of only a short stay to secured creditors in liquidation proceedings;[79] (iii) entitlement of a secured creditor, upon application to the court, to protection of the value of the assets in which it has a security interest;[80] and (iv) relief from the stay upon request of a secured creditor to the court on grounds such as that the encumbered asset is not necessary to a prospective reorganization or sale of the debtor's business, or the value of the encumbered asset is diminishing as a result of the commencement of insolvency proceedings and the secured creditor is not protected against that diminution of value, or a reorganization plan is not approved within any applicable time limits.[81]

32. As this list demonstrates, some aspects of those minimal standards may be more relevant to one type of insolvency proceeding than the other (e.g. reorganization as opposed to liquidation and vice versa), although in some States they may be generally applicable since there is no differentiation between these two types of proceedings at the stage of commencement of insolvency proceedings and, even where such differentiation exists, conversion of proceedings is possible. As a minimum, regardless of the type of the proceeding in question, secured creditors should be no worse off under the *lex fori concursus* than under the *lex rei sitae* (e.g. secured creditors should be entitled to the same value in distribution as would have been realized in the State where the asset is located). They should also be allowed to proceed with the enforcement of their rights against the encumbered assets if it is clear that the encumbered assets are not needed in insolvency proceedings.

33. Depending on a case and an asset, adequate protection may be ensured through a deferral by the court at the State of the opening of insolvency proceedings to a law of the foreign State where, for example, an encumbered immovable property is located (i.e. applying *lex rei sitae* instead of *lex fori concursus* in such a case).[82] This option is envisaged in paragraph 2 of the legislative provision, which builds on articles 28–32 of MLEGI, expanding them to apply not only to multiple debtors members of the same enterprise group but also to a single debtor. It recognizes that, while it would be most practical for the originating court to apply its own law, i.e. the *lex fori concursus*, the originating court may need to apply other law in order to ensure, for example, that the rights of secured creditors are properly protected in the domestic insolvency proceedings, that parallel proceedings are not opened and that the effects of the *lex fori concursus* are recognized in foreign States where the encumbered assets are located.

34. The approach adopted in the legislative provisions as regards the treatment of secured creditors may have far-reaching and wide-ranging consequences, including on financial and housing markets (e.g. availability and cost of credit). It was adopted in the light of the growing recognition of benefits of successful reorganization of financially distressed businesses for all parties in interest, including secured creditors, and, as a consequence, the growing uptake of the rescue culture in many jurisdictions. Since encumbered assets are often the only valuable assets of the debtor, their centralized treatment in insolvency proceedings may increase the chances of successful reorganization (e.g. raising post-commencement finance). Ascertainment of those chances may take place later in the proceedings, necessitating the imposition of a stay on enforcement and execution of security interests, with accompanying adequate protection of secured creditors, from the outset of insolvency proceedings.

[78] See recommendation 4 of the Guide.

[79] Ibid., recommendation 49 (c) and accompanying commentary.

[80] Appropriate measures of protection include cash payment by the estate and provision of additional security interests. See ibid., recommendation 50 and accompanying commentary.

[81] Ibid., recommendation 51 and accompanying commentary.

[82] The deferral to the *lex rei sitae* is less readily justified, however, where the assets in question are contract rights, where the location of the assets is not obvious, or where the assets are located in multiple jurisdictions.

35. Similar measures may be required in liquidation, including upon conversion of failed reorganization to liquidation for an insolvent debtor. For example, a sale of encumbered assets together with other assets of the insolvency estate by the insolvency representative, with all benefits attached to such a sale (e.g. assets may be sold in different combinations, free of all encumbrances), may be more beneficial for all parties in interest, including secured creditors, than separate sales of encumbered assets by different secured creditors outside of insolvency proceedings. The "adequate protection" safeguard may require the insolvency representative to demonstrate such benefits for all parties in interest, including secured creditors.

36. Hence, the approach adopted in the legislative provisions is intended to balance several competing considerations and policy choices involved in the protection of rights of secured creditors and the rights of other parties in interest in insolvency proceedings, including unsecured creditors and the debtor itself.

37. As noted above, item (j) is closely linked to other items on the list, including: (b) commencement aspects; (c) constitution and scope of the insolvency estate; (d) protection and preservation of the insolvency estate; (e) use and disposal of assets; (m) role of the creditors and creditor committee; (n) treatment of claims; and (o) ranking of claims.][83]

(k) Rights and obligations of the debtor

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

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

40. Law other than the insolvency law might apply as part of the *lex fori concursus* in this context, in particular, if the debtor is a natural person. In such cases, human rights instruments binding on the State where insolvency proceedings have been commenced may address, as part of the *lex fori concursus*, the extent of limitations that may be imposed on the freedom of movement of the debtor, disclosure of the debtor's private correspondence and other personal data protection aspects. There may also be a close interaction of insolvency law with civil and criminal procedure law, for example as regards disclosure, examination, search and seizure warrants with respect to the debtor. International treaties, such as on mutual legal assistance, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), and other international instruments, binding on the State where insolvency proceedings have been commenced, may apply as part of the *lex fori concursus* for any actions with respect to or by the debtor across borders.

(l) Duties and functions of the insolvency representative

41. Under the legislative provisions, the *lex fori concursus* determines: instances when the insolvency representative[84] is to be appointed; the mechanisms for selection, appointment, removal and replacement of the insolvency representative, including the insolvency representative appointed on an interim basis; a method of calculating remuneration for insolvency representative services; the role of the court and creditors

[83] **The secretariat kept item (j), as amended by the Working Group at its sixty-fourth session, and its accompanying commentary in square brackets to indicate that issues related to that item have not yet been fully resolved by the Working Group. See A/CN.9/1169, paras. 43–55.**

[84] See footnote 27 for the definition of that term.

in oversight of the work done by the insolvency representative; and liability of the insolvency representative.

42. Apart from general duties, functions and powers of the insolvency representative, the *lex fori concursus* determines the authority conferred upon the insolvency representative in a specific case, which may include the authority to represent the proceeding across borders (article 5 of MLCBI) or to act in another State in respect of an insolvency-related judgment issued in the State of the opening of insolvency proceedings (article 5 of MLIJ), cooperate and directly communicate with foreign courts and representatives (article 26 of MLCBI) and give undertakings with respect to the treatment of claims that could otherwise be brought by creditors in an insolvency proceeding in another State (see articles 28–32 of MLEGI).

43. Law other than the insolvency law may apply as part of the *lex fori concursus*, for example if the insolvency representative is subject to certain professional standards and regulations (e.g. accountants, lawyers, etc.). In addition, international treaties, such as on mutual legal assistance, the Hague Service Convention or the Hague Evidence Convention, and other international instruments, binding on the State where insolvency proceedings have been commenced, may apply as part of the *lex fori concursus* with respect to the exercise of insolvency representative's powers abroad.

(m) Role of the creditors and creditor committee

44. The *lex fori concursus* governs mechanisms for, and the level of creditor participation in, insolvency proceedings, in particular whether and, if so, when, creditor meetings are to be convened or a creditor committee is to be established and the role of those bodies in the oversight of insolvency proceedings; eligibility to participate in those bodies; the matters that would require creditor approval; a threshold for the approval; and mechanisms for seeking the approval and ascertaining that the approval was obtained. 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,[85] 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.[86] As a general rule, creditors encompass both creditors in the forum State and foreign creditors.[87]

45. The item is closely linked to the preceding two items that address rights and obligations of the debtor and duties and functions of the insolvency representative.[88] It is also linked to the next item (treatment of claims).[89]

(n) Treatment of claims

46. Under the legislative provisions, the *lex fori concursus* determines: (i) which creditors should be required to submit claims (e.g. whether secured creditors are required to do so), types of claim that should be submitted, excluded claims and claims subject to special treatment (e.g. claims by related persons); (ii) the procedure for submission, verification and admission of claims, including the deadline for submission of claims, to whom they should be submitted and formalities for submission of foreign claims;[90] (iii) consequences of failure to submit a claim; (iv) rules for valuation of claims; (v) treatment of disputed claims; (vi) effect of submission and admission of claims; (vii) review of decisions related to claims

[85] See the Glossary in the Introduction to the Guide, term (j).
[86] Ibid., term (k).
[87] Ibid., para. 10.
[88] For the description of the role of creditors and creditor committees, including in supervising the debtor-in-possession and the insolvency representative, see e.g. recommendations 126–136 of the Guide and accompanying commentary.
[89] Creditors may be able to assume certain functions in insolvency proceedings (e.g. participation in creditor meetings) after submitting claims, while the exercise of other creditor functions (e.g. approval of a reorganization plan) may be conditioned upon verification and admission of claims. See e.g. recommendations 169–184 of the Guide and accompanying commentary.
[90] See articles 13 and 14 of MLCBI and accompanying commentary in paras. 118–126 of GEI.

(e.g. their rejection or special treatment); (viii) treatment of post-commencement claims; (ix) treatment of claims upon conversion; (x) accrual and payment of interest; and (xi) rules for giving undertakings as regards the treatment of claims that could otherwise be brought by creditors in an insolvency proceeding in another State, including whether the insolvency representative is authorized to give such undertakings and if so, with respect to which claims and under what conditions, and which formal requirements, including the form and language of undertakings, and procedures for seeking approval, review and enforcement of those undertakings, apply. Notwithstanding the exception to the *lex fori concursus* for some aspects of labour contracts and relationships in these legislative provisions, the *lex fori concursus* determines the status and treatment of labour claims and regulates possible undertakings with respect to them.

47. In the context of insolvency proceedings, "claims" means a right to payment from the estate of the debtor, 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.[91]

48. Law other than the insolvency law may apply as part of the *lex fori concursus*, such as secured transactions law in relation to the treatment of secured claims. In addition, criminal law may intersect with insolvency law, for example in relation to the treatment of false claims. International conventions, such as the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (5 October 1961), and other international instruments, binding on the State where insolvency proceedings have been commenced, may apply as part of the *lex fori concursus* to submission, verification and admission of foreign claims. Special rules may apply to the treatment of (foreign) public claims[92] and claims emanating from arbitral awards.[93]

49. This item is linked to the items on the *lex fori concursus* list on avoidance (g), [the treatment of secured creditors (j)] and the treatment of set-off (i), [including exceptions to the *lex fori concursus* envisaged for them under these legislative provisions, some of which apply generally while others apply on a case-by-case basis]. This item is also linked to the item on the implementation of a reorganization plan since the latter usually addresses the treatment of creditor claims and may stipulate the law applicable to that treatment. Law other than the *lex fori concursus* may be applied by the court on a case-by-case basis in other instances. For example, the court may consider and apply the overriding mandatory provisions of the law of the State where recognition and enforcement of the effects of domestic insolvency proceedings would likely need to be sought to ensure recognition and enforcement of those effects in that State. In addition, if the *lex fori concursus* allows giving undertakings as regards the treatment of claims that could otherwise be brought by a creditor in an insolvency proceeding in another State, the affected claims could be treated in accordance with the treatment they would receive in an unopened proceeding, including the otherwise applicable law.

(o) Ranking of claims

50. Under the legislative provisions, the *lex fori concursus* determines the order in which claims will be satisfied from the estate, including claims of the insolvency representative, claims arising after commencement of insolvency proceedings and administrative claims or expenses (for the meaning of the latter, see the item immediately below). It specifies the classes of creditors that will be affected by the insolvency proceedings and the treatment of those classes in terms of priority and distribution. It specifies also rules for establishing functional equivalence between

[91] See the Glossary in the Introduction to the Guide, term (g).
[92] See article 13 (2) of MLCBI and accompanying footnote and commentary in para. 120 of GEI.
[93] In most States, the New York Convention will apply in that context.

domestic and foreign claims and consequences of the failure to establish such equivalence.[94] Where subordination is envisaged, the *lex fori concursus* governs the conditions and limits of subordination. Where giving undertakings as regards the ranking of claims that could otherwise be brought by creditors in an insolvency proceeding in another State is allowed, the *lex fori concursus* determines rules for giving such undertakings. Notwithstanding the exception to the *lex fori concursus* for labour contracts and relationships in these legislative provisions, the *lex fori concursus* determines the ranking of labour claims and regulates possible undertakings with respect to them.

51. Law other than the insolvency law may apply as part of the *lex fori concursus* to the priority of claims in insolvency proceedings generally and in any given insolvency proceeding specifically, including labour law (which may encompass international labour conventions for States parties to those conventions),[95] tax law, secured transactions law and tort law. Special rules may apply to the ranking of (foreign) public claims. Perspectives of cross-border recognition and enforcement of the effects of insolvency proceedings might impact the ranking of claims of specific groups of creditors, such as workers and secured creditors.

(p) Costs and expenses relating to the insolvency proceedings

52. Under the legislative provisions, the *lex fori concursus* determines criteria relating to the allowance of administrative claims and expenses. In the context of insolvency proceedings, "administrative claims and expenses" means costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor, debts arising from the exercise of the insolvency representative's functions and powers, costs arising from continuing contractual and legal obligations and costs of proceedings.[96] The *lex fori concursus* governs the assessment of expenses, the role of the court in approval of expenses and distribution of costs and expenses, in particular which expenses would be covered from the insolvency estate, which may need to be covered by creditors or other parties in interest and for which the insolvency representative may be personally liable. The *lex fori concursus* also determines the treatment of debtors whose assets and sources of revenue are insufficient to meet the costs of administering the insolvency proceeding, in particular whether in such cases the application will be denied or alternative mechanisms for covering costs of administering insolvency proceedings will be used and if so, which ones. It also determines rules related to third-party funding.

53. This item is linked to other items on the *lex fori concursus* list. For example, costs and expenses relating to the insolvency proceedings would include costs and expenses of participation of the insolvency representative in various proceedings impacting the insolvency estate, such as litigation or arbitration with respect to disputed claims or avoidance proceedings.

(q) Distribution of proceeds

54. Under the legislative provisions, the *lex fori concursus* determines rules for distribution of proceeds, which may be different for liquidation and reorganization.[97]

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

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

[96] See the Glossary in the Introduction to the Guide, term (a).

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

55. This item is closely linked to other items on the *lex fori concursus* list, in particular item (n) on treatment of claims and item (o) on ranking of claims. If the *lex fori concursus* allows giving undertakings as regards the treatment of claims that could otherwise be brought by creditors in an insolvency proceeding in another State, the affected claims could be treated in accordance with the treatment they would receive in an unopened proceeding, including as regards the distribution of proceeds.

(r) Closure of the proceedings

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

(s) Discharge

57. Under the legislative provisions, the *lex fori concursus* determines: (i) general conditions for discharge, including debts that are not dischargeable; (ii) procedures and preconditions for discharge, which may be different in different types of proceedings (liquidation, reorganization, standard or simplified proceedings); (iii) the date from which discharge will be effective;[98] and (iv) criteria for denying discharge and revoking discharge granted. In the context of insolvency proceedings, discharge means release of a debtor from claims addressed in the insolvency proceedings.[99]

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

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

59. Unlike the effects of insolvency proceedings on directors' obligations and liabilities arising during insolvency proceedings encompassed by item (k), which are always governed by the *lex fori concursus*, the legislative provisions do not envisage that effects of insolvency proceedings on all directors' obligations and liabilities in the period approaching insolvency should be governed by the *lex fori concursus*. In most cases, the *lex societatis* will continue to apply to them notwithstanding the opening of insolvency proceedings. Item (t) intends to capture specific grounds that may give rise to the liability of directors and causes of action against directors upon commencement of insolvency proceedings under insolvency law. Such grounds include in many States wrongful trading and violation of the duty to file for commencement of insolvency proceedings. Other than in those very few cases closely connected to insolvency law and insolvency proceedings, it will be inappropriate to subject directors' obligations and liability in the period approaching insolvency to the retrospective effect of the *lex fori concursus*.

60. For example, in some States, directors may face criminal liability for not filing for commencement of insolvency proceedings within the period specified in the law after occurrence of certain events. In other States, no such requirement may apply and instead directors may be encouraged to engage in out-of-court debt restructuring

proceeds takes place in accordance with the distribution rules contained in the reorganization plan.

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

[99] See the Glossary in the Introduction to the Guide, term (m).

negotiations. The limited interpretation of item (t) in its application to directors ensures that directors in the second group are shielded from unexpected liability and obligations that would apply to and be expected by directors in the first group. Risks of exposure to such unexpected liability and obligations may be different depending on whether insolvency proceedings are opened at the location of: (i) COMI that is the same as the debtor's place of registration or incorporation or "real seat"; (ii) COMI that is different from the debtor's place of registration or incorporation or "real seat"; (iii) the debtor's establishment; or (iv) the debtor's assets. Such risks are higher where insolvency proceedings are commenced by creditors in a non-COMI State. In other cases, the assessment conducted as regards the *lex societatis* may be similar to the assessment of the COMI with the result that the *lex societatis* will most likely be the same as the *lex fori concursus*.

61. In this context, law other than the insolvency law may apply as part of the *lex fori concursus*, especially if the *lex fori concursus* follows a broad interpretation of "directors", as for example recommended in part four of the Guide.[100] Depending on persons found to be in factual control of the debtor's business in the period approaching insolvency (e.g. a regulated institutional lender, an auditor or a legal advisor), different laws (e.g. laws regulating certain professions) may apply, including on disqualification and other remedies and enforcement mechanisms available against such persons.

Paragraph 2

62. The paragraph is consistent with the provisions of articles 28–32 of MLEGI. To reflect the reported practices,[101] it was expanded to cover situations with multiple debtors members of the same enterprise group and situations with a single debtor.

63. The provision is intended to make it possible for the originating court to defer to the law of a foreign State, when necessary, for example, in order to ensure adequate protection of secured creditors. While this flexibility is beneficial and may be indispensable in particular cases, it may also complicate the administration of insolvency proceedings. Under the provision, the court is left to assess the pros and cons of the deferral to a law of a foreign State in each case. The provision alerts that the benefits of such a deferral may outweigh the negative consequences where, for example, it is necessary to minimize the commencement of foreign insolvency proceedings with respect to the same debtor or enterprise group. By choosing to apply the law of another State to accord to claims in domestic insolvency proceedings the treatment and ranking that they would have received in a foreign insolvency proceeding if it were to be opened, the court would effectively facilitate the treatment and ranking of claims in accordance with the otherwise applicable law and alleviate the need for creditors to bring those claims in foreign insolvency proceedings.

64. Where the court defers to the law of another State, that deference should be understood as deference only to the substantive internal law of that State, not PIL rules of that State, which means that renvoi is not envisaged. This is in line with the approaches taken in other international texts.[102] The goal of that approach is to promote certainty as regards applicable law. In addition, the reference to the law of a foreign State would not encompass that State's public law, i.e. the law relating to the exercise of sovereign powers. Nevertheless, the court may address the treatment and ranking of foreign public claims (e.g. tax and social security claims).[103] The reference to the law of a foreign State does not encompass procedural law either, since courts apply their own procedural law and do not apply any foreign rule that they consider procedural. Some matters (e.g. a set-off or limitation period) may be qualified as substantive or procedural, depending on the legal system. The court makes this

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

[101] See para. 196 of the Guide to Enactment of MLEGI.

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

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

determination in accordance with the law of its State, e.g. the *lex fori concursus* in insolvency proceedings.[104]

Paragraph 3

[to be drafted in due course]

Paragraph 4

[to be drafted in due course]

B. Exceptions to the *lex fori concursus*

1. Labour contracts and relationships

(a) Draft legislative provision

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

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

(b) Draft commentary

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

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

3. The rationale for the exception to the application of the *lex fori concursus* found in the legislative provision is that labour contracts and relationships raise many socioeconomic policy considerations. For that reason, States usually devise a special regime for the treatment of issues arising from labour contracts and labour relationships in insolvency. In some insolvency laws, priority is given to maintaining continuity of employment over other objectives of insolvency proceedings, such as maximization of value of the estate for the benefit of all creditors. This may be evidenced by a focus on sale of the business as a going concern with the transfer of existing employment obligations, as opposed to liquidation or reorganization where those obligations may be altered or terminated. Mandatory provisions of law, including

[104] **This paragraph was originally part of the commentary to the definition of "*lex fori concursus*." Its location may need to be further reassessed in the light of the relevance of matters discussed therein also to chapter III provisions.**

those found in international treaties,[105] may: (a) protect workers against unfair dismissal and discrimination; (b) provide for a financial safety net for workers; (c) impose restrictions on the rejection or modification of labour contracts[106] and conditions for implementing redundancies (including an advance notice to relevant State authorities); and (d) ensure workers' rights to be properly informed about all matters arising from insolvency proceedings affecting their employment status and entitlements. Different regimes may apply in liquidation and reorganization. For example, in some States, employees follow the business in case of sale as a going concern in both liquidation and reorganization, in other States this happens only in reorganization.

4. The legislative provision aims to reduce the risk of uncertainty or inconsistency in the treatment of labour contracts and relationships in insolvency proceedings. That risk increases if the effects of insolvency proceedings on those matters are governed by the foreign *lex fori concursus*. Providing more certainty and consistency to workers' expectations is justified because workers usually have a relatively weaker bargaining position than their employer, especially where no collective bargaining agreements are in place. In addition, workers may be unfamiliar with insolvency proceedings and the protection accorded to them in case of financial difficulties of their employer and may remain uninformed and unaware of plans related to their employment status. Insolvency proceedings may be used to erode their protection, for example, where the business is sold as a going concern and where the elimination of onerous employment contracts could increase the sale price, or where the debtor uses an application for insolvency as a means of obtaining relief from onerous obligations arising from labour contracts or relationships.

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

6. Nevertheless, without the exception envisaged in this legislative provision, the effects of insolvency proceedings on the treatment of labour contracts and relationships may end up being governed by the law of the State that has no or a very distant connection to a given labour contract or relationship (e.g. the law of the COMI State outside the location of all or most workers of the debtor). Such a result would require reconciling the protection afforded to workers under the foreign *lex fori concursus*, the chosen law, where applicable, and the law that would have been mandatorily applicable in any event. Envisaging a combination or hierarchy of applicable laws may be another solution with the advantage of preserving flexibility, but it may impede the efficient conduct and administration of insolvency proceedings since courts would be expected to compare implications of the application of various

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

labour regimes. Although, as noted in the preceding paragraph, a similar disadvantage would be present also in the approach taken in the legislative provision, on balance, the approach adopted in the legislative provision is preferable.

7. The public policy exception (see below) would allow the court at the State of the commencement of insolvency proceedings not to apply a foreign law if the effects of the application of that law would be manifestly contrary to the public policy of that State (e.g. that effectively legitimizes modern slavery, etc.). In such case, the labour law of the State of the commencement of insolvency proceedings or a State that has a closer connection to the labour contract or relationship may apply.

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

(a) Draft legislative provision

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

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

(b) Draft commentary

1. The legislative provision contains an exception to the *lex fori concursus* for the effects of insolvency proceedings on the rights and obligations of the participants in a payment, clearing or settlement system, a regulated financial market or another multilateral trading facility. That exception also applies to avoidance of payments or transactions in those systems, markets or facilities. The law applicable to the system, market or facility, not the *lex fori concursus*, governs those matters. The exception does not displace the law that governs the commencement, conduct, administration and closure of insolvency proceedings for the participants in the covered systems, markets and facilities, their clients or customers or any other person whose transactions happened to be processed through such systems, markets or facilities. Neither does the exception displace the law that governs the effects of any commenced insolvency proceedings on any aspects other than those covered by the exception. The other legislative provisions of this text may apply to those other aspects.

2. For the purpose of this exception:

(a) A payment system is a set of instruments, procedures and rules for the transfer of funds between or among participants (see (f) below for the explanation of the term “participants”). It is typically based on an agreement between or among participants and the operator, and the transfer of funds is implemented using an agreed-upon operational infrastructure. Narrowly, the term may refer only to interbank funds transfer systems in which all or almost all participants are credit institutions and which facilitate the circulation of money in a country or currency area. More broadly, it may refer to any formal arrangements for funds transfer, either based on a private contract or legislation, with multiple membership, common rules and standardized processes, for the transmission, clearing, netting or settlement of monetary obligations arising among its participants. Payment systems may be part of the financial markets (see (d) below for the explanation of the term “regulated

financial market") or may operate separately according to their own governance structure and operating rules;

(b) A clearing system is a set of rules and procedures that establish the final positions of participants prior to their settlement in the settlement system (see (c) below for the explanation of the term "settlement system"). They may be part of the settlement systems or may operate separately according to their own governance structure and operating rules;

(c) A settlement system is a set of instruments, procedures and rules that enables funds, assets or financial instruments to be transferred according to predetermined rules. The transfers would become final (i.e. irrevocable and unconditional) in the settlement system. The settlement systems may operate separately according to their own governance structure and operating rules or as part of a central counterparty (CCP) or as part of a financial market or a central securities depository;

(d) A regulated financial market is a regularly functioning multilateral marketplace, authorized by a competent authority, operated or managed by a market operator, where multiple buyers and sellers engage in the trading of interests in financial instruments (e.g. stocks, bonds, derivatives, trust units) that are admitted to trading in that market under the rules of that market. It operates under specific laws or regulations and subject to oversight or prudential supervision by the competent authority. Before granting authorization to the market operator and the market to function as a regulated financial market, such authority must be satisfied that the market operator and the market comply with the applicable requirements. Examples of regulated financial markets include stock exchanges, bonds and derivatives markets. Unlike payment, clearing and settlement systems, each of which may either operate separately or be part of one another or of a larger financial market, a regulated financial market represents the complex integrated infrastructure for clearing, settling and recording payments, securities, derivatives or other financial transactions;

(e) A multilateral trading facility (MTF) is an electronic platform that facilitates trading in various types of financial instruments. It may operate as part of, or in addition to, a regulated financial market. It is usually a self-regulated financial trading venue, which may operate under discretionary or non-discretionary rules. MTFs operating on a non-discretionary basis do not exercise discretion over the execution of trades. They match orders from various participants based on predefined rules. MTFs operating on a discretionary basis can exercise discretion over the execution of trades. This allows them to act as counterparties to the trades, providing liquidity and executing client orders. MTFs may specialize in the trading of particular types of financial instruments (e.g. equity (shares, bonds) or non-equity (emission allowances) financial instruments);

(f) The participants in the system, market or facility covered by the exception are persons both (i) identified and recognized as such by the relevant system, market or facility, and (ii) allowed directly or indirectly to effectuate transfers through that system, market or facility. Traditionally, the participants have included credit institutions, investment firms, public authorities, a CCP, settlement and clearing agents and operators of the system, market or facility. Most recently, they have been expanded to include other persons, for example, indirect participants and, in systems, markets or facilities based on distributed ledger technologies (DLT), such as blockchain, retail investors who may interact with each other directly, without intermediaries.

3. The systems, markets and facilities (and their different combinations) covered by the exception enable multiple parties buying and selling trading interests in financial instruments to interact. The inability of one or more participants to perform their obligations in those systems, markets and facilities render other participants in those systems, markets and facilities unable to meet their obligations to the other

participants and third parties when they become due. This "domino" effect is often referred to as systemic risk.

4. Systemic risk is further increased by disruptions that insolvency proceedings may cause to the operation of the covered systems, markets and facilities, for example by avoidance or a stay of payments, settlements, clearances and other actions occurring in such systems, markets and facilities on a regular basis. Such disruptions may lead to losses and liquidity problems and to ineffectiveness of measures that those systems, markets and facilities take to reduce their operational and systemic risks. In addition, in the light of multiplicity of the participants in those systems, markets and facilities and multiplicity of third parties whose insolvency proceedings may affect the operation of those systems, markets and facilities, various different *lex fori concursus* could apply, whose effects on the rights and obligations of the participants would be difficult to assess, making the management of operational risks difficult, if not impossible, thereby amplifying systemic risks. The exception, by identifying a single law that governs the effects of insolvency proceedings on the rights and obligations of the participants in a payment, clearing or settlement system, a regulated financial market or another multilateral trading facility as well as avoidance of payment or transactions effectuated through those systems, markets and facilities, helps to make disruptions caused by insolvency proceedings more predictable and hence more manageable.

5. The exception is not limited to the effects of only those insolvency proceedings that are commenced with respect to the participants of a system, market or facility. The effects of any insolvency proceeding, including those commenced with respect to a non-participant of a payment, clearing or settlement system, a regulated financial market or another multilateral trading facility, would fall under the scope of the exception to the extent of their impact on the rights and obligations of the participants in a payment, clearing or settlement system, a regulated financial market or another multilateral trading facility. For example, while the *lex fori concursus* will govern measures imposed upon commencement of insolvency proceedings (e.g. a stay of proceedings) with respect to, for example, party A who is an individual vendor (i.e. not a participant of any covered system, market or facility), it will not govern the impact of those measures on, for example, clearance and settlement of payments by A to its suppliers that are processed through the covered system, market or facility.

6. The rights and obligations of the participants in the covered system, market or facility may arise from the statutory or regulatory rules, or procedures or contracts, that govern, impact or are otherwise directly relevant to the operation of the system, market or facility (e.g. risk control and liquidity-saving mechanisms). They include the rights and obligations of participants arising from, or related to the performance, modification or termination of contracts, including: (a) settlement and payment netting; (b) assumption and discharge of obligations; (c) finality of transfers; (d) novation; (e) open offers or other binding arrangements through which a CCP becomes a counterparty to trades with participants; (f) the provision of collateral to cover current and potential future exposures; and (g) the provision of various types of guarantees. They may also include the rights and obligations arising from, or related to, contracts directly relevant to the operation of those systems, markets and facilities that are entered between or among the participants or between the operator of the system, market or facility and third parties. Such contracts may concern netting, enforcement of collateral arrangements, credit support arrangements and guarantees and the treatment of ipso facto clauses.

7. As noted above, the exception is not intended to interfere with the law applicable to insolvency proceedings that may be commenced with respect to any participant in a payment, clearing or settlement system, a regulated financial market or MTF. To illustrate: party A, located in State A, is a participant in a regulated financial market governed by the law of State B and in that capacity entered into transactions with multiple parties (B, C, D, etc.) in that market. Under these legislative provisions, if insolvency proceedings are commenced with respect to party A in State A, the *lex fori concursus* of that State A will apply to all aspects of those insolvency proceedings

(e.g. to the eligibility of party A to be the debtor under insolvency law of State A, the commencement standards, etc.) except for those identified in these legislative provisions, including that, under this exception, the law of State B will determine the effects of the commenced insolvency proceedings in State A on transactions between party A and multiple parties B, C, D, etc. in the market.

8. In addition, the rights and obligations arising from contracts and other transactions linked to the covered systems, markets and facilities, but not directly relevant to their operations, remain to be governed by the *lex fori concursus*. To illustrate: in a payment system, if party A ordered its bank B to transfer funds to the account of party C maintained at bank D, the exception will apply only to the rights and obligations arising from that funds transfer order between A and B, B and D, and D and C, but not to the effects of A's insolvency on the rights and obligations arising from the underlying transaction between A and C that triggered that funds transfer order, which will be subject to the *lex fori concursus*.

9. The exception does not intend to insulate avoidable transactions processed through the systems, markets and facilities covered by the exception from avoidance. As noted in the second sentence of the legislative provision, the law applicable to that system, market or facility will govern avoidance of payments or transactions in that system, market or facility. In most cases, that law would follow the internationally accepted standards for regulation of the covered system, market or facility, which envisage a short stay aimed at, inter alia, identifying and addressing any avoidable transactions processed through the systems, markets and facilities covered by the exception. The exception does not insulate from avoidance any other avoidable transactions that might have taken place in relation to transactions processed through the covered systems, markets and facilities. Such transactions will be subject to the avoidance regime of the *lex fori concursus* applicable to the insolvent participant or non-participant of the covered system, market or facility. The same applies to any stay that the *lex fori concursus* may impose.[107]

10. The law applicable to the systems, markets and facilities covered by the exception may be the law of the State where the system, market or facility is located or the law chosen by the system, market or facility itself or, failing that, by their participants. Some States do not permit the choice of law, either by the system, market or facility or by its participants, and require the mandatory application of the law of the location of the system, market or facility. Other States permit the choice of law by the system, market or facility or (only or in addition) by its participants but may subject such choice to certain restrictions or conditions. For example, a requirement may apply to choose the law of the State in which at least one participant has its head office, or the choice of law by the system, market or facility or by the participants may be subject to verification by the competent authority, which may not permit the choice of the law that circumvents the fundamental public policy of its State. In the absence of the permissible choice of law or in case of a deficient choice, the law of the location of the system, market or facility usually applies.

11. The systems, markets and facilities covered by the exception often identify the law that will apply to each aspect of their operations in the rules governing their activities. Under some applicable law, they may be required to do so. As a risk mitigation strategy, they are often also under a requirement to identify and analyse potential conflict-of-laws issues that would arise from their activities and develop rules and procedures to mitigate those conflict-of-laws risks.

12. The exception should be interpreted and applied flexibly in order to achieve its intended purpose, which is to protect public interests, contain systemic risk and ensure investor protection, financial market integrity and financial stability. The exception should apply to the covered systems, markets and facilities regardless of the technology they use in their operations as long as they meet the criteria for application of the exception.

[107] **A/CN.9/1169, para. 80.**

13. The court in the State of the commencement of insolvency proceedings will be able to invoke the public policy exception (see below) if the effects of applying a foreign law determined as applicable under this exception would be manifestly contrary to the public policy of that State. The *lex fori concursus* would be expected to provide rules for determining which other law, if not the *lex fori concursus* itself, will apply in such cases.

3. Close-out netting [under eligible financial contracts][108] outside payment, clearing and settlement systems, regulated financial markets or other multilateral trading facilities[109]

(a) Draft legislative provision

Law governing the effects of insolvency proceedings on close-out netting arrangements [under eligible financial contracts] outside payment, clearing and settlement systems, regulated financial markets or other multilateral trading facilities

1. Except as provided in these legislative provisions, the effects of insolvency proceedings on the operation of a close-out netting arrangement in relation to [eligible financial contracts] [securities, commodities, derivatives, forward, options, swaps, securities repurchase, master netting and other similar contracts or agreements ("eligible financial contracts")][110] shall be governed by the law applicable to that arrangement[111] unless that law has no substantial relationship to the parties or the arrangement and there is no other reasonable basis for applying that law.

2. [Paragraph 1 does not preclude avoidance and a [short] stay of close-out netting under the *lex fori concursus* applicable in insolvency proceedings commenced with respect to any party to the close-out arrangement.] [Notwithstanding paragraph of this legislative provision, the *lex fori concursus* applicable in insolvency proceedings commenced with respect to any party to the close-out arrangement governs issues arising from avoidance of acts and a stay of proceedings in relation to close-out netting arrangements].[112]

(b) Draft commentary

1. This legislative provision contains an exception to the *lex fori concursus* for close-out netting arrangements under eligible financial contracts, with some carve-outs. The exception provides that the effects of insolvency proceedings on the operation of close-out netting arrangements are governed, as a general rule, by the law applicable to those arrangements. That law may be determined by the parties to the close-out netting arrangement themselves (e.g. a choice of law provision may be included in a close-out netting contractual clause or agreement, including the master agreement referring to underlying contracts between the same parties) or it may be established by the court on a case-by-case basis (e.g. according to the applicable PIL rules).

2. The arrangements covered by the exception allow the termination of the underlying contracts between the parties upon occurrence of a predefined event (e.g. commencement of insolvency proceedings with respect to any party to the arrangement), either automatically or upon the initiative of any party to the

[108] **For the definition of a "financial contract" included in the Guide, see footnote 69 above.**

[109] **The secretariat held further consultations on the issues covered in this section with experts who had taken part in the June 2023 and January 2024 expert group meetings (see para. 15 of A/CN.9/WG.V/WP.190 and footnote 112 of A/CN.9/WG.V/WP.194). The results of those consultations are reflected in the draft legislative provision and commentary thereto.**

[110] **A/CN.9/1169, para. 62.**

[111] **Ibid., para. 63.**

[112] **Ibid., para. 62.**

arrangement (i.e. close-out), followed by a valuation of the mutual obligations under the terminated contracts and the determination of a net aggregate value for all these obligations (i.e. netting).[113] Although similar to some extent to payment or settlement netting in payment, clearing or settlement systems, regulated financial markets or other multilateral trading facilities covered by another exception in these legislative provisions, close-out netting arrangements differ from them in several respects, in particular because of their contractual nature and the flexibility accorded to the parties under the principle of freedom of contract. They are also different from classical contractual set-off. Although the aggregation element of close-out netting arrangements is present also in that type of set-off, the close-out netting arrangements covered by this exception also include the element of acceleration of parties' obligations to each other, which, as a result, become due upon occurrence of a predefined event, such as commencement of an insolvency proceeding with respect to any party to the close-out netting arrangement. Obligations accelerated and terminated under those arrangements would not be necessarily connected or mutual as usually the case in classical contractual set-off.

3. Close-out netting arrangements covered by the exception are increasingly used in bilateral and multilateral and domestic and cross-border settings, for example: in enterprise groups for cash-pooling; in wholesale energy contracts; commodity contracts; mining; trading in non-standardized over-the-counter derivatives that might not be eligible for clearing and settlement through a payment, clearing or settlement system, a regulated financial market or other multilateral trading facilities; and by airlines and similar businesses where prices and currencies fluctuate rapidly. It is reported that the existence of effective close-out netting arrangements in those sectors substantially reduces credit and commercial risks of partis to those arrangements, for example by hedging against risks of fluctuating prices.[114] Close-out netting arrangements also reduce the risk of creating or increasing financial difficulties for counterparties caused by the inability of one party to meet its obligations, which in turn might lead to a systemic risk. They also enhance the availability of credit by allowing counterparties to extend credit based on their net exposure after taking into account the value of all "open" contracts.[115]

4. Close-out netting arrangements may receive a different treatment across jurisdictions. In some States, especially in those where the freedom of contract prevails in the context of those arrangements, enforceability of close-out netting arrangement upon commencement of insolvency proceedings is recognized and protected. In other States, this may not be the case. It is usually the case that, before entering into close-out netting arrangements, contracting parties will assess the enforceability of those arrangements in all potentially relevant jurisdictions and tailor their choice of law provisions accordingly. A favourable choice-of-law provision is usually included also in standard master agreements, such as those recommended by international specialized agencies. Nevertheless, uncertainties as regards enforceability in insolvency proceedings of those choice-of-law clauses and close-out netting arrangements more generally exist.

5. The exception is intended to address those uncertainties and to preserve benefits of close-out netting arrangements that may be lost if various different laws govern the effects of insolvency proceedings on them. At the same time, the exception builds several safeguards to mitigate concerns about the impact of the enforcement of those arrangements in insolvency proceedings on the equitable treatment of similarly situated creditors and other insolvency law objectives and provisions, such as the treatment of ipso facto clauses in insolvency and the insolvency representative's

[113] See the Glossary in the Introduction to the Guide, terms (z) and (aa) ("netting" and "netting agreement", respectively); para. 210 in the financial contracts and netting section of part two of the 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.

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

[115] See e.g. ibid., para. 209.

powers to continue or reject contracts not yet fully performed[116] (see in that context the commentary to the *lex fori concursus* rule, in particular item (h) on the *lex fori concursus* list). A related concern is that the enforcement of close-out netting arrangements may endanger the rescue and reorganization of the debtor.

6. [The safeguards include that only close-out netting arrangements under eligible financial contracts are covered. Although criteria for ascertaining eligible financial contracts differ across jurisdictions, "eligible financial contracts" usually include securities, commodities, derivatives, forward contracts, options, swaps, securities repurchase, master netting and other similar contracts or agreements concluded for underlying financial purpose and, in that context, also for risk management strategy. A simple supply contract settled at the market price would be excluded from that definition.][117]

7. Another safeguard included in the legislative provision allows the court in the State of opening insolvency proceedings to displace the law applicable to close-out netting arrangements if that law has no substantial relationship to the parties or the arrangement and there is no other reasonable basis for applying that law. A public policy exception may also apply in appropriate circumstances. Depending on connecting factors, the *lex fori concursus* itself or another law with a closer connection to the issue may apply in lieu of the displaced law (e.g. the *lex rei sitae* if the close-out netting arrangements are linked to a collateral or a right in rem located in a different jurisdiction).

8. The legislative provision also contains a safeguard permitting the avoidance of acts arising from close-out netting arrangements under the *lex fori concursus* if conditions for avoidance are met. This ensures that the exception does not insulate avoidable transactions arising from a close-out netting arrangement from avoidance, a result that would undermine the objectives of insolvency proceedings, notably protection, preservation and maximization of the value of the insolvency estate to allow equitable distribution to creditors.

9. The additional safeguard provides that the *lex fori concursus* remains applicable to issues related to a stay of close-out netting arrangements. If imposed, a stay should be very short (e.g. 24 hours), as strictly necessary for orderly resolution of the debtor,[118] in order not to undermine benefits of close-out netting arrangements.

10. In jurisdictions where eligible financial contracts must have a financial institution as a counterparty, the need for inclusion of this legislative provision should be considered in the light of a possible exclusion from the scope of application of the legislative provisions of insolvency proceedings concerning financial and other entities that are subject to a special insolvency regime (e.g. resolution). The need for this legislative provision should also be considered in the light of the exception found in these legislative provisions for rights and obligations of participants in payment, clearing or settlement systems, regulated financial markets or other multilateral trading facilities. In addition, inclusion of this legislative provision would also need to be assessed in the light of mandatorily applicable insolvency law provisions on set-off. In that latter context, the legislative provision is thus closely linked to item (i) on the *lex fori concursus* list above.[119]

[116] See e.g. recommendations 69–86 of the Guide.

[117] See in that context recommendations 101–107 of the Guide and their accompanying commentary.

[118] For discussion of a stay in the context of inter alia close-out netting arrangements, see the UNIDROIT Principles on the Operation of Close-Out Netting Provisions (Principle 8) and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, Principle C10.4 and endnote 9.

[119] **See footnote 70 above.**

C. Public policy exception

1. Draft legislative provision

Public policy exception

The court may refuse the application of the foreign law if the effects of the application of that law would be manifestly contrary to the public policy of the court's State. [120]

2. Draft commentary

1. The public policy exception allows courts not to apply the foreign law determined as applicable under the provisions of this chapter (for example, the law applicable to the labour contract or relationship or the law of the system, market or facility). That exception can be invoked if the court ascertained that the effects of applying that law would be manifestly contrary to the public policy of the court's State.

2. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted. However, since the legislative provisions deal with matters of international cooperation, public policy should be understood more narrowly and restrictively than domestic public policy. This intention is conveyed by the expression "manifestly" in the legislative provision. Hence, under these legislative provisions, the public policy exception could be invoked only under exceptional circumstances concerning matters of fundamental importance for the State where insolvency proceedings have been commenced. Such matters include security, sovereignty, concepts of fundamental justice and basic values of a State, and exceptional circumstances include situations where application of the foreign law designated by the legislative provisions of this chapter might effectively legitimize illegal schemes or practices (for example, evasion of mandatorily applicable law and obligations, such as environmental, human rights and other social responsibilities, or the use of law for attaining politically motivated goals).

3. Public policy implications of applying the foreign law designated by the legislative provisions of this chapter would be assessed in each case but the same narrow and restrictive interpretation of the exception should be followed regardless of the type of the proceeding (liquidation or reorganization). The consequences of not applying the otherwise applicable foreign law on grounds of public policy would be addressed in the *lex fori concursus*. Depending on connecting factors, the *lex fori concursus* itself or another law with a closer connection to the issue may apply in lieu of the displaced foreign law.

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

1. Draft legislative provision

Giving effect to the *lex fori concursus* and other laws applied by the foreign court

Upon recognition of a foreign (planning) proceeding, the court may grant relief by giving effect to the *lex fori concursus* and other laws applied by the foreign court. [121]

[120] A/CN.9/1169, para. 72.
[121] Ibid., paras. 74 and 75.

2. Draft commentary[122]

1. Under UNCITRAL insolvency texts, States are expected to cooperate and coordinate in cross-border insolvency cases to the maximum extent possible.[123] Means to achieve such maximum cooperation and coordination are different and encompass granting relief, including provisional, to assist the foreign proceeding and the foreign representative.[124]

2. Chapter III of these legislative provisions is in line with those aims, enabling the receiving court to give effect to the *lex fori concursus* or other law applied by the foreign court. To illustrate, the foreign representative, to enforce a stay on the execution of the assets of the insolvency estate located in a State other than the State that opened insolvency proceedings, will need to seek a relief that will produce the same result in the State where the assets are located. The courts in that State may more readily apply domestic laws rather than the *lex fori concursus* when considering a request for such a relief. Where domestic laws do not impose a stay in the relevant case, the legislative provision in chapter III enables courts in the receiving State to give effect to the *lex fori concursus* with the result that the stay imposed under the *lex fori concursus* will be effective also in the receiving State.

3. Chapter III thus supplements the existing provisions on relief and additional assistance in MLCBI, MLIJ and MLEGI, like article X of MLIJ supplements MLCBI with respect to the recognition and enforcement of foreign judgments. Chapter III also supplements article 15 of MLIJ on equivalent effect under which the recognized or enforceable judgement is to be given the same effect it has in the originating State or would have had if it had been issued by the domestic court. That article further states that, if the insolvency-related judgment provides for relief that is not 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.

4. Effects to the *lex fori concursus* or other law applied by the foreign court could also be given by courts in local insolvency proceedings when those are required to be commenced under domestic law, for example to protect local employees' rights, or need to be commenced for practical reasons, for example for effective management of immovable property belonging to the insolvency estate located in multiple jurisdictions.

5. As envisaged in the legislative provision, effects may be given not only to the *lex fori concursus* but also to the law of another State applied by the foreign court, which may occur, for example, as a result of either the application of the exceptions to the *lex fori concursus* found in Chapter II or deferral by the foreign court to the law of another State. The law of another State may be the *lex rei sitae* or any other law with a connection closer than the *lex fori concursus* to any given matter considered in the relevant case, and it may turn out to be the local law of the receiving State.

6. The observed convergence of substantive insolvency rules should make granting the relief envisaged in the legislative provision less problematic. Granting it may also be required under certain circumstances in some States (for example, those bound by international obligations to defer to the *lex fori concursus* of the foreign main proceeding in the relevant case).[125] Nevertheless, the legislative provision does not envisage giving automatic effect to the *lex fori concursus* or other law applied by the foreign court in the receiving State upon recognition of a foreign proceeding, either main or non-main, unlike, for example, article 20 of MLCBI that envisages certain

[122] **Ibid., para. 75.**

[123] See e.g. chapter IV of MLCBI and chapter 2 of MLEGI.

[124] GEI, para. 35.

[125] 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.

automatic consequences, subject to some exceptions, upon recognition of a foreign main proceeding.

7. Granting the relief envisaged in the legislative provision is subject to the usual safeguards of the public policy exception and adequate protection of creditors.[126] In particular, 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. In addition, in granting, denying, modifying or terminating a relief in the form of giving effect to the *lex fori concursus* or other law applied by the foreign court, the domestic court will unavoidably compare the ensuing result with the result that would be achieved if the domestic law were applied instead. In particular, to ensure the adequate protection of local interests and all parties in interest under articles 21 (2) and 22 of MLCBI, the domestic court will compare the treatment that creditors and other parties in interest, including the debtor itself, receive under the *lex fori concursus* or the law of another State applied by the foreign court in the relevant case and the treatment that they would receive in the domestic court (either under the domestic law or the law of yet another State that the domestic court may be required to apply in the relevant case under PIL rules or overriding provisions of insolvency law of its State). Where that comparison demonstrates that the adequate protection has not been ensured by the foreign court, the court may refuse to grant the relief envisaged in the legislative provision.

8. Additional considerations may arise from giving effects to the *lex fori concursus* as regards the treatment of security interests because of public policy considerations involved in designing the domestic regime for secured lending, including the treatment of secured creditors in insolvency proceedings. States may be concerned that the intrusion of a foreign law upon that regime may introduce a factor of instability that may lead to the impairment of protections and the value of local security interests and increase the domestic costs of finance. COMI movements, if they bring an unforeseen last-minute radical change in the position of secured creditors, may exacerbate those concerns. However, if sufficient assurances of adequate protection of interests of secured creditors in foreign proceedings are provided to the receiving court, there should be no obstacles to giving effects of the *lex fori concursus* also as regards the treatment of secured creditors. Chapter II of these legislative provisions discusses elements that may provide such assurances to the receiving court. They include that the foreign court: (a) recognized a security interest effective and enforceable under the law other than the insolvency law as effective and enforceable also in the foreign proceeding; (b) ensured adequate protection of the value of the encumbered assets; and (c) lifted a stay on the enforcement and execution of security interests under appropriate circumstances. In addition, the receiving court may take comfort where the foreign court applied the law that the receiving court would have applied in the relevant case (e.g. the insolvency law of the *lex rei sitae*) since the effects on the treatment of secured creditors in such cases would be the same, including as regards a stay of enforcement and execution of their security interests.

9. As in other cases, coordination and cooperation would need to be ensured in granting the relief when concurrent proceedings take place, whether with respect to a single debtor or multiple debtors members of the same enterprise group. Under the UNCITRAL framework, the receiving court may refuse granting the relief if granting it would interfere with the administration of a foreign main proceeding. Where the relief is granted to a foreign non-main proceeding, it must be consistent with the foreign main proceeding. The receiving court shall review, modify or terminate the relief in effect that is inconsistent with the foreign main proceeding. A conflict or inconsistency may in particular arise with a stay or other order issued in the foreign proceeding, whether main or non-main, that have already been or could be recognized or enforced by the receiving court. Inconsistency with a stay, for example, would typically arise where the stay permitted the commencement or continuation of

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

individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition and enforcement of any ensuing judgment. It could also arise where the stay did not permit the commencement or continuation of such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay (and was thus potentially in violation of the stay).[127]

10. In addition, the relief may not be granted to a foreign non-main proceeding if granting it would produce effects on assets that, under the domestic law, should not be administered in the foreign non-main proceeding or on information that is not required in that proceeding. Where two or more non-main proceedings take place, the receiving court shall grant, review, modify or terminate the relief granted to foreign non-main proceedings for the purpose of facilitating coordination of those proceedings.

11. Additional considerations arise in coordination of relief under MLEGI. The relief may not be granted to the foreign planning proceeding if granting it would produce effects on the assets and operations of an enterprise group member that is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings.[128]

[127] GE, para. 107.

[128] See articles 20, 22 and 24 of MLEGI and the commentary under article 20 of MLEGI.

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