**Virtually in Vienna (Again!): New Projects on the Horizon at UNCITRAL**

*Introduction*

A few intrepid attendees braved the slowly reducing threat of delta and the more ominous increase of Omicron to attend the 59th meeting of UNCITRAL’s Working Group V in Vienna from 13-17 December 2021. However, the vast majority of delegates from the 48 attending states eschewed travel to attend virtually through UNCITRAL’s Interprefy meeting platform. Meeting platforms and virtual attendance – these concepts are quickly becoming a norm in face of the still raging COVID 19 Pandemic as the reluctance to take the risk of travel continues to grow.

Although strudel and schnitzel were certainly missed by all (apart, perhaps, by the lucky few who were able to or brave enough to attend in person), a productive and well-run meeting was held from Vienna during which more than one important aspect of international insolvency models and rules were discussed in detail by the 48 jurisdictions and several international organisations contributing to Working Group V, along with associated observers, including INSOL Europe.

*UNCITRAL Legislative Recommendations on Insolvency of MSMEs*

On the first day – and quite quickly – the ground-breaking and timely *UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises* was finalised. The Working Group had been toiling over this document for the last several sessions, so it was quite a great accomplishment that this document will now be published after final approval by the Commission so it can be relied upon by jurisdictions to provide greater assistance and solutions to small businesses and entrepreneurs. It was recognised by a number of delegates and organisations that the publication of this text is particularly important in the current economic climate when MSEs are facing financial difficulties worldwide.

*Asset Tracing and Recovery in Insolvency Proceedings*

On the second day, the Secretariat presented a note on asset tracing and recovery in insolvency proceedings for discussion. This project is particularly important as an effective system of asset tracing and recovery in insolvency would help to maximise the value of an insolvent estate while emphasising the protection of creditors. A number of practical difficulties faced by insolvency practitioners were recognised during the discussion of asset tracing. Of particularly current importance was the challenge of tracing assets in an era of digital trade, which will require some significant modernisation of the tools available to insolvency practitioners to accomplish this task.

Asset tracing and recovery were viewed unanimously as a natural extension of the various insolvency projects undertaken by the UNCITRAL Working Group V. However, views of the delegates were mixed on whether the project should eventually take the form of an practice guide aimed at insolvency practitioners, or if it should target policymakers and legislators as a legislative guide. However, it was broadly welcomed as an educational opportunity during which existing gaps could be filled in some jurisdictions that had little or no experience with asset tracing and recovery, which would then assist in preventing the unchecked dissipation of assets in an insolvency.

With the educational aspect in mind, a toolbox approach to drafting the text is likely to be adopted (though other models have not been excluded), which would explain different existing tools in different jurisdictions and within existing UNCITRAL texts. This approach was recognised as particularly important to raise awareness between common and civil law jurisdictions and to enhance understanding and bridge differences between tools as much as possible.

Later that week, the Working Group also turned to the importance of creating tools of cross-border cooperation in the context of asset tracing, which would empower provisional insolvency representatives across borders and authorise courts and insolvency practitioners to cooperate and coordinate during an early stage of an insolvency process. However, there are many methods used among the UNCITRAL jurisdictions, thus this aspect of early action during an insolvency will need careful consideration and a cautious approach.

The causes of actions and incentives for making claims and by whom in relation to asset tracing were also discussed, during which it was recognised that there were a number of controversial elements that would need to be carefully considered. Involving creditors was noted as particularly controversial as regards the need to achieve a balance of treatment of a number of competing considerations. In contrast, it was noted that allowing creditor action could mean that at least some action is taken, when the alternative may be no action at all. Safeguards would clearly be necessary to ensure fairness and a balance of treatment among all creditors.

*Applicable Law in Insolvency Proceedings*

The third topic discussed by Working Group V pertained to a note produced by the Secretariat on applicable law in insolvency proceedings. During the discussion on this topic, its importance and complexities were both recognised, noting that harmonising applicable law in insolvency proceedings and reinforcing the application of the *lex fori concursus* would enhance legal certainty and predictability while preventing abusive forum shopping and reducing complexities and costs of insolvency proceedings.

This idea is of course not unfamiliar to those well-versed in European cross-border insolvency discourse and it is perhaps not surprising that the European Insolvency Regulation (Recast) was brought up on a number of occasions as an exemplar of how this has been accomplished elsewhere. However, views did differ on the appropriateness of transposing solutions found in the EIR Recast, though clearly the Regulation has stood the test of time and has (in both its incarnations) been well used for more than twenty years. It was also noted that there remain certain outstanding controversial topics that still garner academic debate and have yet to be fully settled in the courts. Doubtless reference will be made to the EIR Recast, but borrowing will be tempered by a full consideration of the broad applicability and ease of use by a much larger set of jurisdictions with contrasting legal cultures and economic systems.

*Conclusion*

The 59th Meeting of the UNCITRAL Working Group on Insolvency Law was indeed productive and interesting, if disappointing for its largely virtual nature. The next session should prove to be highly interesting with a number of difficult cross-border matters to discuss. There will also be a new set of recommendations for MSMEs to look forward to, which is nothing if not timely for small businesses continuing to struggle under the limitations and market volatility of the COVID19 pandemic.

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