

Working Group V – Insolvency – Vienna, December 2019

On behalf of LawAsia, UNCCA was again well represented at the 56th session of Working Group V, held in Vienna in December 2019, and at the following colloquium on civil asset tracing.

Samantha Pacchiarotta, who attended WGV in Vienna in December 2018 as a student, and who is now qualified as an Australian lawyer, led the delegation, along with Cassandra Heaslip, a student at Griffith University in Queensland, attending under UNCCA's UNLAWS program. Samantha is studying for a Master of International Law at Maastricht University, and Cassandra is in her final year in law and environmental science.

As UNCITRAL explains, micro, small and medium-sized enterprises (MSMEs) constitute the majority of businesses in economies around the world, Australia included, with those in the micro and small-sized part of the spectrum (MSEs) being the focus of the Working Group.

The topic is relevant to Australia, given the high proportion of MSMEs in its economy, and the current inquiries and law reform in relation to both personal and corporate business enterprises. In particular, the Australian Small Business and Family Enterprise Ombudsman is conducting an inquiry into the insolvency system, to investigate if current insolvency practices achieve the best possible outcome for small and family businesses in financial trouble. It is to report in February 2020. Civil asset tracing across borders is also a significant issue – across seas for Australia – and not only in insolvency.

The following report is given by Samantha Pacchiarotta and Cassandra Heaslip.

Michael Murray, Chair, Expert Advisory Group, UNCCA

Report on the 56th session of Working Group V – Insolvency and the colloquium on civil asset tracing and recovery

The 56th session of UNCITRAL Working Group V was held between 2 and 5 December 2019 in Vienna. The Working Group session was followed by a colloquium on civil asset tracing and recovery which took place on 6 December 2019.

The Working Group continued its focus on a simplified insolvency regime for micro and small-sized enterprises ('MSEs') following its last session in New York in May 2019. The document titled 'Draft text on a simplified insolvency regime' (A/CN.9/WG.V/WP.168) ('Draft Text') was considered by the Working Group. The Draft Text is divided into two parts: the annotated recommendations on a simplified insolvency regime and the relationship with other laws and institutional frameworks.

Scope and objectives of a simplified insolvency regime

Working Group V agreed that the scope of a simplified insolvency regime should apply to all MSEs however, that it may provide for 'different treatment of individual entrepreneurs, unlimited liability MSEs and limited liability MSEs'. The Working Group did not attempt to define MSEs eligible for access to a simplified insolvency regime but rather left the issue to be addressed by States.

To address the key objectives of an effective insolvency regime, the Working Group referred to the UNCITRAL Legislative Guide on Insolvency Law which notes the need to provide for timely, efficient and impartial resolution of insolvency. A simplified insolvency regime should aim to

encourage, facilitate and incentivise MSEs to access insolvency regimes early and therefore, such a regime should primarily provide for expeditious, simple, flexible and low-cost insolvency proceedings. Delegates emphasised that proceedings should be easily available, accessible and protect the MSE debtor, creditors and other persons affected by the insolvency.

Social stigma and insolvency

A point of debate between delegations centered around the term ‘social stigma’ which appeared at Recommendation 4 of the Draft Text. The social stigma associated with insolvency was identified as a key disincentive for MSEs to enter into insolvency procedures. There was support for the view that social stigma, while being a reality in the context of MSE insolvency, was not a legal concept. It was highlighted that trust and confidence in a simplified insolvency regime would ultimately fight stigmatisation.

A requirement to access current insolvency processes is that MSEs must be able to declare or demonstrate their insolvency. This approach was criticised by delegations as being one of the ways in which stigma is created. Some delegations were in favour of an informal debt restructuring procedure which would involve a limited number of creditors and would not only preserve the confidentiality and the integrity of the MSE, but also accommodate the need for a prompt resolution. Delegations showed strong support in favour of removing the requirement for an MSE to declare or demonstrate insolvency in order to encourage MSEs to take early action. The Working Group resolved to remove the term ‘social stigma’ from the Draft Text.

Zero-asset proceedings

Zero-asset cases constitute the majority of MSE insolvencies across all jurisdictions. Delegates agreed that a separate recommendation was necessary in order to address the distinct issues raised by zero-asset proceedings. Speed and funding were cited as two main issues to be addressed. Delegates proposed different ways of addressing these issues, such as the implementation of fast screening mechanisms by a competent authority or an independent party. It was agreed that further clarification was required regarding the term ‘zero assets’ and eligibility to access zero-asset proceedings.

The potential for the abuse of process through a debtor’s repetitive use of zero-asset proceedings creates a risk associated with this insolvency mechanism. Delegates agreed that the Draft Text should incorporate specific safeguards including the investigation of pre-insolvency transactions. The Working Group acknowledged the importance of zero-asset proceedings as a quick and efficient mechanism allowing debtors the opportunity of a ‘fresh start’ to return to the economy and agreed that therefore, the risks associated with zero-asset proceedings should be dealt with proportionally. The Working Group deferred the consideration of elements for an additional recommendation relating to zero-asset proceedings to a later stage.

The definition of the ‘competent authority’ and an ‘independent party’

A significant point of contention during the Working Group surrounded the definition, role and functions of the ‘competent authority’. The Draft Text defines the ‘competent authority’ as ‘a standing body that performs functions related to simplified insolvency proceedings.’ Broad support was expressed for a proposal to replace the current definition in order to allow States greater flexibility and to ensure a functional and neutral approach to defining the term. Delegates agreed to amend the definition of the ‘competent authority’ to:

... the authority in which the State has vested conduct or oversight of simplified insolvency proceedings; it can be a standing body, an administrative office or agency,

or a court or court-based official. The competent authority is responsible for the independent oversight and integrity of simplified liquidation and simplified reorganisation proceedings.

Delegates discussed the functions of the competent authority such as those in relation to the recovery of assets, adjudication and relief. Concern was expressed that functions related to oversight and liquidation may give rise to conflicts of interest. It was agreed that a proposal regarding the role and functions of the competent authority could be included in the Draft Text as specific recommendations and commentary and therefore, could be excluded from the definition.

The Working Group considered a proposal to allow some functions of the competent authority to be assigned to an ‘independent party.’ Differing views were expressed about the definition and role of an independent party. Some delegates suggested that the Draft Text should delineate functions of the independent party, as distinct from those of the competent authority and the insolvency representative, to ensure its functional independence and impartiality.

The alternative view adopted by some delegates was that no definition of ‘independent party’ was required and that the independent party would be treated as an arm of the competent authority. Consideration was raised that introduction of the concept to most jurisdictions would cause confusion and uncertainties particularly with respect to the independent party’s remuneration, independence and impartiality. In light of the divergence in views, the Working Group deferred its decision on including a separate definition of an ‘independent party’ to be considered at its next session.

Working Group V will meet again in May 2020 to continue its work on MSE insolvencies at the 57th session in New York.

Colloquium on civil asset tracing and recovery

The colloquium on civil asset tracing and recovery was held on Friday, 6 December 2019 and was organised by the Secretariat at the request of the Commission. The purpose of the colloquium was to assist UNCITRAL in determining whether it should take up issues associated with civil asset tracing and recovery as part of its mandate. The colloquium was divided into four panel sessions and experts on asset tracing from the World Bank, the International Monetary Fund, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law and other organisations were invited to attend and contribute to the discussion on a possible toolkit for asset tracing and recovery.

Experts discussed the challenges associated with asset tracing and recovery within different jurisdictions such as language barriers, differing rules on data protection, banking secrecy and the large diversity of national instruments on insolvency law and civil laws. Information gathering on asset recovery tools available within each jurisdiction was emphasised as an important starting point for future work on the topic. The complexities associated with digital asset tracing were also examined by experts and highlighted as crucial in light of advancement in new technologies. Some experts promoted the idea of an UNCITRAL model law on asset recovery as a useful tool to address the challenges of asset tracing. The Secretariat noted that it would report to the Commission on the contributions made at the colloquium.

Other events attended by the LawAsia delegation

On Monday evening, the International Bar Association hosted a cocktail reception at the Weltmuseum Wien (Museum of Ethnology) which the LawAsia delegation attended. It included

a guided tour of parts of the museum which highlighted the history of Austria in regards to its relationship with foreign states and cultures. On Wednesday, the LawAsia delegation attended a Christmas party hosted by the Austrian law firm BKP Rechtsanwälte at the scenic roof top gardens of Palais Coburg Residenz. The LawAsia delegation also attended a social dinner with several other delegations on Thursday evening opposite the Vienna State Opera.

The LawAsia delegation would like to thank UNCCA for the invaluable opportunity to attend and report on the 56th session of Working Group V.

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