

Council on General Affairs and Policy – March 2020

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| Document | Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/> | Prel. Doc. 14 of December 2019 |
| Title | Future joint work of UNCITRAL and the HCCH on Insolvency | |
| Author | Permanent Bureau | |
| Agenda item | Item IV-5-b | |
| Mandate(s) | N/A | |
| Objective | To present the background to the cooperation that exists between UNCITRAL and the HCCH in the field of insolvency law and to explore possible future coordination and cooperation on work related to applicable law in insolvency proceedings | |
| Action to be taken | For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/> | |
| Annexes | Extract from the Report of the United Nations Commission on International Trade Law, Fifty-second Session | |
| Related documents | <u>“Information Document on the UNICTRAL draft Legislative Guide on Insolvency and Questionnaire in relation to the Law Applicable to Insolvency Proceeding”, Info. Doc. of November 2003</u> <u>“Report on Cooperation with UNCITRAL on the Law Applicable to Insolvency Proceedings”, Prel. Doc. No 17 of March 2004</u> | |

I. Introduction

1. At the Fifty-second Session of the United Nations Commission on International Trade Law (hereinafter, UNCITRAL), the European Union (hereinafter, the EU) submitted a proposal in support of future work by UNCITRAL on harmonising applicable law in insolvency proceedings (hereinafter, EU Proposal).¹

2. As recorded in the Report of the Fifty-second Session of UNCITRAL (hereinafter, UNCITRAL Report), the EU Proposal pointed out that three UNCITRAL model laws relating to cross-border insolvency did not address choice of law or issues of applicable law, and the divergent approaches in national laws led to inconsistency and lack of predictability in cross-border insolvency cases. The EU Proposal suggests that “the harmonisation of choice-of-law rules in cross-border insolvency cases could significantly improve the coordination of liquidation and rescue of enterprises; promote consistency, certainty and predictability in cross-border cases; and improve and rationalize the content of the relevant choice-of-law rules, with a positive effect on trade and commerce.”² While suggesting that the form of the future instrument be a model law, a stand-alone text or a supplement to the current UNCITRAL Model Law on Cross-Border Insolvency, the EU Proposal noted that “work could utilise the Principles on Choice of Law in International Commercial Contracts of 2015 as a potential model for a soft law instrument”.³

3. UNCITRAL agreed on the importance of the topic. However, given that the subject matter is potentially complex and requires 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 the Commission had not worked recently, UNCITRAL considered it essential to delineate carefully the scope and nature of the work that it could undertake.⁴ It then “requested the Secretariat to organise a colloquium, in cooperation with other relevant international organizations, possibly in conjunction with the fifty-seventh session of Working Group V, with a view to submitting more concrete proposals for consideration by the Commission at its fifty-third session, in 2020.”⁵

4. Given the above developments at UNCITRAL, the mandate and expertise of the Hague Conference on Private International Law (hereinafter, HCCH), and considering past cooperation of the two organisations in the field of insolvency, the Permanent Bureau (hereinafter, PB) presents this document to the Council on General Affairs and Policy (hereinafter, CGAP) with a view to providing background information and to seeking its deliberation regarding possible cooperation between the two organisations in the field of insolvency. For this purpose, section II provides information in relation to earlier cooperation between the two organisations in the field of insolvency, and section III proposes ways forward for the consideration of CGAP.

II. Earlier cooperation between UNCITRAL and the HCCH in the field of insolvency

5. In the course of 2003, UNCITRAL began work to prepare a legislative guide on insolvency law (hereinafter, Legislative Guide), of which it was proposed that a chapter should be devoted to applicable law governing insolvency proceedings. It was felt that failure to provide guidance on these

¹ “Proposal by the European Union – Note of the Secretariat” ([A/CN.9/995](#)).

² Report of the United Nations Commission on International Trade Law, Fifty-second Session ([A/74/17](#)), para. 205 (see Annex I).

³ *Ibid.*

⁴ *Ibid.*, para. 206.

⁵ *Ibid.*

issues would reduce the usefulness of the Legislative Guide to legislators, particularly given the differences that exist in choice-of-law rules. In this regard, UNCITRAL, in September 2003, sought the cooperation of the HCCH with a view to assisting the preparation of commentaries and recommended legislative principles in relation to the law applicable to insolvency proceedings.

6. With a view to facilitating the work and soliciting views on the law applicable to insolvency proceedings, the PB circulated a questionnaire⁶ to its Members in November 2003 enquiring about whether there were specific applicable law rules in national laws, and the principles, scope and object of the law applicable in insolvency proceedings. A compilation of the responses received from 14 Members was sent to the UNCITRAL Secretariat in December 2003.⁷ In the same month, the two Secretariats, with two external HCCH-designated experts, Mr Johan Willem Byvanck (the Netherlands) and Mr Francisco Garcimartín (Spain), and a number of UNCITRAL designated experts, met in Vienna to draft comments and develop recommendations.

7. The work derived from the above group was included in the document entitled “Draft legislative guide on insolvency law – Note by the Secretariat”, which was submitted to UNCITRAL Working Group V (Insolvency Law) for consideration.⁸ Working Group V endorsed the document with several modifications,⁹ and UNCITRAL subsequently approved these suggested modifications at its Thirty-seventh Session.¹⁰ The joint efforts by the HCCH and UNCITRAL on the applicable law in insolvency proceedings are now incorporated in the final version of the Legislative Guide.¹¹

III. Further steps

8. Based on the foregoing, and after informal consultations with the Secretariat of UNCITRAL, the PB will continue to follow the discussions on insolvency law taking place at UNCITRAL. This not only is in line with the mandate and expertise of the HCCH, but it also builds on earlier cooperation between the two organisations in the field of insolvency law. The PB will thus participate in the colloquium to be organised by the UNCITRAL Secretariat, on 15 May 2020, as suggested in the UNCITRAL Report.

The PB invites CGAP to confirm the PB’s mandate to co-operate with the Secretariat of UNCITRAL on this subject matter. In doing so, CGAP may also confirm that if the May 2020 colloquium and UNCITRAL’s fifty-third session later that year support the desirability of legislative action at the international level on the applicable law in insolvency, the PB may establish and take part in a joint UNCITRAL-HCCH Experts’ Group to discuss the nature, scope and content of a possible UNCITRAL-HCCH instrument in the field of applicable law in insolvency. Subject to available resources, and with a view to keeping momentum, such a meeting could take place before CGAP 2021. The membership of such an Experts’ Group would be coordinated by the PB and the Secretariat of UNCITRAL, in close consultation with Members of both organisations. The PB will update CGAP in 2021.

⁶ “Information Document on the UNICTRAL draft Legislative Guide on Insolvency and Questionnaire in relation to the Law Applicable to Insolvency Proceedings”, Info. Doc. of November 2003, available on the HCCH website < www.hcch.net > under “Publications and Studies” then “Publications” and “Joint publications HCCH-UNCITRAL-UNIDROIT”.

⁷ “Responses to the Questionnaire in relation to the Law Applicable to Insolvency Proceedings”, the compilation of the responses is available on the HCCH website < www.hcch.net > under “Publications and Studies” then “Publications” and “Joint publications HCCH-UNCITRAL-UNIDROIT”.

⁸ A/CN.9/WG.V/WP.72, also appearing in the Annex of “Report on Cooperation with UNCITRAL on the Law Applicable to Insolvency Proceedings”, Prel. Doc. No 17 of March 2004, available on the HCCH website < www.hcch.net > under “Governance” then “Council on General Affairs and Policy” then “Archive (2000-2019)” and “Meeting of April 2004”.

⁹ *E.g.*, Section D is suggested to move to Section C of Part two, Chapter I.

¹⁰ Report of the United Nations Commission on International Trade Law, Thirty-seventh session, (A/59/17).

¹¹ Legislative Guide on Insolvency Law is available at < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf >. Relevant parts can be found in Section C of Part two, Chapter I, paras 80-91, and Recommendations 30-34.

ANNEX

Extract from the Report of the United Nations Commission on International Trade Law, Fifty-second Session (A/74/17)

204. The Commission recalled that, at its fifty-first session, the European Union had presented a proposal to dedicate future work to applicable law related to insolvency as an alternative to work on asset tracing and recovery.⁷⁹ It was stressed that the issue of applicable law was an important matter that warranted consideration.

205. The European Union presented a proposal in support of future work by UNCITRAL on harmonizing applicable law in insolvency proceedings ([A/CN.9/995](#)). It was pointed out that the three UNCITRAL model laws relating to cross-border insolvency addressed important areas of cross-border insolvency law, including access, recognition and relief (including enforcement of judgments, coordination, centralization and cooperation in cases of enterprise group insolvency) but they did not address choice of law or issues of applicable law. The divergent approaches in national laws were said to lead to inconsistency and lack of predictability in cross-border insolvency cases. It was suggested that the harmonization of choice-of-law rules in cross-border insolvency cases could significantly improve the coordination of liquidation and rescue of enterprises; promote consistency, certainty and predictability in cross-border cases; and improve and rationalize the content of the relevant choice-of-law rules, with a positive effect on trade and commerce. The future instrument could take the form of a model law, a stand-alone text or a supplement to the current UNCITRAL Model Law on Cross-Border Insolvency. The instrument should complement the existing model laws by providing rules on the scope of the *lex fori concursus*, and the law applicable to avoidance actions, automatic termination of contracts, rights in rem, set-off rights and limitations. The view was expressed that the work could utilize the Principles on Choice of Law in International Commercial Contracts of 2015 as a potential model for a soft law instrument.

206. The Commission agreed on the importance of the topic, which complemented the significant work already done by the Commission in the area of insolvency law, in particular cross-border insolvency. The Commission agreed, however, 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 the Commission had not worked recently. The Commission also agreed that it was essential to delineate carefully the scope and nature of the work that it could undertake. For that purpose, the Commission requested the Secretariat to organize a colloquium, in cooperation with other relevant international organizations, possibly in conjunction with the fifty-seventh session of Working Group V, with a view to submitting more concrete proposals for consideration by the Commission at its fifty-third session, in 2020.

⁷⁹ *Ibid.*, para. 251.