Annex

Summary of the Conference[1]

1. The Conference, organized by the UNCITRAL secretariat jointly with the WBG, III, INSOL International and IBA, brought together legislators, policy makers, judges and insolvency practitioners from across the world, to assess evolution of the enactment, implementation, application and the use of MLCBI and to discuss the future of MLCBI, whether as a stand-alone text or enacted alongside MLIJ and MLEGI and possible future texts. The Conference was attended by more than 100 in-person participants and was broadcasted in the six official languages of the United Nations from the dedicated web page.[2] The Conference was organized around three broad themes: (a) the evolution of enactment of MLCBI across the globe and what was and was not envisaged by the drafters of the text; (b) issues commonly faced by judges when interpreting and applying MLCBI and how they handle them; and (c) the experience of insolvency practitioners with the use of the text.

2. The opening statements[3] conveyed that: (a) since its adoption on 30 May 1997, MLCBI had evolved into a centrepiece of cross-border insolvency practice, contributing to the harmonization of the international cross-border insolvency law framework, influencing substantive domestic insolvency law reform, case law and practice around the globe and shaping the work programme of UNCITRAL in the area of insolvency law; (b) the steadily growing number of enacting States,[4] encompassing both common and civil law jurisdictions from all over the world, was testament to the growing recognition of the importance and impact of cross-border insolvency and enduring relevance of the text; and (c) the significance of the text was explained by the fact that MLCBI provided a clear, consistent and predictable framework for mutual recognition and cooperation in cross-border insolvency proceedings and robust and flexible tools for efficient and cost effective resolution of cross-border insolvencies, which ultimately benefited all stakeholders involved in the insolvency process. It was recalled that the main elements of MLCBI included: (a) direct access by foreign representatives and foreign creditors to courts; (b) simplified procedures for recognition of foreign insolvency proceedings; (c) timely and effective relief to support the orderly and fair conduct of cross-border insolvencies; (d) court-to-court direct communication and cooperation; and (e) coordination of concurrent proceedings.

3. The recurrent themes throughout the three sessions of the Conference were issues arising from: (a) deviations made upon enactment of MLCBI, their reasons and impact on cross-border insolvencies, in particular with respect to the public policy exception (article 6 of MLCBI), automatic relief upon recognition of the foreign main proceeding (article 20 of MLCBI) and introduction of reciprocity requirements; (b) court-to-court communication and cooperation (articles 25-27 of MLCBI); (c) enterprise group insolvencies; (d) recognition and enforcement of insolvency-related judgments, in particular as they relate to avoidance powers (article 23 of MLCBI); (e) the need for increased awareness about the text and capacity to effectively use it; and (f) impact of other factors on the uptake of the text, including inter- and intra-regional developments.

4. Statements during **the first session**[5] highlighted: (a) divergent and convergent approaches to the enactment of MLCBI, noting the growing convergence of

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[1] The summary was prepared by the UNCITRAL secretariat. It was not before the Working Group for adoption as part of the report of the session.

[2] https://uncitral.un.org/en/mlcbi25.

[3] By the Chair of the Working Group, Mr. Xian Yong Harold Foo (Singapore), and by the Principal Legal Officer, Head of the Legislative Branch, UNCITRAL secretariat, Mr. José Angelo Estrella-Faria.

[4] As of the date of the Conference, 53 States encompassing 56 jurisdictions.

[5] By Neil Cooper, Professor, Nottingham Trent University; Line Herman Langkjær, Professor, Aarhus University; Wai Yee Wan, Associate Dean and Professor, City University of Hong Kong; and Fernando Dancausa, Senior Financial Sector Specialist, WBG.

approaches in recent years. In particular, it was noted that, while among usual deviations from the provisions of MLCBI in the early years after its adoption had been introduction of the reciprocity requirement, the need for that requirement was reconsidered in some MLCBI enacting States; and (b) that most enacting States, after the usual scrutiny of the text and related materials, tended to preserve many parts of MLCBI upon enactment, introducing minimal deviations. It was argued, however, that the impact of those deviations on cross-border insolvencies should not be underestimated and should be carefully studied. For example, the word "manifestly" in the public policy exception was dropped in some enacting States with the result that the threshold for rejection of recognition on the ground of public policy was lowered in those States.

5. During that session, speakers referred to commonly held misconceptions about the text, including that MLCBI was more suitable for common law jurisdictions. The surveys of enactments of MLCBI presented at the Conference indicated that deviations from MLCBI upon enactment were explained not so much by legal traditions of enacting jurisdictions but by other factors. It was noted that MLCBI-enacting common law jurisdictions also deviated from MLCBI, and the deviations that those jurisdictions introduced were not uniform. It was submitted that different enactments were often explained by domestic insolvency law provisions. For example, the absence of a stay upon commencement of insolvency proceedings in the domestic insolvency framework might explain non-enactment of article 20 of MLCBI in some jurisdictions. Deviations were also explained by approaches of enacting jurisdictions to cross-border insolvency matters generally at the time of enactment of MLCBI: States with a moderately territorial approach to handling insolvency matters were likely to adopt MLCBI in full compared with States that had taken an exclusively territorial approach to insolvency matters. In addition, triggers of MLCBI enactments (e.g. donor-driven processes, urgent reforms in response to an economic crisis) also influenced the extent and nature of deviations from MLCBI.

6. Other misconceptions mentioned about MLCBI included that it negatively impacted the sovereignty of States, eroded the powers and independence of domestic courts and negatively affected interests of the local insolvency profession and local creditors. It was suggested that the experience with the enactment and use of MLCBI, including safeguards found there, had demonstrated the opposite effects of the text.

7. It was recalled that the drafters of the text were guided by the following considerations: (a) the resulting text should be simple and procedural in nature; (b) it should take the form of a soft law text; (c) it should not interfere with domestic insolvency law and try to harmonize it; (d) it should envisage automatic relief upon recognition of the foreign main proceeding and the latter should be defined with reference to the centre of the debtor's main interests (COMI) as the most pragmatic solution; (e) it should provide for direct court-to-court communications and cooperation (before the work on MLCBI commenced, it had been ascertained that achieving such a direct court-to-court communications and cooperation, unknown to many jurisdictions at that time, would be possible, subject to certain safeguards); and (f) it should not deal with reciprocity.

8. At the same time, drafters left out some matters, such as applicable law, enterprise group insolvency, proceedings that were neither main nor non-main and the date with reference to which the COMI was to be determined. In addition, the drafters chose to be deliberately vague on some other matters, leaving them to States, such as the scope of foreign proceedings (e.g. the treatment of schemes of arrangement) and discretionary relief.

9. The drafters did not envisage that: (a) the text would have an unexpectedly slow uptake in some jurisdictions that supported and actively participated in its preparation; (b) there would be resistance from insolvency professionals to its enactment because of the perceived threat to their work; (c) state-owned or controlled entities, interpreted broadly, would be excluded from the scope of MLCBI; (d) COMI would be determined by some courts with reference to the location of the insolvency

representative handing the case; and (e) some other fundamental notions of the text would be rejected or implemented differently as was originally envisaged.

10. The role of international financial institutions (IFIs) in elevating cross-border insolvency reform in the policy agenda of States and promoting MLCBI in that context had proven indispensable and was appreciated. It was noted that the demand for technical assistance with the enactment of MLCBI was steadily growing in the last five years, and that further MLCBI enactments might be expected soon. It was acknowledged that promotion of MLCBI enactment was a resource- and time-intensive process, often necessitating awareness-raising among legislators and policymakers and provision of technical assistance, and that not all those efforts by IFIs led to the enactment of MLCBI. The WBG informed that it was working on establishing a mechanism that would allow: (a) tracking progress with cross-border insolvency reform in jurisdictions that had been interested in enacting MLCBI but did not enact it; and (b) studying the reasons for non-enactment, which should inform IFIs' further steps, including possibly launching revisited promotional and technical assistance programmes in those jurisdictions.

11. It was emphasized that the successful uptake of MLCBI depended not only on the enactment of MLCBI but also on the preparedness of judges and insolvency practitioners to use the enacted text effectively. While there was often an element of urgency in enacting the text, especially if cross-border insolvency reform was triggered by the economic crisis, considerably more time was needed to build local capacity for the use of MLCBI. Examples were given of jurisdictions that enacted MLCBI long time ago but where the text had never or rarely been used for the lack of such capacity. It was suggested that readily available resources allowed building the required local capacity considerably earlier to the enactment of MLCBI. Other reasons for non-use of the text were also given, including the reciprocity requirement (see further below).

12. The first session was concluded with a presentation by the UNCITRAL secretariat of the Consolidated Text of the UNCITRAL Model Laws on Cross-Border Insolvency, Recognition and Enforcement of Insolvency-related Judgments and Enterprise Group Insolvency (2021) and an accompanying Guidance Note[6] that explained how the consolidated text should be read and how specific provisions of each model law could be combined to create a single consolidated enactment. It was stressed that the materials, although they recognized that each of the two more recent UNCITRAL insolvency model laws supplemented MLCBI, did not suggest any mandatory or simultaneous enactment of all three model laws nor any identical enactment or drafting approach. It was noted that the text of each model law was maintained in its original form as much as possible in the consolidated text, which ensured that the purpose of each model law continued to be achieved, and that visuals (different colours for each model law, underlines, strikeouts, drafting notes in square brackets, in bold and in the colour corresponding to the relevant model law) were used to identify clearly the source of provisions and changes made.

13. During **the second session**, the invited judges[7] shared their experience with the use of MLCBI, from both procedural and substantive perspectives. They observed that, while in many MLCBI enacting jurisdictions, general civil and commercial courts handled recognition requests like any other case, and rotation of judges was common, in other jurisdictions, there were courts or judges specializing in cross-border insolvency cases, and those cases were handled under special procedural

[6] Both are found at Consolidated Text of the UNCITRAL Model Laws on Cross-Border Insolvency, Recognition and Enforcement of Insolvency-related Judgments and Enterprise Group Insolvency (2021) | United Nations Commission On International Trade Law.

[7] Moderators: Chief Justice Geoffrey Morawetz (Canada) and Sir Alastair Norris (United Kingdom). Panellists: Judge Olga Borja Cárdenas (Mexico), Judge Marko Radovic (Serbia), Justice Aedit Abdullah (Singapore) and Justice Lydia Mugambe (Uganda).

rules. For the first group of States, the role of the applicant in elevating priority of its recognition application was emphasized.

14. The judges illustrated procedural rules and tools that helped them to deal with requests for recognition of foreign proceedings and for cooperation and coordination with foreign courts, including in the enterprise group insolvency context, expeditiously. Examples included: (a) incorporation of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the JIN Guidelines)[8] in the domestic procedural rules; (b) pretrial conferences conducted by registrars ahead of the actual hearing, which helped identifying issues and possible shortcomings in the applicant's submissions and rectifying them before the hearing; (c) standard forms, which could be mandatory or optional for use and different for liquidation and reorganization and types of requests (e.g. provisional relief, discretionary relief, first day orders); and (d) the role of court officers in preparing the case and in advising the judge on policy issues involved.

15. The judges also noted factors that usually slowed down recognition, such as allegations or suspicion of fraud, corruption, the absence of due process in foreign proceedings or other factors that usually justified application of the public policy exception or MLCBI's provisions on adequate protection. The WBG[9] referred to another stumbling block to speedy recognition – the need to ascertain reciprocity in jurisdictions that introduced that requirement. It was recalled (see para. 7 (f) of this annex) that the drafters of the 1997 text chose not to address reciprocity either in MLCBI or its Guide to Enactment and Interpretation (the GEI) with the result that no guidance was provided by UNCITRAL as regards that issue. It was argued that, while it might be straightforward to ascertain reciprocity in jurisdictions where competent authorities maintained a list of designated countries, it might be difficult to do so in jurisdictions that did not maintain such lists: there the courts often queried which deviations from MLCBI in a requesting jurisdiction were so significant as to justify assertion of the absence of reciprocity and rejection of recognition. The trend to eliminate the reciprocity requirement was recalled (see para. 4 of this annex). The experience of at least one jurisdiction indicated that it might be difficult to reconcile the reciprocity requirement with the requirements of MLCBI for court-to-court direct communication, cooperation and coordination if those requirements were enacted as well.

16. According to the speakers, it was regrettable that the readily available resources that could facilitate the use of MLCBI by judges (e.g. the GEI, *travaux préparatoires* of MLCBI, and explanatory materials specifically designed for judges such as The Judicial Perspective (2022),[10] the Digest (2021)[11] and MLCBI-related collection in CLOUT[12]) were underutilized. It was observed that many judges were not aware of MLCBI and those supplementary resources. The role of international insolvency judicial training and international insolvency judicial networks was highlighted in that respect. At the same time, their limits were also noted. It was considered useful to involve local professionals alongside international experts in the delivery of insolvency judicial training for local judges. That measure allowed reflecting better not only local circumstances and local legal framework, including deviations from MLCBI that might have been introduced in a given jurisdiction, but also the content of international standards and explanatory texts that might not be available in a local language.

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[8] Available at: Judicial Insolvency Network (jin-global.org).

[9] Mr. Fernando Dancausa, Senior Financial Sector Specialist, spoke on behalf of the WBG in the second session as well.

[10] Available at: UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective | United Nations Commission On International Trade Law.

[11] Available at: Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency.

[12] Available at: Case Law on UNCITRAL Texts (CLOUT) | United Nations Commission On International Trade Law.

17. During **the third session**, the invited insolvency practitioners[13] shared their experience with the use of MLCBI in cross-border insolvency cases of different sizes and contexts (e.g. complex restructuring, asset tracing and recovery and crypto insolvencies), involving legal and natural persons as well as enterprise groups. According to them, it was undisputed that many MLCBI-related factors influenced practitioners' cross-border insolvency strategies, such as: (a) whether MLCBI was enacted in a particular jurisdiction and, if so, how (i.e. the extent and nature of exemptions from its scope (i.e. excluded entities) and deviations from its provisions (e.g. public policy exception, automatic stay and other relief)); (b) how COMI was determined in a particular jurisdiction; and (c) discretionary elements and how they were used by courts (i.e. less predictability or pragmatic results). As regards non-enacting States, the strategies were informed by the stance of those States towards cross-border insolvencies and the achievement of objectives of insolvency law generally (e.g. the need to maximize the value of the insolvency estate, protect business rescue finance) and to court-to-court communication and cooperation specifically. The role and limits of cross-border protocols were acknowledged in that respect.

18. The utility of MLCBI for the insolvency profession was demonstrated by the steadily increasing number of requests for recognition of foreign proceedings in some major international debt restructuring centres. In addition, real-life examples demonstrated the positive difference in tracing and recovering assets in the same jurisdiction before and after it enacted MLCBI. In comparison, in MLCBI-non-enacting jurisdictions, an urgent relief and other steps had to be requested and were handled using procedures and requirements from the nineteenth century.

19. It was submitted that the continuous work by UNCITRAL on clarifying, amplifying and complementing MLCBI was the proof that the text was being used by practitioners since the experience with its use informed the need for further reform and directions of reform. It was acknowledged that the ongoing work by UNCITRAL on cross-border insolvency aspects, although complex, was needed, including to tackle issues that had been considered not ripe for harmonization when MLCBI was prepared and to address inconsistencies arising from States' divergent practices on cross-border insolvency matters. It was suggested that the relevance and utility of MLCBI and MLEGI and the current work of the Working Group on APL and ATR were expected to be tested especially in crypto insolvencies, while the relevance and utility of MLIJ would be tested especially with reference to its broader scope than that of MLCBI (covering, for example, judgments related to voluntary or out-of-court restructuring agreements), its relevance to the *Gibbs* principle[14] and its article X confirming that MLCBI's relief provisions encompassed the recognition and enforcement of insolvency-related judgments.

20. It was suggested that parties to transactions should be aware of the implications of various factors on their possible future debt and business restructuring options, including laws governing their transactions, other applicable laws, the location of counterparties, jurisdictions involved and the stance of those jurisdictions on cross-border insolvency aspects. It was also suggested that, while awaiting and promoting the enactment of two other UNCITRAL insolvency model laws as well as broader enactment of MLCBI, practitioners might already use mechanisms proved to be effective in complex cross-border insolvency proceedings, such as mediation. In addition, it was considered desirable to explore the possibility of creating an international court for resolution of complex restructuring disputes involving multiple jurisdictions or for cases where connection to any single jurisdiction would be difficult to establish (e.g. in crypto insolvencies).

21. The Conference was concluded with the recognition of MLCBI as the key pillar of cross-border insolvency framework and of the significance and complementarity

[13] Moderators: Annerose Tashiro (Germany) and Evan J. Zucker (United States). Panellists: Scott Atkins (Australia), Diana Rivera Andrade (Colombia), Ashok Kumar (Singapore) and Charlotte Møller (United Kingdom).

[14] *Antony Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

of other UNCITRAL insolvency texts and ongoing work on APL and ATR for establishing effective and efficient cross-border and domestic insolvency frameworks. Looking towards the next decades of MLCBI, everyone was encouraged to join the efforts of various initiatives and stakeholders within and outside the United Nations to facilitate further enactment and stronger uptake of MLCBI.