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Report of the Colloquium on Applicable Law in Insolvency Proceedings (Vienna, 11 December 2020)

Contents

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I. Introduction

1. The Colloquium on Applicable Law in Insolvency Proceedings was held in Vienna (online) on 11 December 2020, following the fifty-seventh session of Working Group V (Insolvency Law), held from 7 to 10 December 2020.[1]

2. The Colloquium was organized by the UNCITRAL secretariat, in cooperation with the Permanent Bureau of the Hague Conference on Private International Law (HCCH),[2] pursuant to the request of the Commission at its fifty-second session, in 2019. At that session, following the consideration of a proposal for possible future work from the European Union on harmonizing applicable law in insolvency proceedings (A/CN.9/995), the Commission agreed on the importance of the topic, which complemented the significant work already accomplished by UNCITRAL in the area of insolvency law, in particular regarding cross-border insolvency.[3] At the same time, the Commission 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 UNCITRAL had not worked recently", and it was considered essential to delineate carefully the scope and nature of the work that UNCITRAL could undertake on that topic. For that purpose, the Commission requested its secretariat to organize a colloquium, in cooperation with other relevant international organizations, to further clarify and refine various aspects of possible future work on applicable law in insolvency proceedings, for consideration by the Commission at its fifty-third session, in 2020.

3. Due to mitigation measures required by the COVID-19 pandemic, the fifty-seventh session of Working Group V was postponed from May 2020 to December 2020, as was the attendant colloquium originally scheduled to be held on 15 May 2020. At its resumed fifty-third session in 2021, the Commission requested its secretariat to organize a Colloquium on Applicable Law in Insolvency Proceedings on 11 December 2020 at the conclusion of the fifty-seventh session of Working Group V, and to report on conclusions reached by the colloquium at the fifty-fourth session of the Commission, in 2021.[4]

4. The Colloquium was attended online by more than 130 participants from 40 States, of which approximately 12 States represented the common law tradition, and 28 States represented the civil law tradition. In order to elicit additional input, an online questionnaire on the law applicable in insolvency proceedings and the prospects for future work by UNCITRAL in this area was circulated to participants after the Colloquium.[5]

5. The Colloquium was structured around four main themes: (a) an overview of the current status of applicable law in insolvency proceedings; (b) the practical implications of applicable law in cross-border insolvency; (c) applicable law in insolvency proceedings from the perspective of different regions; and (d) possible

[1] The web page relating to the Colloquium, including links to the programme and audio recordings, as well as a concept note, may be found at https://uncitral.un.org/en/applicablelawcolloquium.

[2] The Commission may wish to note that the Council on General Affairs and Policy of HCCH was expected to make a decision on possible future work of HCCH during its session from 1–5 March 2021.

[3] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 206.

[4] Ibid., *Seventy-fifth Session, Supplement No. 17* (A/75/17), paras. 16(c) and 66.

[5] Responses were requested to the following questions: (a) Does the current lack of uniformity in applicable law in cross-border insolvency proceedings undermine or create obstacles to the achievement of the objectives of such proceedings? (b) Would harmonization of the rules governing applicable law in this area be feasible? (c) Should UNCITRAL's global insolvency work to date be supplemented with work in the area of applicable law in insolvency proceedings? and (d) If work is undertaken in this area, what are the specific issues that should be addressed as priority matters (e.g. avoidance actions, rights in rem, contracts of employment, set-off, pending proceedings, etc.)? For a summary of the responses given to the online questionnaire see below, para. 46.

future work on applicable law in insolvency proceedings. Due to the limited time available for the Colloquium as a result of its online setting, it was not possible to discuss matters beyond these four main themes, including the limited issues selected for discussion to illustrate the problem (e.g., rights *in rem*, avoidance actions, securities and other financial instruments, and local creditor claims).

II. Summary of issues considered at the Colloquium

A. General considerations

6. In the context of cross-border insolvency proceedings involving parties or assets located in different States, complex questions could arise regarding which law applied to issues of the validity and effectiveness of rights in those assets or of other claims, as well as regarding the treatment of those assets and of the rights and claims of foreign parties in the insolvency proceedings. In such cases, the forum State would usually apply its private international law rules to determine which law was applicable to the validity and effectiveness of a right or claim and to their treatment in the insolvency proceedings. The UNCITRAL Model Law on Cross-Border Insolvency did not contain rules on conflict of laws, leaving it to enacting States to establish rules and practices. While insolvency proceedings would typically be governed by the law of the State in which the proceedings were commenced (the *lex fori concursus*), many States had adopted exceptions to that rule that varied in number and scope, thus creating uncertainty and unpredictability for stakeholders in cross-border insolvency proceedings. Certain efforts[6] had thus been made to ensure that insolvency laws addressed issues of applicable law in a transparent and predictable manner in order to provide certainty regarding the effects of insolvency proceedings on the rights and claims of stakeholders affected by those proceedings.

7. One example of such an effort could be found in the UNCITRAL Legislative Guide on Insolvency Law, which contained a section with general commentary on applicable law in insolvency proceedings, followed by five recommendations for legislators.[7] That section of the Legislative Guide had been developed in close cooperation with HCCH, through the circulation of a questionnaire to HCCH Member States (see paragraph 41, below) and the organization of a drafting meeting of both UNCITRAL and HCCH experts.[8] The UNCITRAL Legislative Guide recommended 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 were commenced (recommendation 30), and that the insolvency law of the State in which insolvency proceedings were commenced (*lex fori concursus*) should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects (recommendation 31), listing a number of examples (e.g., avoidance of prejudicial transactions, treatment of contracts, set-off, treatment of secured creditors, treatment and ranking of claims, distribution of proceeds and discharge). Exceptions to the application of the general *lex fori concursus* rule were recommended in respect of the effects of insolvency proceedings on the rights and obligations of the participants in a payment of settlement system or in a regulated financial market (recommendation 32), which were governed by the law applicable to that system or market), and on rejection, continuation and modification of labour contracts (recommendation 33), which were governed by the law applicable to that contract. It was further recommended than any additional

[6] Additional examples to those provided in paras. 8 and 9 may be found in the concept note, *supra*, note 1.

[7] UNCITRAL Legislative Guide on Insolvency Law (Legislative Guide), Part two: I. Application and commencement; C. Applicable law in insolvency proceedings, paras. 80–91 and recommendations 30–34.

[8] HCCH, Prel. Doc. 14 of December 2019 – Future joint work of UNCITRAL and the HCCH on Insolvency, para. 5 seq.

exceptions to the general rule should be limited in number and clearly set forth in the insolvency law (recommendation 34).

8. Additional rules aimed at harmonizing the law applicable in insolvency proceedings were found in the European context in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the EIR recast), which replaced and superseded Council Regulation (EC) 1346/2000 on insolvency proceedings (the EIR). Like its predecessor, the EIR recast set out detailed conflict of law rules for insolvency proceedings concerning debtors based in the European Union (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 had its centre of main interests (COMI). Again, the general *lex fori concursus* rule applied in principle in main as well as secondary proceedings,[9] and would determine the conditions for the opening of proceedings, as well as their conduct and closure (e.g., debtors against which insolvency proceedings may be brought; effects on current contracts of the debtor; rules governing the lodging, verification and admission of claims). Specific exceptions to the general *lex fori concursus* rule were then set out a series of articles.[10]

B. Applicable law in insolvency proceedings: overview

9. The opening discussion at the Colloquium provided a general overview of the main issues and what had been achieved to date in terms of harmonizing the applicable law in insolvency proceedings in cross-border context, first in terms of the UNCITRAL insolvency texts, followed by a consideration of the regime applicable in the EU. Reference was made to the fact that harmonization of the law applicable in insolvency proceedings did not refer to the process of harmonizing substantive insolvency law, but rather to harmonizing the choice of law rules in insolvency proceedings so as to be able to determine in advance which law would apply in the insolvency, and to avoid conflicts. Emphasis was placed on the importance of distinguishing between the law applicable to the validity and effectiveness of rights and claims created prior to the insolvency (e.g., the law applicable to the validity of a contractual right or a security interest), and the law applicable to insolvency proceedings and their effects (i.e., the effect of insolvency on those interests, and whether, for example, the enforcement of those rights could be avoided or stayed as a result of the insolvency proceeding).

10. The first presentation explored chronologically the work already completed by UNCITRAL in the area of insolvency law, in particular the Model Law on Cross-Border Insolvency (1997) (the MLCBI), the Legislative Guide (Parts one and two (2004), three (2012) and four (2nd ed., 2019)), the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) (the MLIJ) and the Model Law on Enterprise Group Insolvency (2019) (the MLEGI).

11. It was noted that the MLCBI did not attempt to unify all aspects of private international law in insolvency, but rather followed the approach of modified universalism,[11] wherein a cross-border insolvency proceeding was centralized as much as practicable in a single jurisdiction. Under the MLCBI, this was achieved

[9] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the EIR recast), arts. 7 and 35.

[10] Ibid., arts. 8–18.

[11] The classical theoretical approach to cross-border insolvency focused on two competing concepts: universalism, in which a single insolvency proceeding administered a cross-border insolvency that covered all of the debtor's assets and liabilities, wherever they were located; and territorialism, in which multiple insolvency proceedings were opened in different forums, and in which each forum applied its own insolvency law. Modified universalism, the approach represented in the current cross-border insolvency architecture, permitted the opening of more than one set of insolvency proceedings, but attempted to maximise cooperation and coordination between proceedings, as well as the taking of a global perspective of the cross-border insolvency by establishing a main proceeding.

through a mechanism of recognition of main proceedings (and relief granted), as well as the requirement that courts and insolvency representatives should cooperate to the maximum extent possible in the conduct of cross-border insolvency proceedings.[12] The MLCBI provided for the recognition of a foreign main proceeding opened in the State where a debtor had its centre of main interests (COMI), as established through application of the means set out in the MLCBI and elaborated its Guide to Enactment and Interpretation.[13] Certain relief (e.g., a stay under article 20) was automatic following the recognition of a foreign main proceeding, and other discretionary relief could be granted upon recognition of a foreign main or non-main proceeding, subject to safeguards (e.g., provided that the receiving court was satisfied that the interests of creditors were adequately protected).[14] Notably, while the MLCBI did not explicitly address the issue of applicable law in insolvency proceedings, in focusing on the actions of the court receiving the application for recognition of the foreign main proceeding and in keeping with the approach of modified universalism, it did suggest that the receiving court should defer to the law of the foreign main proceeding in granting discretionary relief in order to facilitate dealing with the insolvency as a whole in a single jurisdiction.

12. It was observed that the UNCITRAL Legislative Guide considered the private international law issues of insolvency only to a limited extent. In terms of establishing jurisdiction for insolvency proceedings, the Legislative Guide recommended the enactment of the MLCBI (recommendation 5), which used the concept of the debtor's COMI to establish the jurisdiction of the foreign main proceeding, and the concept of the debtor's establishment (under article 2(f)) to establish the jurisdiction of a foreign non-main proceeding. In terms of applicable law issues, as outlined above in greater detail (paragraph 7), the recommendations in the Legislative Guide distinguished clearly between the law applicable to the validity and effectiveness of rights and claims existing at the time of insolvency, which should be determined by the private international law rules of the forum (recommendation 30), and the law applicable to the insolvency proceedings and their effects, which should be determined in general by the *lex fori concursus* (recommendation 31), subject to certain clear and limited exceptions (recommendations 32 to 34). It was observed that the Legislative Guide sounded a cautionary note that the application of an exception to the *lex fori concursus* for insolvency effects could result in disparate treatment of the insolvency effects on similarly situated creditors merely because different applicable law governed their rights and claims.[15]

13. Turning to the MLIJ, it was noted that, like other model laws, the instrument was intended to achieve uniformity through enactment by States, and that it aimed at complementing the MLCBI by addressing an uncertainty whether the article 21 relief provisions of the MLCBI included the recognition and enforcement of insolvency-related judgments. The MLIJ not only provided specifically for the recognition and enforcement of insolvency-related judgments, but it established harmonized rules regarding the process for seeking such recognition and enforcement, as well as specific grounds for which recognition and enforcement of such judgments could be refused. The MLIJ also included a provision, article X, that States that had already enacted the MLCBI could implement to clarify that article 21 of the MLCBI was sufficiently broad and flexible to include the recognition of foreign insolvency-related judgments in the discretionary relief that could be granted by a receiving court upon recognition of foreign main or non-main proceedings. It was observed that while the MLIJ did not deal directly with the issue of applicable law, there was a link in that recognition and enforcement of a foreign insolvency-related judgment would indirectly give effect to foreign insolvency law.

[12] UNCITRAL Model Law on Cross-Border Insolvency (1997) (MLCBI), arts. 25–27.

[13] Ibid., arts. 15–17 and UNCITRAL MLCBI Guide to Enactment and Interpretation, paras. 141–147.

[14] Ibid., arts. 20 and 21.

[15] UNCITRAL Legislative Guide on Insolvency Law, Part two, para. 91.

14. The final UNCITRAL text considered was the MLEGI, which complemented the MLCBI by extending its framework for cross-border insolvencies of single debtors to include members of an enterprise group and thus sought to facilitate collective group solutions. This was achieved by providing an effective cooperation mechanism between courts and other competent authorities, as well as insolvency representatives, and importantly, through providing for group planning proceedings in which a group insolvency solution for the whole or part of an enterprise group could be developed and implemented. Relief under the MLEGI could be granted under the law of the planning proceeding forum in order to assist in the development and implementation of the group solution.[16] Broad and flexible relief could also be granted by other courts[17] (in States other than the planning proceeding forum) where the enterprise group had assets, establishments or subsidiaries, which could include deferring to that central group process by staying or declining the opening of local proceedings and providing a range of relief to support the planning proceeding process (subject, again, to adequate protection of the interests of creditors of each enterprise group member).[18] Again, the MLEGI did not deal directly with applicable law, but was indirectly linked to it by encouraging local courts to defer to the forum of the planning proceeding, and by providing relief in support of the planning proceeding, including possible deference to the law of the forum of the planning proceeding, subject in certain circumstances to the application of local laws in respect of the treatment of claims.

15. In conclusion, it was reiterated that the foundations of the UNCITRAL model laws adhered to a modified universalist approach to cross-border insolvency, relying on deference and assistance mainly to foreign main proceedings or enterprise group planning proceedings through cooperation, recognition and relief, and were complemented by recommendations on applicable law in the Legislative Guide. The view was expressed that the existing UNCITRAL insolvency instruments could be usefully supplemented by the development of an international instrument with explicit rules on applicable law in insolvency proceedings for uniform adoption, which would assist in addressing the problem of discrepancies that had arisen in jurisprudence on these issues. It was further suggested that such an instrument should be based on the relevant recommendations of the existing UNCITRAL Legislative Guide, but that clarity should be established on the precise scope of the *lex fori concursus* rule, as well as to its application in the enterprise group context, and to the more modern restructuring regimes. Finally, it was recommended that any exceptions to the general *lex fori concursus* rule should be clearly established, as should criteria for avoiding the opening of additional insolvency proceedings, and in determining when local law should be applied in the foreign main proceeding or in the group planning proceeding.

16. Discussion next turned to the current European regime for harmonizing applicable law in cross-border insolvencies, the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the EIR recast). It was noted that both the EIR recast and the MLCBI contained provisions addressing key issues in the cross-border insolvency context, such as establishing jurisdiction for main and non-main insolvency proceedings (via the COMI and establishment rules), and providing for cross-border recognition and cooperation for such proceedings. In addition, the EIR recast (article 7) and the recommendations in the UNCITRAL Legislative Guide (recommendation 31) were similar in supporting a general *lex fori concursus* rule in respect of the law that should determine the opening, conduct and closure of insolvency proceedings, with both texts setting out a non-exhaustive list of the matters that would thus be governed by the *lex fori concursus*. It was noted, however, that there was no uniform UNCITRAL insolvency text that set out harmonized conflict of laws rules as such. By way of contrast, article 7 of the EIR recast specifically established the general rule that the

[16] UNCITRAL Model Law on Enterprise Group Insolvency (2019) (MLEGI), art. 20.
[17] Ibid., art. 24.
[18] Ibid., arts. 28–32.

law applicable to insolvency proceedings and their effects was that of the Member State in which proceedings were opened (i.e., the *lex fori concursus*), subject to specific exceptions in respect of: third parties' 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.[19]

17. Despite the more articulated applicable law rules in the EIR recast, it was observed that applying those rules in practice was complex, and that determining the actual scope of the *lex fori concursus* could often be difficult (for example, in respect of the exceptions affecting avoidance actions, rights *in rem* of creditors in another State, and demands for set-off). Reference was made to a large and complex cross-border insolvency case applying the EIR recast that highlighted a number of these difficulties, for example, in terms of the determination of the insolvency estate, as well as the scope of the *lex fori concursus* rule and its exceptions. The example illustrated, in the case of termination of employment contracts, the potential problem of incompatibility between application of the *lex fori concursus* of the main proceeding in one State and the labour law of another State which was applicable as an exception to the general *lex fori concursus* rule (to subject labour contracts to the law of the Member State applicable to the contract of employment). The case also raised questions regarding whether the court hearing the main proceedings or the court hearing the secondary proceedings had international jurisdiction over the matter in issue; as well as which law should be applicable in determining which of the debtor's assets fell within the scope of the effects of the secondary proceedings. In terms of the second question on applicable law, the case was resolved by deciding that the date of the opening of the insolvency proceedings was decisive for determining the location of the debtor's assets, and which of them fell within the scope of the effects of the secondary proceedings.

18. Additional examples were provided that demonstrated the link between the establishment of the international jurisdiction for the insolvency proceeding and choice of law rules. In an example with implications for civil asset-tracing, under the law of the main insolvency proceeding, the liquidator was the fiduciary owner of the debtor's assets, while under the law of the non-main proceeding, the debtor was only divested of its ownership, while the liquidator was to realise on the assets and act on behalf of the general body of creditors. A recent decision held that the court in the non-main proceeding should recognise the special powers of the liquidator in the main proceeding, and thus giving effect to the *lex fori concursus*, even though such powers were unknown in the non-main jurisdiction.

19. In conclusion, it was emphasized that the EIR recast, while more articulated on the issue of applicable law than UNCITRAL texts, nonetheless demonstrated the continued link between the establishment of the international jurisdiction for the main proceeding (and the *lex fori concursus* rule that applied to those proceedings), and the choice of law rules. The operation of the current applicable law regime in Europe demonstrated that further harmonization of appropriate conflict of laws rules was certainly desirable in the cross-border insolvency context.

C. Applicable law in cross-border insolvency: practical implications

20. The next broad area of discussion in the Colloquium focussed on examples of particularly problematic issues that had arisen in cross-border insolvency proceedings regarding the law applicable to claims and issues, such as rights *in rem*, avoidance actions, and securities and other financial instruments.

21. The first area examined was the choice of law question of which State's non-insolvency law governed the substantive law of property rights (rights *in rem)* in

[19] EIR recast, arts. 8–18.

insolvency proceedings. As alluded to in previous discussions, it was again noted that it was crucial to maintain the distinction between the law applicable to insolvency law and that applicable to non-insolvency law (i.e. the validity and effectiveness of rights and claims). In this context, it was emphasized that the general view, consistent with the UNCITRAL Legislative Guide, was that the determination of validity and effectiveness of rights and claims including rights *in rem* was not an insolvency law question, but rather a matter of other applicable law.

22. It was further elaborated that the general rule was that the law applicable to the validity and effectiveness of rights and claims (like rights *in rem*) existing at the time of the commencement of insolvency proceedings should be determined by non-insolvency private international law rules of the State in which the insolvency proceedings were commenced. The point was made that that approach was consistent with the general goal of insolvency law to prevent the redistribution of wealth from those with non-insolvency legal entitlements to those without legal entitlements. Drawing on the UNCITRAL Model law on Secured Transactions, two examples of the operation of non-insolvency choice of law rules were provided. First, in the case of intangibles (including ordinary receivables), the law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset was the law of the State in which the grantor was located, which was thought to be an appropriate rule. Second, in the case of non-intermediated certificated securities, the law applicable to their creation, effectiveness against third parties and priority was, in the case of equity securities, governed by the law under which the issuer was constituted, while in the case of debt securities, was governed by the law governing the securities. The choice of law rules in this latter example were thought to be appropriate for uncertificated securities, but not for certificated securities, in which case it was suggested that, as in the case of possessory collateral such as negotiable documents and negotiable instruments, their location might be a better means of determining the applicable non-insolvency law.

23. In conclusion, the view was expressed that the *lex fori concursus* should continue to be the most significant choice of law rule for insolvency proceedings, but that the development of harmonized insolvency choice of law rules would benefit the general operation of insolvency proceedings. It was also observed that in developing such rules, it would be crucial to retain the distinction between the law applicable to insolvency law and that applicable to non-insolvency law, but that drafters should stay vigilant to any potential for manipulation of that distinction by stakeholders.

24. The next discussion considered the law applicable to securities and other financial instruments, such as intermediated securities, collateralization of accounts receivable and closeout netting provisions in financial derivatives, in insolvency proceedings. Special attention was paid to the question of which law should govern intermediated securities in insolvency proceedings. It was observed that the HCCH Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary indicated that in the non-insolvency context, the law applicable to intermediated securities was the law of the State in which the intermediary that maintained the account was located. That rule, often referred to as PRIMA (place of the relevant intermediary approach), ensured that the applicable law remained fixed over time despite regular changes that might be made in the underlying security portfolio of the investor. The question was then considered of what the applicable law for intermediated securities should be when the investor (or debtor) became insolvent, and whether the applicable law should differ from the non-insolvency scenario. It was explained that application of the *lex fori concursus* rule could be problematic in the case of intermediated securities, since that approach could disrupt the hypothetical bargain underlying a financial transaction involving the intermediated securities, and result in the application of the law of an unexpected State in which one or more insolvency proceedings were commenced.

25. The panellist suggested that, taking a functional perspective of insolvency law in which it aimed to minimize debtor and creditor misbehaviour, exceptions to the *lex fori concursus* rule should be recognized for transactions involving intermediated

securities, particularly in determining their validity and effectiveness against third parties in collateral transactions and determining priorities. It was cautioned that parties might otherwise use insolvency proceedings to change initial entitlements *ex post* resulting in disruptions and higher costs for financial transactions.

26. A third area explored was the law applicable to avoidance actions in cross-border insolvency proceedings. It was observed that the law of avoidance depended on policy choices and involved a delicate balance between the collective interest of the creditors to maintain or maximize the insolvency estate and the legitimate expectations of third parties in maintaining the validity of a transaction. It was noted that the law of avoidance differed across States, particularly on such issues as: (a) the types of transactions subject to avoidance; (b) the categories of persons with sufficient connection to the debtor to be treated as related persons; (c) the suspect periods for different types of transactions; (d) the authority and responsibility to commence avoidance proceedings; (e) international jurisdiction and territorial competence for avoidance actions; (f) the allocation of the burden of proof; (g) the distribution of the costs of avoidance proceedings; and (h) the legal consequences of the successful avoidance and rights of a counterparty to that transaction.

27. Based on the observation that most States currently lacked specific rules that addressed the question of applicable law for avoidance actions in cross-border insolvency, practical and legal solutions were explored to enhance cooperation between jurisdictions. A detailed explanation was given of the advantages and disadvantages of taking the following approaches to the issue: (a) *lex causae*; (b) *lex fori concursus*; (c) a combination of the *lex fori concursus* and the *lex causae*; and (d) an alternating application of the *lex fori concursus* and the *lex causae*, depending on which was more favourable for the insolvency estate. In conclusion, it was suggested that the *lex fori concursus* would provide the best solution for avoidance actions, with an emphasis placed on the general importance of questions of applicable law in cross-border insolvency cases. The following points were made in support of applying the *lex fori concursus* to avoidance actions: (a) it represented the law of the closest connection; (b) it protected the integrity of the insolvency estate (c) it respected the principle of equitable treatment of creditors; (d) avoidance issues were closely connected with the law of the state of the opening of insolvency proceeding; (e) it provided a simple solution for insolvency practitioners; (f) it prevented the parties from manipulating the applicable law; and (g) in those cases where an unacceptable result might be reached, the public policy exception could be applied to avoid it.

28. The next presentation began with the premise that the current cross-border insolvency regime, which was considered to reflect modified universalism, should stray as little as possible from the ideal of universalism. It was observed that in order to do so, there should thus be as few exceptions as possible made to the general *lex fori concursus* rule. To accomplish that goal, the question was asked on what basis exceptions from the general rule should be made. The response to that question, it was suggested, should be determined in terms of protecting the legitimate expectations of local stakeholders when they relied on the anticipated application of a particular legal regime, such as local laws. Taking the example of local creditors, the view was expressed that not all local creditors might want the local law to apply to their claim, and that some of them might prefer to have the treatment and priority of their claim considered pursuant to the *lex fori concursus*. In order to avoid the untenable scenario which would require a claim-by-claim determination of the applicable law, it was suggested that a proxy could be used, for example, one based on the commercial sophistication or size of the creditor, to estimate whether that creditor was dependent on the local law to protect their rights and claims and whether it would be unfair to subject their claim to the *lex fori concursus*.

29. In summary, while it was observed that the optimal approach in the case of financial transactions would be for harmonized choice of law rules that applied both inside and outside insolvency, there was general agreement on the significance of and good prospects for the harmonization of applicable law in insolvency proceedings. At

the same time, it was considered essential to delineate carefully the scope and nature of the work that UNCITRAL could undertake on that topic, as requested by the Commission. It was suggested that, in keeping with UNCITRAL's insolvency texts to date, harmonization might take the form of a model law. The view was also expressed that the Global Rules on Conflict-of-Laws Matters in International Insolvency Cases (2012)[20] (ALI/III Global Rules), prepared by the American Law Institute and the International Insolvency Institute, and the EIR recast could serve as appropriate starting points for the discussion of harmonization. In addition, particularly in the case of labour law, it was thought that an approach could be employed along the lines of the "margin of appreciation doctrine",[21] emphasizing the protection of minimum standards for labour rights, even when they were subjected to the *lex fori concursus* rule of a main insolvency proceeding.

D. Applicable law in insolvency proceedings: regional implications

30. Further discussion proceeded on the practical issues arising in respect of applicable law in cross-border insolvency proceedings, focussing on challenges faced in various regions of the world. A review of cross-border insolvency in the Latin American context revealed that jurisdictional fragmentation and multiple proceedings persisted, despite the various historical efforts that had been made in the region to foster the principle of unity of insolvency proceedings. Some States had ratified the Montevideo Treaties concluded in 1889[22] and revised in 1940,[23] which espoused the concept of unity of bankruptcy proceedings, with some exceptions, such as when the debtor had two or more independent commercial establishments. The Havana Convention on Private International Law (known as the "Bustamante Code"), applicable in a few States in the region,[24] also provided for the filing of a single insolvency proceeding in the court in which the debtor was domiciled, but extended the effects of such proceeding to all countries in which the Bustamante Code had been adopted. That approach was 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* (article 420). It was expressed that the principle of unity was the common objective sought by the main regional instruments of harmonization but that that principle had to be accommodated with exceptions, especially in the cases where the debtor had a separate establishment or assets located in a different jurisdiction. Such a situation could trigger the opening of an additional insolvency proceeding and could favour local creditors under local law. To balance the disadvantages of having several proceedings opened, in which each used its domestic rules, the regional instruments would, for example, simplify the extraterritorial effect of enforcement measures in States parties to the treaty to ensure better recognition of rights of creditors created under foreign law.

31. Despite efforts to seek unification of legal regimes for applicable law in insolvency proceedings, it was said that the situation remained considerably different between States in the region. For instance, there were States where the universalism

[20] Annex to "Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases" (2012).

[21] The "margin of appreciation doctrine" is a doctrine of the European Court of Human Rights, which gives States limited discretion to derogate from the obligations laid down in the Convention provisions of the European Convention on Human Rights.

[22] States Parties to the Montevideo Treaty on International Commercial Law of 12 February 1889 are Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay.

[23] In 1940, Argentina, Paraguay and Uruguay approved and ratified a revision of the 1889 Treaty. For more information on the Montevideo treaties, see Fletcher, Ian F., Insolvency in Private International Law: national and international approaches, 2nd ed. (Oxford University Press, 2005), Part 2, paras. 5.1 et seq.

[24] 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 et seq.).

of proceedings was a principle at the domestic level, but such approach was countered by territorialism – a principle applied under private international law rules. For example, that approach would deprive domestic courts of jurisdiction if there were no establishment of the debtor in the State, even when economic activity was identified. Territorialism could also be reinforced by insistence on local proceedings to deal with local creditors, as well as through adherence to a reciprocity principle when considering foreign proceedings. At the other end of the spectrum, some jurisdictions were more inclined towards recognition of foreign proceedings and application of foreign law in insolvency proceedings, such as in providing increased flexibility in the conditions for the opening of insolvency proceedings, rather than insisting on the core requirement of an official establishment of the debtor in the jurisdiction. An advantage of a more flexible approach to cross-border insolvency would also translate into clear procedural patterns provided to creditors and debtors as to which law would be applicable to their claims, with *lex fori concursus* being the norm, with certain clear exceptions. Another useful principle used to mitigate the differences between foreign and local rules was resort to the principle of national treatment which guaranteed the equal protection of foreign and domestic creditors, subject to limited exceptions and the reciprocity principle. The view was expressed that, in conclusion, a more uniform approach to cross-border insolvency was increasingly evident in the region, particularly through enactments of the MLCBI, but that there remained a need for the development of additional harmonized rules on applicable law in order to assist and provide clarity in cross-border coordination of insolvency proceedings.

32. The next regional discussion focused on the insolvency litigation and restructuring landscape in Southeast Asia. It was noted that although the issue of applicable law in insolvency proceedings had not been extensively considered in regional jurisprudence to date, the incidence of such issues could certainly be expected to increase along with the increasing number of cross-border restructurings taking place in the region. An overview of the cross-border restructuring and financing market described a regional situation in which a few established international financial centres or jurisdictions (which had the benefit of having a more advanced legal regime) provided the funding, while the governing law of the debt itself was often a legal regime outside the region. As such, there was often a difference in the law applicable to the debt itself, and the law applicable to the domestic security package, which was usually local law. In the context of restructuring, it was noted that the two available options were for the debtor or creditors to take up the “local” option and file insolvency proceedings in the jurisdiction of incorporation of the debtor, or, in certain circumstances, to seek greater flexibility in debt restructuring by filing in a forum outside of the jurisdiction of incorporation of the debtor. It was further observed that despite the limited number of issues that had arisen to date in respect of applicable law in insolvency proceedings, the elaboration of harmonized rules on applicable law could certainly streamline proceedings, particularly in a region where the amount of debt for restructuring was increasing rapidly.

33. Among the recurring issues witnessed in the region, particular mention was made of a trust mechanism often used in international capital market transactions in which the debtor issued a foreign law bond which was then held by a bond trustee. Such trust structures were typically not recognized in the local legal regime, and courts often simply applied the local law to the foreign law documents rather than conduct a detailed analysis of private international law principles. That approach often resulted in inconsistent jurisprudence, and a resultant lack of commercial certainty for stakeholders. Another issue noted was the lengthy litigation necessary to ascertain the validity and effectiveness of the rights and claims of the creditors under the applicable law of the debt, again negatively affecting the certainty and security sought by creditors and debtors. Such trends could be expected to grow as the level of complexity of financial instruments used in the region was expected to increase with time. In terms of possible solutions, the most modern legal framework adopted in one of the leading financial centres of the region was also discussed. That framework regulated a number of issues, including digital assets and decentralized finance, however some questions were left unanswered and could give rise to future

uncertainty in considering applicable law in insolvency proceedings. In conclusion, it was felt that in light of the clear differences between national legal systems and the on-going regional integration of national economies, the need for common standards on applicable law in insolvency proceedings in Southeast Asia was growing in importance.

34. The presentation on applicable law in cross-border insolvency proceedings in Africa recalled the progress made in the region in enacting the MLCBI in domestic legal systems, with 24 States having done so to date. That trend was said to be one of the steps taken amongst various reforms and policy efforts made by African countries in the last decade to improve their management of cross-border insolvency. Important efforts were also being undertaken on substantive insolvency law issues, aiming at promoting efficiency, preservation of value, commercial reality and the global nature of business.

35. However, it was also noted that despite such efforts, the insistence of some States on including reciprocity clauses in their enactment of the MLCBI was negatively affecting the scope and flexibility of those enactments, and the effectiveness of their cross-border insolvency proceedings. In addition, creditors and other insolvency stakeholders were continuing to face challenges in terms of the capacity of insolvency professionals and the judiciary, but also in terms of structural gaps in the court administration system, as well as a lack of resources being provided to local courts, leading to case backlogs and logistical problems. The view was expressed that the development of new rules would only be successful if accompanied by a strengthening of the understanding and implementation of those rules in these jurisdictions.

36. Focusing on specific cases in the region, it was observed that problems arose in cross-border insolvency proceedings due to a lack of harmonized rules on the applicable law in specific areas, such as that governing labour contracts, financing transactions, and cross-collateralization of securities within enterprise groups. Although such examples illustrated the benefit of developing uniform rules for applicable law in insolvency proceedings, it was important to note that, based on the experience in the region, difficulty in identifying common interests could be expected. For instance, it was recalled that local creditors enjoyed preferential treatment in some States, sometimes even ranking ahead of secured creditors. Despite such challenges, however, it was concluded that the current situation in the region could be improved through the development of harmonized choice of law rules in the area of cross-border insolvency.

37. A final set of remarks further explored how best future work by UNCITRAL on applicable law could give effect to the legitimate expectations of local creditors while nonetheless preserving the modified universalist approach reflected in the existing insolvency and restructuring framework. In answering that question, it was observed that choice of law localism should be seen as a potentially serious problem that could be used to reinforce strategic territorialism and negatively affect the overall goal of transactional gain. Modified universalism's goal of a single global procedural proceeding was said to be most effective when the main proceeding focussed on the procedural aspects of realising value of the insolvency estate and, to the extent possible, respected local entitlements and corporate forms (and thus minimised the benefits of forum-shopping) by resorting to virtual or synthetic[25] treatment to respect the local entitlement baseline (through which priority claims could be quantified).

[25] The concept of "synthetic" treatment has been described as follows (para. 193 of the Guide to Enactment of the UNCITRAL Model Law on Enterprise Group Insolvency): "Certain measures have been developed in practice to assist the coordination of cross-border insolvency proceedings involving members of an enterprise group. Often referred to as synthetic non-main proceedings, these measures involve according the claim of a foreign creditor the same treatment in a main proceeding as it would receive in a foreign non-main proceeding under the applicable law, were such a non-main proceeding to commence. For example, if a main proceeding for a particular

38. It was observed that the current cross-border insolvency and restructuring architecture as reflected in the UNCITRAL Legislative Guide and EIR recast was already based on a general *lex fori concursus* rule for procedural aspects of insolvency proceedings (with specific exceptions to that general rule), while the law applicable to the validity and effectiveness of rights and claims (or the "non-insolvency law") covered the distributional aspects and was governed by local law as determined by private international law rules. However, it was reiterated that it could be difficult to determine the scope of the *lex fori concursus* rule (or the "insolvency law"), and it was observed that while the current architecture functioned well for liquidations involving a single debtor and ancillary proceedings, a problem arose in the context of enterprise group insolvencies and reorganisations. The problem created was referred to as a "value allocation problem", in which, for example, an enterprise group entity operated on a consolidated basis and it was not possible to divide assets between group members or assign them to specific locations, or in the reorganization or rescue context, which created an additional increment of "reorganization value" that could not be realized in a simple liquidation. In effect, the issue was said to be how, in these more complex scenarios, local claims could be quantified at full value, when full value might not be realised given the insolvency of the group as a whole.

39. It was suggested that the solution to the problem had already been evolving as a practical matter in cross-border insolvency practice by way of the implementation of virtual or synthetic treatment of claims, which was said to be facilitated by both the EIR recast and the MLEGI, as well as some existing jurisprudence. In this scenario, it was suggested that the entitlement baseline for local creditors to claim distributional priority would have to be traceable to the value that could be realized from the assets, in the local corporate structure (in the absence of the enterprise group solution), and in the jurisdiction as determined through the application of choice of law rules. The realizable value of the assets would thus establish the entitlement baseline, which could be seen as the synthetic entitlement of the local creditor in the main proceeding. It was suggested that the creation of a synthetic entitlement approach to solve difficult choice of law problems, particularly in the context of enterprise group insolvencies and reorganisations, would be the logical next step for existing cross-border insolvency instruments, in that little, if any, amendment would be necessary, and existing work on applicable law in insolvency, such as that found in the ALI/III Global Rules could provide a template for further development.

E. Possible work by UNCITRAL and HCCH on applicable law in insolvency proceedings

40. The final session focussed on the feasibility and desirability of UNCITRAL, in cooperation with HCCH, engaging in work on applicable law in insolvency proceedings and, if such work were to be undertaken, its possible form and scope. In summarizing the previous sessions, it was observed that there was general agreement that inconsistency in the jurisprudence arising from the lack of a uniform approach to applicable law in insolvency proceedings, and the resulting legal and commercial uncertainty was having a negative impact on international trade and investment. That uncertainty was illustrated in terms of the treatment in cross-border insolvency cases of selected issues such as claims involving rights *in rem* and securities, but also in respect of avoidance actions and the protection of legitimate expectations of local creditors. It had also been observed that particular attention would need to be paid to the context of applicable law in enterprise group insolvency, and that distinct

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enterprise group member commences in one State and that enterprise group member has creditors in another State, the claims of those creditors could be addressed in the first State in accordance with the treatment they would receive under the relevant applicable law if a non-main proceeding were to commence in the second State. The use of the word "treatment" refers to the status of the claim and the manner in which it would be handled under the applicable law; if, for example, the claim is for unpaid wages, it would have the same priority and the same statutory conditions as to amount, if any, that may be applicable under the relevant law."

solutions might be necessary to accommodate instances of both cross-border liquidation and reorganisation.

41. From a historical perspective, it was recalled that the preparation of the UNCITRAL Legislative Guide had been assisted through a 2003 survey on choice of law in insolvency conducted by HCCH with its Member States. The questionnaire asked three main questions: (1) whether States had specific choice of law rules for insolvency matters; (2) what connecting factors triggered the opening of insolvency proceedings and established the scope of the *lex fori concursus*; and (3) what exceptions had been established to the general *lex fori concursus* rule. Despite the modest number of responses received (13) due to the relatively short time frame of the exercise, the following paradox was noted: although the EIR had been prepared between States with strong economic ties and a similar level of development, as well as a similar legal tradition, it contained more exceptions to the *lex fori concursus* than recommended by the UNCITRAL Legislative Guide. It was suggested that the fewer exceptions in the Legislative Guide might be explained by greater substantive harmonization achieved by that text and the MLCBI than by the EIR in the European context. In conclusion, it was observed that the approach adopted by the EIR, with the same conflict of law rule applying irrespective of the nature of the debtor or the type of proceedings, might need to be revisited, particularly in light of the different solutions that might be needed in the liquidation and reorganisation contexts.

42. The view was expressed that core private international law rules would be more amenable to harmonization than substantive rules governing all the rights and contracts impacted by insolvency proceedings. Noting the close link that had been identified throughout the Colloquium between the law applicable in insolvency proceedings and the issue of the international jurisdiction of courts, the importance of clarity and agreement on the policy implications was emphasized. Given the great number of similarities on this issue that already existed in various States and legal systems, for example, in respect of a general *lex fori concursus* rule, it was thought that harmonization of private international law rules in this area should be achievable. While the best form for such a future instrument was perhaps not yet clear (e.g. model law, legislative guide, practice manual, sample protocols, and the like), the text should complement other texts on insolvency and ensure full respect for State sovereignty, including on rules of jurisdiction. In addition, it was felt that the extensive experience of UNCITRAL's Working Group V (Insolvency Law) would be invaluable in achieving a solution.

43. At the conclusion of the discussion, a representative of the EU delegation to Working Group V (Insolvency Law) recalled the EU 2019[26] proposal that UNCITRAL might undertake future work in this area, and praised the participants for the fruitful exchange of views provided during the Colloquium, which had suggested that uniform rules on applicable law in insolvency proceedings would fill gaps identified in the current cross-border insolvency architecture. It was emphasized that exploration of the issue of applicable law was expected to proceed in a manner consistent with the existing body of work of UNCITRAL in insolvency, and bearing in mind the more articulated work represented by the EIR recast. Clarity was said to be particularly important in terms of the priority of labour claims, set-off, avoidance issues, payment systems and financial markets, intellectual property matters, pending litigation and arbitral proceedings, third party rights *in rem*, reservation of title, and contracts in respect of immovable property. It was also observed that the prospects for a successful outcome of work in the field were positive, and that modernized and harmonized rules in this regard would reinforce the legal certainty and predictability of international trade law, which would in turn assist in strengthening developing economies and improving their resilience.

44. It was noted that while the EU currently enjoyed a well-developed regime for cross-border insolvency that included specific rules on applicable law, there was commitment to improving that system, and a report on the application of the EIR

[26] Work programme – Proposal by the European Union, A/CN.9/995.

recast was to be presented by the European Commission by 2027. As such, the advancement of work in this area by UNCITRAL, in collaboration with organizations with relevant experience such as HCCH, would be of great benefit and could be expected to serve the purpose of improving the EIR recast in the future. Continued support was expressed for the development of an instrument that would not only promote uniformity, but that would permit rapid progress to be made in reaching consensus on solutions in this area, as well as respecting State sovereignty and providing sufficient flexibility on the implementation of the solutions identified.

45. Several participants from different State delegations to Working Group V (Insolvency Law) expressed support for the project. In addition, there was support for the view that the project that had also been proposed on civil asset-tracing and recovery[27] had links with the applicable law proposal, and that Working Group V, if charged by the Commission with both tasks, had extensive experience in advancing work on multiple projects at the same time.

46. The responses to the online questionnaire[28] indicated general agreement that the lack of uniformity in applicable law in cross-border insolvency created obstacles to the general purpose of insolvency proceedings and that harmonization of the rules governing applicable law would be feasible. The questionnaire responses further indicated strong support that UNCITRAL's global insolvency work should be supplemented with work in the area of applicable law in insolvency proceedings, with a focus on avoidance actions, security rights, rights *in rem*, contracts of employment, set-off, and pending proceedings. However, some responses noted that further discussion would be necessary to ascertain the exact scope of the conflict of law rules and any exceptions thereto.

III. Conclusions

47. The following main conclusions may be drawn from the exploratory work carried out by the UNCITRAL secretariat on the topic and from a consideration of the issues at the Colloquium:

(a) Applicable law in insolvency proceedings was considered to be a topic of growing importance in the current global economy. While in the current cross-border insolvency architecture there had been some guidance provided on applicable law and a more articulated regional instrument was in place, it was felt that there was nonetheless a need for global harmonization on applicable law in insolvency proceedings, based on rapid developments in both the practice and legal framework of international insolvency;

(b) Linked to the previous conclusion, and in light of the current framework for cross-border insolvency, it would be advisable to consider applicable law rules that would be suitable for both liquidation and reorganization;

(c) Consistency with previously adopted UNCITRAL instruments, whether related to insolvency or to other areas of work, such as secured transactions, should be maintained;

(d) Applicable law in insolvency proceedings should consider the treatment of digital assets and consider issues that might arise from the digitalization of financial markets and transactions;

(e) A number of specific issues should be considered for inclusion in the work, such as avoidance actions, security rights, rights *in rem*, contracts of employment, set-off, and pending proceedings.

[27] Work programme – Proposal by the United States of America, A/CN.9/996; Report of the Colloquium on Civil Asset-Tracing and Recovery, A/CN.9/1008.

[28] For the questions contained in the online questionnaire, see above, para.4, footnote 5.

48. In light of the above, the Commission may wish to consider whether to undertake work on the topic and if so, the form, scope and method of such work:

(a) *Form.* The Commission may wish to recall the existence of an extensive set of UNCITRAL texts on insolvency, including three model laws (the MLCBI, the MLIJ and the MLEGI) (including relevant guides to enactment), as well as a comprehensive explanatory text (the UNCITRAL Legislative Guide), the latter of which contained commentary and recommendations on applicable law on insolvency proceedings, while the former texts established a cross-border insolvency architecture with implications for applicable law issues;

(b) *Scope*. The Commission may wish to consider whether it was necessary to limit the scope of any future work on the topic in any manner other than to restrict it to harmonized rules on applicable law in insolvency proceedings;

(c) *Method.* Possible future work could take place in a working group or in the Commission in plenary, or it could be undertaken by the UNCITRAL secretariat with the involvement of experts. The Commission may wish to recall that, at its forty-sixth session, in 2013,[29] it agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (i) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (ii) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (iii) 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 (iv) whether duplication might arise with work being undertaken by other international organizations. The Commission may wish to recall that all legislative texts and most non-legislative texts have been prepared by UNCITRAL either through a working group or at annual sessions of UNCITRAL. Some non-legislative texts, although prepared by the UNCITRAL secretariat, were later subject to review and approval by UNCITRAL, which authorized their publication as a product of its secretariat.

[29] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 303–304.