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**UNCITRAL Working Group V and Further Projects in Applicable Law and Asset-Tracing**

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*Introduction*

New York City. The Big Apple. Gotham. The City that Never Sleeps, where the Bronx is up and the Battery down. Although Central Park beckons avid runners and matinee performances of favourite musicals play in the day, many delegates and some observers from the world over gathered in at UNCITRAL headquarters to discuss a number of issues the enhance and improve cross-border insolvency law. Although not many of the delegates and observers shared the joy of this trip to the Big Apple given the hybrid approach taken this year due to the continuing impact of COVID, many did attend in person to enjoy once again the camaraderie and fellowship with colleagues from all over the world.

*Updates to the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*

During this session, the UNCITRAL Working Group V met to discuss firstly a few updates on the *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*. This document aims to acknowledge the international origin of the Model Law on Cross-Border Insolvency and to promote the uniformity in its application. The updates to the Judicial Perspective cover developments by other international bodies such as newly adopted UNCITRAL texts like the Model Law on Recognition and Enforcement of Insolvency Related Judgments; the Model Law on Enterprise Group Insolvency; Part V of the Legislative Guide on Insolvency Law covering Micro- Small and Medium Sized Enterprises; as well as the EU Insolvency Regulation (Recast) and other developments after 2013.

The update will also necessarily cover the interpretations of the MLCBI by judiciaries across the world. These interpretations were given in cases dealing with the public policy exception, which was interpreted restrictively in *Zetta Jet*. Its consideration in cases of bad faith, such as *Creative Finance* and *Ivan Cherkasov*, were also important developments in this area that were to be covered in the update.

The Updates proposed were accepted with a few additions during the session which covered additional cases for the most part, such as *Leitzbach* and *LATAM Airlines Group SA/Technical Latam SA* and other cases dealing with COMI issues. Additional updates that the Working Group delegations consider important will be transmitted to the Commission to be considered during the 55th session.

*Civil Asset-Tracing and Recovery in Insolvency Proceedings*

The second important topic on the agenda revolved around the introduction of some kind of harmonising instrument that deals with civil asset-tracing and recovery in insolvency proceedings. At an earlier session, it was agreed that a document providing a description of the many possible tools that are used to recover assets in jurisdictions would be useful as a pedagogical tool to guide other jurisdictions to implement more effective regimes. It has been largely agreed that this guide, in whatever form it takes, should adopt a pedagogical approach rather than directive in order for jurisdictions that are relatively less developed in their procedures in this area to draw from the experience of those with more developed regimes.

There were a number of interesting discussions around this topic with some seemingly insurmountable conceptual differences. With that being said, there was agreement that some harmonisation in this area would be useful for the efficient progress of cross-border insolvencies. However, it was also acknowledged that any substantive consolidation should be treated with caution due to the sensitive issues it raised, including the need to respect the principal of separate legal identity and issues surrounding intermingled assets.

Views differed on the scope of powers that should be afforded to an insolvency representative in asset-tracing and recovery, particularly where such representatives were not required to seek court authorisation. This included reservations about an insolvency practitioner’s access to privileged or confidential information. Whereas some delegations argued that sufficient safeguards should already be in place to allow extensive access, a more cautious approach was promoted by others, citing the implications on the debtor, creditor, third party rights and privileges.

One area where there was quite a lot of discussion and argument focused on the existence and extent of sanctions to be applied in the context of asset-tracing. Although it was recognised that sanctions could facilitate asset-tracing and recovery in the domestic and cross-border contexts, a majority of the delegation agreed that in reality and from the perspective of creditors, the main focus of asset-tracing and recovery should be to facilitate the recovery of insolvency estate assets. In this context, preventive measures were viewed as more important than sanctioning after the fact. These measures could include capacity-building, training, awareness raising, and education.

Although views differed on issues such as whether creditors rights to commence avoidance should be restricted in this and other seemingly contentious areas, it was agreed to adopt similar approaches taken elsewhere in UNCITRAL model laws and guides.

It is unclear as yet what form this will take, and despite some reservations expressed about sanctions and liability regimes, there was broad agreement that this project should progress to a stage wherein the Working Group V and the UNCITRAL Secretariat would create some kind of instrument that would cover this important topic at a future session. What is absolutely clear is that any instrument should include an illustrative list of asset-tracing and recovery that could facilitate and expedite asset-tracing and recovery across borders, including through recognition of provisional determinations by courts that a particular asset should belong to the insolvency estate.

*Applicable Law in Insolvency Proceedings*

Finally, the Working Group considered the topic of applicable law in insolvency proceedings. It was agreed that the introduction of a harmonising instrument would promote certainty and predictability thereby enhancing efficiency while reducing the propensity for abusive forum shopping and filling the gaps in the current applicable law structure governing cross-border insolvency.

The discussion revolved around the consistent and appropriate use of *lex fori concursus* in a cross-border insolvency proceedings. The purpose of further legislative provisions in this area should therefore reinforce the consistent application of the *lex fori concursus*. The meaning of this term was therefore important to establish and it was agreed that insolvency law should be interpreted broadly as encompassing not just liquidation but also those procedures aimed at rescue and even preventive restructuring, as long as there was a sufficient connection with insolvency.

Many ancillary issues to insolvency were discussed where *lex fori concursus* may or may not apply. These would need to be determined before a firm conclusion could be reached on the scope of applicable law for digital assets, intellectual property rights and licences, which were confounding issues in the *Nortel* case, for example.

Avoidance actions are another area where it is unclear at all times which law should be applicable. While an example was drawn from the operation of the EU Insolvency Regulation (Recast) which has largely resolved the issue of avoidance actions in terms of applicable law for EU member states (with some exceptions), applying the COMI rule, this was viewed by some as being too cumbersome for the purpose of an UNCITRAL instrument, particularly as applied to the digital world. The extra protection provided to some creditors was also viewed as unjustified in terms of the need to ensure equal treatment in an insolvency context, which was contrasted with the safeguards already available within UNCITRAL texts in the form of public policy exceptions and adequate protection.

A number of other distinct areas were considered in terms of their inclusion in an applicable law instrument. Explicitly excepted from this list were payment and settlement systems and regulated financial markets and labour contracts.

It was also agreed to include a public policy exception to ensure respect for state sovereignty. Concern was specifically expressed about the manipulative use of insolvency proceedings for attaining political goals. A number of delegations emphasised that the interpretation of this exception should be restrictive and used in only exceptional circumstances in order to ensure that the legislative project could be meaningful.

Views on the form such an instrument should take differed, but a number of solutions were mooted: a model new law; an ad-hoc approached based on the identification of gaps in current rules; amendment of the Legislative Guide filling the gaps identified; or a gradual approach that may take include each of the previous options. Most delegations favoured preparing a model law to be discussed at the next session of the Working Group; whereas this was greeted as being potentially premature given the number of substantive issues that remain to be resolved.

*Conclusion*

It will be interesting to see how the asset-tracing and recovery and applicable law areas develop given the wide differences that appear to exist between the approach to asset-tracing and recovery in many advanced jurisdictions. In any event, the next session (61) in Vienna will hopefully be attended by INSOL Europe’s observers in person with schnitzel and glühwein overflowing after intensive hours of deliberation and discussion with the other delegates in attendance.