



Choice of Law in Cross-Border Cases

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Existing Instruments

- **Model Law**
 - Silent on applicable law
 - Suggests deference to/cooperation with the “main proceeding”
- **EU Insolvency Regulation – Article 4**
 - Apply the insolvency law of the jurisdiction of opening (COMI)
 - Some key exceptions are specified
- **UNCITRAL Legislative Guide – Recommendations 30-34**
 - Lex Situs – determines validity of the claim – Recommendation 30
 - Lex Fori – determines treatment of the claim – Recommendation 31
 - Several exceptions are specified -- Recommendations 32-33
 - Other exceptions are contemplated, but only if specifically authorized by statute – Recommendation 34

***Lex Situs* determines which country's law determines validity of a claim.**

- **30. The law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings should be determined by the private international law rules of the State in which insolvency proceedings are commenced.**

Lex Fori determines everything else.

- 31. The insolvency law of the State in which insolvency proceedings are commenced (*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.

There Are a Few Exceptions

- 32. Notwithstanding recommendation 31, the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market should be governed solely by the law applicable to that system or market.
- 33. Notwithstanding recommendation 31, the effects of insolvency proceedings on rejection, continuation and modification of labour contracts may be governed by the law applicable to the contract.
- 34. ***Any exceptions additional to recommendations 32 and 33 should be limited in number and be clearly set forth or noted in the insolvency law.***

Limitations of Existing Instruments

- **Model Law – Silent on Applicable Law**
- **EU Regulation – Main case applies its own bankruptcy law (Article 4)**
 - Amendments Proposed
- **Legislative Guide focuses on “domestic” bankruptcy law.**
 - It does not contemplate cross border cases
 - Might benefit from a “Recommendation 34(a) to permit choice of law inquiry in existing cases

The Stakes:

- **Centralizing (universal) approach**
 - Facilitates coordinated governance
 - Facilitates rescue
 - May encourage forum shopping
 - May trigger a “sovereignty” objection
- **Decentralizing (territorial) approach**
 - May create coordination problems
 - Reduces the stakes of forum shopping
 - Respects sovereignty

Evolving Practice – Distinguish Procedure and Substance

- **UK – *Collins and Aikman***
 - UK court respects local priorities for foreign creditors in lieu of opening a secondary
- **US – *Condor***
 - Foreign administrator brings avoidance action in US applying foreign avoidance statute

Emerging Distinction

- **Procedure (Universal)**
 - Governed by forum law – *lex fori*
- **Substance (Local)**
 - Determined by “local” law -- *lex situs*

Consequence

- **Administratively Universal Case (Procedure)**
 - Governed by forum law – *lex fori*
- **Enforceability and Treatment Territorial (Substance)**
 - Determined by “local” law -- *lex situs*
- **Increased need to “locate” claims and assets.**

Evolving Disharmony

- **US (*Condor*) and UK (*Collins and Aikman*)**
- **Civil Law Countries and EU Reg (without common law gloss)**
 - No authorization to apply foreign law
- **Legislative Guide – Recommendation 34**

Proposed Amendments to the EU Insolvency Regulation

- **Validates the *Collins and Aikman* approach giving the “main case” the power to respect “local” priority in order to save the trouble of opening a secondary case.**

Article 29a-Decision to Open Secondary Proceedings

- 1. The court seized of a request to open secondary proceedings shall immediately give notice to the liquidator in the main proceedings and give him an opportunity to be heard on the request.
- 2. ***Upon request by the liquidator in the main proceedings, the court referred to in paragraph 1 shall postpone the decision of opening or refuse to open secondary proceedings if the opening of such proceedings is not necessary to protect the interests of local creditors, in particular, when the liquidator in the main proceedings has given the undertaking referred to in Article 18 (1) and complies with its terms.***
- 3. When deciding whether to open secondary proceedings, the court referred to in paragraph 1 shall open the type of proceedings under its national law which is the most appropriate taking into account the interests of the local creditors, irrespective of whether any condition relating to the debtor's solvency are fulfilled.
- 4. The liquidator in the main proceedings shall be notified of the decision to open secondary proceedings and shall have the right to challenge that decision."

Article 18(1)

- ***The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened*** there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. Subject to Articles 5 and 7, he may in particular remove the debtor's assets from the territory of the Member State in which they are situated. ***He may also give the undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings.*** Such an undertaking shall be subject to the form requirements, if any, of the State of the opening of the main proceedings and shall be enforceable and binding on the estate."

Conforming Initiatives

- **Legislative Guide**
 - Recommendations 30-34
 - Perhaps add a Recommendation 34(a) to deal with choice of law in cross-border cases
- **Model Law**
 - Add a provision enabling “choice-of-law” inquiry

Interaction with Ongoing Initiatives

- **Convention**
 - Should be consistent with EU Approach
 - Should permit synthetic secondaries
- **Group COMI**
 - Allow for central administration and coordination of case

Future Work

- **Principles Project**
 - **Scope of *Lex Fori***
 - Main case
 - Secondary
 - **Harmonization of Rules for Locating Claims and Assets -- *Lex Situs***
 - Main case
 - Secondary
- **ALI/III Principles Annex as a starting point**