INTERNATIONAL COLLOQUIUM ON APPLICABLE LAW IN INSOLVENCY PROCEEDINGS (Vienna, 11 December 2020 (tentative))

CONCEPT NOTE

I. Mandate for holding the Colloquium

1. The United Nations Commission on International Trade Law (UNCITRAL), at its fifty-second session (Vienna, 8-19 July 2019), considered a proposal by the European Union (EU) in support of future work by UNCITRAL on harmonizing applicable law in insolvency proceedings.[1] While UNCITRAL agreed on the importance of the topic of applicable law in insolvency proceedings, it also noted that "the subject matter was potentially complex and required a high level of expertise in various subjects of private international law, as well as on choice of law in areas such as contract law, property law, corporate law, securities and banking and other areas on which UNCITRAL had not worked recently."[2] The Commission, therefore requested the Secretariat to organize a colloquium, in cooperation with other relevant international organizations, with a view to submitting more concrete proposals for consideration by the Commission.

2. Pursuant to that request, the Secretariat will hold the International Colloquium on Applicable Law in Insolvency Proceedings in cooperation with the Hague Conference on Private International Law (HCCH), on 11 December 2020. The main objective of the Colloquium will be to gather subsidies to enable the Secretariat "to delineate carefully the scope and nature of the work that [UNCITRAL] could undertake".[3] This concept note provides background information to participants on the topic of applicable law in insolvency proceedings and issues that the participants may wish to consider.

II. Background information for the Colloquium

A. Overview of existing "instruments"[4]

3. The first step to assess the possible need for further harmonization by UNCITRAL, is to take stock of how and to what extent existing instruments address applicable law in insolvency proceedings.[5]

1) UNCITRAL

[1] See A/73/17, paras. 204-206. For the proposal made by the EU, see A/CN.9/995. For the previous proposal made by the European Union in that respect and the deliberations of the Commission on this proposal in 2018, see, para. 251.
[2] See A/74/17, para. 206.
[3] The Commission, at its forty-sixth session, in 2013, agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (1) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (2) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (3) whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization, harmonization or unification of the international trade law; and (4) whether duplication might arise with work being undertaken by other international organizations (A/68/17, paras. 303–304).
[4] "Instruments" means any legal text, whether of direct application to States (such as the EU Regulation or the Nordic Convention) or providing guidance to legislators and courts (such as the UNCITRAL Legislative Guide or the International Bar Association Concordat).
[5] For a detailed list of instruments, see Fletcher F. Ian, Insolvency in Private International Law.

4. The UNCITRAL Legislative Guide on Insolvency Law ("the UNCITRAL Legislative Guide") contains a section on applicable law in insolvency proceedings followed by four recommendations.[6] This section was developed in close cooperation with HCCH, through the circulation of a questionnaire to HCCH Member States and the organization of a drafting meeting of both UNCITRAL and HCCH experts.[7] In essence, the UNCITRAL Legislative Guide recommends that 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 concursus*) and should provide for a limited number of clearly noted exceptions (see below para. 12).

2) EU Regulation on Insolvency Proceedings

5. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ("the EU Regulation") applies to insolvencies beginning on or after 26 June 2017. It replaces and supersedes Council Regulation (EC) 1346/2000 on insolvency proceedings. Like its predecessor, the EU Regulation sets out detailed conflicts of law rules for insolvency proceedings concerning debtors based in the EU with operations in more than one Member State, recognizing the universal scope of the insolvency proceeding opened in the Member State in which a debtor has its centre of main interests.

3) European Convention on Certain International Aspects of Bankruptcy (Strasbourg Convention)

6. Negotiated under the auspices of the Council of Europe and adopted in Istanbul on 5 June 1990, this Convention allows for the opening of a main bankruptcy and, following such opening, of secondary bankruptcies, in any other State Party to the Convention in which the bankrupt possesses assets, without any need for their insolvency to be established in such secondary proceedings. The main provision related to applicable law in insolvency proceedings that can be found in this instrument is Article 19. This Article states that the applicable law of the secondary bankruptcy is governed by the national law of the State in which it is opened (*lex fori concursus*). This Convention, however, has not yet entered into force.[8]

4) The International Bar Association Concordat

7. Adopted by the Council of the International Bar Association (IBA) in 1995, the IBA Concordat is a "soft law" instrument that focuses on harmonisation of cross-border insolvency proceedings. Principle 8 touches upon applicable law in insolvency proceedings, specifically in making decisions on the value and admissibility of claims filed in a forum. According to Principle 8, the rules of international law should apply to determine the choice of law for claims, collateral, set-off rights, and lawsuits among the participants regardless of the forum in which the insolvency proceedings are opened. Such a rule seeks to limit the automatic application of private international law of the forum and advocates for the establishment of international principles on the choice of law. In that context, it bears mentioning that IBA is a long-time supporter of the adoption by the United Nations of an insolvency convention that would cover inter alia the harmonization of rules of applicable law in insolvency proceedings.[9]

[6] See Legislative Guide, Part two: I. Application and commencement, section C (paras. 80-91) and Recommendations 30-34.
[7] See HCCH, Prel. Doc. 14 of December 2019 - Future joint work of UNCITRAL and the HCCH on Insolvency, para. 5 seq.
[8] Currently, Cyprus is the only State having ratified this Convention.
[9] Both IBA and UIA made proposals in the past supporting the work of UNCITRAL in this area, see https://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/Projects.aspx.

5) Other regional instruments

8. Various regional instruments dealing with private international law or cross-border insolvency contain provisions on applicable law in insolvency proceedings.[10] Some countries in Central and South America have ratified the Montevideo Treaties concluded in 1889 and revised in 1940,[11] which espoused the concept of unity of bankruptcy proceedings, with some exceptions, for example when the debtor has two or more independent commercial establishments. The Havana Convention on Private International Law (known as the "Bustamante Code") [12] provides also for the filing of a single insolvency proceeding in the court in which the debtor is domiciled, but extends the effects of such proceeding to all countries in which the Bustamante Code has been adopted. Such approach is balanced by a rule providing for application of the law of the location of the asset (*lex rei sitae)* for real actions and rights in rem (art. 420). The Nordic Bankruptcy Convention,[13] which continues partly to operate, is another example of regional harmonization to regulate insolvency proceedings within countries of the Scandinavian area, despite the EU Regulation being in force. Based on the principle of universality, the Convention places strong emphasis on the *lex fori concursus* and provides limited exceptions allowing for recognition of foreign law to protect foreign creditors.[14]

B. General distinctions made regarding applicable law in insolvency proceedings

9. The theoretical approach to cross-border insolvency is often divided between two concepts: territorialism (proceedings opened in multiple fora, each of them applying their insolvency law, including their conflict of law rules) and universalism (one court having jurisdiction, one insolvency law for the proceedings).

10. Such a dualistic approach has strong implications on the applicable law in insolvency proceedings, as long as no unified conflict of law rules exist. Depending on the forum applying its own private international law rules, the law applicable to the recognition and enforcement of a "foreign" right or a claim in the insolvency proceedings may differ. Accordingly, a question to be addressed during the Colloquium may be whether there is a need for a unified corpus of rules on conflict of law in insolvency proceedings.

11. As explained below, the recommendations contained in the UNCITRAL Legislative Guide list the topics that should generally be governed by the *lex fori concursus*, on one hand, such as commencement, conduct, administration and conclusion of the proceedings. Accordingly, the *lex fori concursus* may generally govern the insolvency effects over rights and claims validly acquired under foreign law, for example, whether the right or claim, given its nature and conditions, is admissible in the insolvency of the debtor and how it will be ranked (see Recommendation 31). At the same time, the UNCITRAL Legislative Guide recognizes that a few topics are not usually governed by the *lex fori concursus*. Those are: payment and settlement systems and regulated financial markets; labour contracts; security interests; and avoidance provisions.

[10] See Fletcher, Part 2, chapter 5.
[11] States Parties to the Montevideo Treaty on International Commercial Law of 12 February 1889 are Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. In 1940, Argentina, Paraguay and Uruguay approved and ratified a revision of the 1889 Treaty. For more information on the Montevideo treaties, see Fletcher, Part 2, paras. 5.1 seq.
[12] *Convención de derecho internacional privado* (Havana, 20 February 1928), Organization of American States (OAS) *Treaty Series*, No. 23. States Parties to this Convention are: Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti ,Honduras, Nicaragua, Panama, Peru, and Venezuela (see Fletcher, Part 2, paras. 5.2 seq).
[13] Nordic Bankruptcy Convention, 7 November 1993. States Party to this Convention are Denmark, Finland, Iceland, Norway and Sweden.
[14] For an in-depth analysis of the Convention, see for instance https://www.iiiglobal.org/sites/default/files/Nordic_Bankruptcy.pdf

12. The EU Regulation follows the same approach and provides for the application *de facto* of the *lex fori concursus* to the main aspects of the proceedings (see the list in Article 7.2 (a) – (m)). Articles 8 to 18 of the EU Regulation provide a much longer list of assets and rights that are not governed by l*ex fori concursus*. That list comprises: rights in rem, set-off, reservation of title, contracts relating to immoveable property, payment systems and financial markets, contracts of employment, rights subject to registration, some patents and trademarks, detrimental acts, protection of third-party purchasers and pending lawsuits or arbitral proceedings. Such categories are usually governed by the law of the State in which the asset is located (*lex rei sitae)* or by the law where the right is registered (ships, aircrafts). Such an approach that choses between *lex fori concursus* and foreign laws is also the one favoured by the regional instruments listed in II A above, although often in less detail.

13. Indeed, as explained in the Guide, insolvency law does not "create" rights (personal or proprietary) or claims but should respect the rights and claims that have been acquired against the debtor according to other applicable law or located in a different jurisdiction. It is, however, difficult to draw a comprehensive list of topics that typically give rise to questions of conflicts of law. In addition to those outlined above, one author has identified the following list: title finance, trusts, contract and leases, priority, pari passu and deferred creditors, discharge, director's liability, group insolvencies, discovery, penalties.[15] While the Colloquium may not offer enough time to discuss all those topics in detail, the Secretariat expects that it could highlight the main possible areas for harmonization.

14. Two examples may be given of current issues encountered in international insolvency proceedings. Firstly, set-off and netting, which involve complex derivatives and commercial contracts and which can be described broadly as contractual arrangements allowing for settling or eliminating of all or a portion of a debt. Such mechanisms are of great importance when insolvency proceedings commence, since they may have an effect on the rights of creditors. Determining the law applicable to such contracts is not an easy task and could be harmonized.[16] A second example is the law applicable to avoidance actions. Although the principle of avoidance is widely accepted and can be found in many jurisdictions, a number of conflicting issues regarding the applicable law remain subject to debate rooted in the differences in substance between legal systems.[17] Such issues include questions such as whether a particular transaction prejudices creditors; the length of the suspect period and whether insolvency must be proved; the defences that could be raised; and the application of the rules to related persons that are more likely to be favoured and tend to have the earliest knowledge of when the debtor is in financial difficulty.[18]

C. Parallel proceedings and enterprise group insolvency

15. Currently, the UNCITRAL Legislative Guide does not clearly distinguish between the applicable law where there is only one domestic or foreign proceeding from that law applicable where there are concurrent insolvency proceedings. This approach differs from the one followed by the regional instruments listed in II A above, which often deal with multiple proceedings in addition to applicable law. Regarding enterprise group insolvency, Article 28(1) of the UNCITRAL Model Law on Enterprise Group Insolvency contemplates that, subject to

[15] See the full list provided in Principles of International Insolvency, 2nd edition, Philip R. Wood, Chapter 29.
[16] For legal qualification outside of insolvency proceedings, see UNIDROIT Principles on the Operation of Close-out Netting Provisions, 2013 (https://www.unidroit.org/overview-netting).
[17] See Wood, paras 29-047 seq.
[18] See Legislative Guide, Part two: II. Treatment of assets on commencement of insolvency proceedings, para. 182

certain conditions, "a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with the treatment it would be accorded in the non-main proceeding". The conditions required for operation of the rule are that the insolvency representative has given its undertaking to accord such treatment to a creditor involved in the non-main proceeding and does not constitute a formal exception to conflict rules of private international law in the enacting State. The provision aims at diminishing the risk of foreign creditors commencing non-main proceedings in their jurisdictions, despite a proceeding having been opened in the centre of main interests (COMI) of the debtor.

16. Parallel proceedings are often opened at the request of creditors that do not wish to be subject to a law other than the law applicable to their right or claim. One possible way of reconciling these issues could be to ensure that the same rule of insolvency law should apply regardless of whether the matter is addressed by the court in a debtor's main proceeding, in a non-main proceeding, or in another forum. Taking the concept of COMI used in UNCITRAL texts and the EU Regulation as a starting point, it has been suggested that the insolvency law of the COMI should apply to a debtor and its assets, wherever located, but should respect appropriate local interests by giving way to the insolvency law of another jurisdiction to certain assets located in that jurisdiction.[19] The Colloquium would present an opportunity to discuss the various legal constructions and consider arguments in favour of (or against) including parallel proceedings and enterprise group insolvency within any harmonized rules of applicable law in insolvency proceedings.

III. Is there a future for future work on applicable law in insolvency proceedings?

17. Based on the report prepared by the Secretariat after the Colloquium, the Commission, at its fifty-third session, will consider whether the topic of applicable law in insolvency proceedings should be referred to a working group. The Colloquium should provide as much as possible information related to the scope of the future work and the problems encountered by courts and insolvency practitioners, as well as by debtors and creditors, in international insolvency proceedings.

18. Any discussion or proposal should consider previous international experience and should avoid the duplication of existing or on-going work. In addition, in line with the mandate provided by UNCITRAL and following the formal approval given by the Council on General Affairs and Policy of HCCH,[20] possible future work related to the rules of private international law relating to insolvency should be discussed in close cooperation with HCCH. In that context, participants may wish to bear in mind the work of HCCH on principles of choice of law in international commercial contracts[21].

19. The form of any future legislative text is not a matter to be decided by the Colloquium, nor will the Commission decide on the form of a future text at its next session. However, participants should be aware of previous texts on insolvency adopted by UNCITRAL (three Model Laws and a comprehensive Legislative Guide[22]). Maintaining consistency with existing texts is an overall objective of the project and should be highlighted at the outset of the preparatory work, and throughout the development of any text.

[19] See Harmonizing Choice-of-Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the problem of Local Interests, Charles W. Mooney Jr. 2014.
[20] See Conclusions and Decisions adopted by the CGAP, 3-6 March 2020, paras. 40-41.
[21] See https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.
[22] All the texts of UNCITRAL on Insolvency are at: https://uncitral.un.org/en/texts/insolvency.