

# Applicable law in insolvency proceedings and existing UNCITRAL texts

**UNCITRAL**  
Virtual Colloquium on  
Applicable Law  
in Insolvency  
Proceedings

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# UNCITRAL Texts (Insolvency)

1997-2019

Applicable  
law in  
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UNCITRAL  
texts

- Model Law on Cross-Border Insolvency (MLCBI)
- Legislative Guide on Insolvency Law (Guide)
- Model Law on Enforcement of Insolvency Judgments (MLIJ)
- Model Law on Enterprise Groups Insolvency (MLEGI)

Applicable law?

# Applicable law in insolvency proceedings?

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Distinguish:

- The law applicable to the validity and effectiveness of rights and claims
- The law applicable to insolvency proceedings and their effects

# Harmonization?

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Distinguish:

- Harmonization of insolvency laws
- Harmonization of the applicable law (in insolvency proceedings) rules



# MLCBI (1997)

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## Model law for uniform adoption, reflecting modified universalism

- Cooperation
- Recognition
  - Main proceedings (COMI)
  - Non-main proceedings (establishment)
- Relief
  - To main proceeding - automatic stay; *additional discretionary relief* (art 21)
  - To non-main proceeding - discretionary relief that relates to information required or assets that should be administered in the non-main; if consistent with the foreign main proceeding
- Safeguards
- **Applicable law?**
  - Deference to law of forum as *discretionary relief*?

[See also Chan Ho, 'Applying foreign law - realising the Model Law's potential' JIBLR (2010); Westbrook, 'Universalism and Choice of Law' (2005) 23 Penn St Intl L Rev; Mevorach, 'On the road to Universalism: A Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency' EBOR (2011)]

# Guide (2004)

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## Guidance for legislative bodies

- Part two - Core provisions for an effective insolvency law
  - Jurisdiction - should be specified and include COMI/ establishment
  - Applicable law (recs 30-34)
- The law applicable to the validity and effectiveness of rights and claims
  - > should be determined by the private international law rules of the forum (rec 30)
- The law applicable to insolvency proceedings and their effects
  - > should be the insolvency law of the forum (*Lex fori concursus*) (rec 31)

# Guide (2004) - cont.

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31. ...*lex fori concursus* should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects. These may include, for example:

- (a) Identification of the debtors that may be subject to insolvency proceedings;
- (b) Determination of when insolvency proceedings can be commenced and the type of proceeding that can be commenced, the party that can apply for commencement and whether the commencement criteria should differ depending upon the party applying for commencement;
- (c) Constitution and scope of the insolvency estate;
- (d) Protection and preservation of the insolvency estate;
- (e) Use or disposal of assets;
- (f) Proposal, approval, confirmation and implementation of a plan of reorganization;
- (g) Avoidance of certain transactions that could be prejudicial to certain parties;
- (h) Treatment of contracts;
- (i) Set-off;
- (j) Treatment of secured creditors;
- (k) Rights and obligations of the debtor;
- (l) Duties and functions of the insolvency representative;
- (m) Functions of the creditors and creditor committee;
- (n) Treatment of claims;
- (o) Ranking of claims;
- (p) Costs and expenses relating to the insolvency proceedings;
- (q) Distribution of proceeds;
- (r) Conclusion of the proceedings; and
- (s) Discharge.

## Guide (2004) - cont.

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### Exceptions (to *lex fori concursus*):

- (i) the effects of insolvency proceedings on participants in a payment settlement system/regulated financial market > law applicable to the system/market (rec 32)
- (ii) the effects of insolvency proceedings on labour contracts > law applicable to the contract (rec 33)
- additional exceptions should be limited and clearly set forth (rec 34)

‘... application of an exception to the *lex fori concursus* for insolvency effects may result in disparate treatment of the insolvency effects on similarly situated creditors...’

[see also Pottow, ‘Beyond Carve-Outs and Towards Reliance’ (2014) Brooklyn Journal of Corporate, Financial & Commercial Law ; Clark and Goldstein, ‘Sacred Cows: How to Care for Secured Creditors’ Rights in Cross-Border Bankruptcies’ (2011) Tex Intl LJ]

# MLIJ (2018)

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## Complementing the MLCBI- judgments

- Recognition and enforcement of insolvency-related judgments
  - Process for seeking recognition and enforcement
  - Grounds to refuse recognition and enforcement/ safeguards
  - Art X- MLCBI relief (art 21) includes enforcement of judgments
- **Applicable law?**
  - *Enforcement* of foreign insolvency judgments may give effect to foreign insolvency law

[see also Mevorach, 'Overlapping international instruments for enforcement of insolvency judgments: undermining or strengthening universalism?' EBOR (2021)]

# MLEGI (2019)

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## Complementing the MLCBI- groups

- Cooperation
- Group solution developed in a planning proceeding; discretionary relief under laws of the planning forum (art 20)
- Recognition of group solutions; relief to the planning proceeding -
  - Discretionary, *including any additional relief* (art 24)
  - Receiving court may stay/decline commencement of local proceedings particularly when undertaking given regarding treatment of claims based on local law/ may approve and give effect to the group solution (arts 28-32)
- Safeguards
- **Applicable law?**
  - Application of/deference to law of group planning forum as *discretionary relief*?
  - Application of law of entities' forum - treatment of claims

[see also Mevorach, 'A Fresh View on the Hard/Soft Law Divide - Implications for International Insolvency of Enterprise Groups' Michigan Journal of International Law (2019)]



# Conclusions



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- UNCITRAL Model Laws reflect modified universalism, unify certain PIL aspects, complemented by guidance in the Guide
- Gaps concerning applicable law (what is missing?)
  - explicit rules on applicable law in insolvency proceedings for uniform adoption [see also Gropper, 'The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases' (2014) Brooklyn Journal of Corporate, Financial & Commercial Law; Fletcher and Wessels, 'Global Rules on Conflict of Laws Matters in International Insolvency Cases' (2012)]
  - clarity regarding scope of the *lex fori concursus* rule, including its application in the group context; and in restructuring [see also Mevorach 'Cross-border insolvency of groups: the choice of law challenge' (2014) Brooklyn Journal of Corporate, Financial & Commercial Law; Mevorach & Walters, 'The characterization of pre-Insolvency proceeding in private international law' EBOR (2020)]
  - exceptions to the rule; clear criteria/scope of application of local law to minimize multiple proceedings

Thank you