

APPLICABLE LAW FOR RIGHTS *IN REM* IN INSOLVENCY PROCEEDINGS

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I. INTRODUCTION: SCOPE OF PRESENTATION

A. Choice of law: Which State's *non*-insolvency law applies in an insolvency proceeding?

1. In particular: Which State's non-insolvency law governs rights in rem (substantive law of proprietary rights)?

2. Prof. Kanda next: COL rules for securities and other financial assets

B. Distinguish *insolvency* law governing rights in rem (eg, avoidance actions; assets not subject to insolvency estate)

I. INTRODUCTION (CONT'D)

C. Which State's *insolvency* law should apply?

1. Others will address—not my topic

2. My views: See Charles W Mooney, Jr, *Harmonizing Choice-of-Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests*, 9 Brook. J. Corp. Fin. & Com. L. 120 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491070

I. INTRODUCTION (CONT'D)

D. Crucial issue: Distinction between insolvency law and non-insolvency law

1. *For purposes of harmonized insolvency choice-of-law (HICOL) rules*, practicality dictates assumption that an issue addressed by forum's insolvency law is one of insolvency law.

2. This is so even if a normatively coherent insolvency law *should not* address the issue — otherwise project would address substantive rules of insolvency law.

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS

A. General rule:

1. See UNCITRAL Legis Guide 68, 72-72 (Rec. 30)
2. Validity and effectiveness of rights and claims (including rights in rem) determined by PIL rules (including COL rules) of State where insolvency proceedings commenced (insolvency forum)
3. This determination of validity and effectiveness is not a question of insolvency law

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS CONT'D)

B. General rule sets a baseline for property and claims addressed in insolvency proceedings:

1. Consistent with goal of insolvency law to vindicate non-insolvency legal entitlements—*not* to redistribute wealth from those with legal entitlements to those without legal entitlements

2. Rule is important to distinction between insolvency law and non-insolvency law rules

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS CONT'D)

B. General rule is baseline for insolvency proceedings (cont'd):

3. Important for guarding against manipulation of COL rules to further judicial preferences for results in insolvency proceedings

4. Goal should be clear COL rules for non-insolvency law and insolvency law

5. Crucial as point of departure for developing HICOL rules

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS CONT'D)

C. Examples: COL rules in UNCITRAL Model Law on Secured transactions (MLST)

1. See generally Charles W Mooney, Jr, *Choice-of-Law Rules for Secured Transactions: An Interest-Based and Modern Principles-Based Framework for Assessment*, 22 Unif. L. Rev. 638 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000566

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS CONT'D)

C. Examples: COL rules in UNCITRAL Model Law on Secured transactions (MLST arts. 84-100)

2. Intangibles (including ordinary receivables)

a. Creation, 3P effectiveness (perfection), and priority governed by law of location of grantor (MLST art. 86)

b. Location and time of determination (MLST arts. 90, 91)

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS CONT'D)

C. Examples: COL rules in UNCITRAL Model Law on Secured transactions (MLST arts. 84-100)

2. Intangibles (including ordinary receivables) (cont'd)

c. Sound rule, but some controversy

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS CONT'D)

C. Examples: COL rules in UNCITRAL Model Law on Secured transactions (MLST arts. 84-100) (cont'd)

3. Non-intermediated certificated securities: Creation, perfection, and priority governed by (i) law under which issuer is constituted (equity securities) (MLST art. 100(1) and (ii) law governing securities (debt securities) (MLST art. 100(2))

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS CONT'D)

C. Examples: COL rules in UNCITRAL Model Law on Secured transactions (MLST arts. 84-100) (cont'd)

3. Non-intermediated certificated securities (cont'd)

a. Rules are appropriate for *uncertificated* securities

b. For *certificated* securities, rules are incoherent and an aberration.

II. CHOICE-OF-LAW RULES: (NON-INSOLVENCY) RIGHTS IN REM IN INSOLVENCY PROCEEDINGS CONT'D)

C. Examples: COL rules in UNCITRAL Model Law on Secured transactions (MLST arts. 84-100) (cont'd)

3. Non-intermediated certificated securities (cont'd)

c. For certificated non-intermediated securities governing law should be location of certificated security as with possessory collateral such as negotiable documents and negotiable instruments (MLST art. 85(1))

III. CONCLUSIONS

- A. Most significant COL rule for insolvency proceedings: General rule that validity and effectiveness of rights and claims determined by general COL rule of State pf insolvency forum
- B. Harmonizing general COL rules would benefit operation of insolvency proceedings
- C. Distinction between non-insolvency law and insolvency law issues is crucial, but is subject to manipulation and HICOL rules probably must accept that possibility

