

Title	Private International Law and Insolvency
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Mandate(s)	C&D No 41 of CGAP 2020 C&D No 12 of CGAP 2021
Objective	To report on the cooperation between the PB and the Secretariat of UNCITRAL in the field of PIL and insolvency, as well as the progress made in the ongoing work
Action to be Taken	For Decision <input type="checkbox"/> For Approval <input checked="" type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input checked="" type="checkbox"/>
Annexes	N/A
Related Documents	Prel. Doc. No 14 of December 2019, "Future joint work of UNCITRAL and the HCCH on Insolvency" for the attention of CGAP 2020

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Private International Law and Insolvency

I. Introduction

1. At its 2021 meeting, noting the progress made with respect to the UNCITRAL Project on Applicable Law in Insolvency Proceedings, CGAP reiterated its support for the PB to coordinate and cooperate with the Secretariat of UNCITRAL on this project.¹ In line with this mandate, the Transnational Litigation Team at the PB continued its close cooperation with the UNCITRAL Secretariat and followed the work of UNCITRAL in insolvency where private international law (PIL) issues are involved, both on work related to applicable law in insolvency proceedings and to civil asset tracing and recovery in insolvency proceedings.
2. In this document, the PB reports on its involvement and cooperation with the UNCITRAL Secretariat. For this purpose, Section II reports on the progress and developments on the project of “Applicable law in insolvency proceedings” within UNICTRAL, which was built on earlier and recent cooperation with the HCCH. Section III provides information on the progress and developments on the UNCITRAL project “Civil asset tracing and recovery in insolvency proceedings” to the extent that it is relevant to the work of the HCCH. Section IV proposes ways forward for CGAP’s consideration.

II. Applicable Law in Insolvency Proceedings

A. Adoption of the project and progress made

3. Following the consideration of the proposal submitted by the European Union, UNCITRAL agreed on the importance of harmonising applicable law in insolvency proceedings.² With a view to carefully delineating the scope and nature of the work that it could undertake, UNCITRAL called on its Secretariat to organise a Colloquium on Applicable Law in Insolvency Proceedings, in cooperation with other relevant international organisations (Colloquium on Applicable Law).
4. As endorsed by CGAP in 2020,³ and then orally reported to CGAP at its 2021 meeting, the PB jointly organised the Colloquium on Applicable Law with the Secretariat of UNCITRAL, which took place on 11 December 2020. The PB attended the Colloquium along with its representative, Professor Francisco Garcimartín (Spain). At the Colloquium, the experts looked into the current status of applicable law in insolvency proceedings and the practical implications of applicable law in cross-border insolvency. They also shared views on the law and practice on the applicable law in insolvency proceedings from the perspective of different regions, and exchanged views on possible future work on applicable law in insolvency proceedings.⁴ At its fifty-fourth session in 2021, after considering the reports of both Colloquiums on Applicable Law and on Civil Asset Tracing and Recovery (for the Colloquium on Civil Asset Tracing and Recovery, see para. 9, *infra*), the Commission agreed to refer both topics to Working Group V (Insolvency)).

¹ C&D No 12 of CGAP 2021, available on the HCCH website at < www.hcch.net > under “Governance” then “Council on General Affairs and Policy”.

² For the history of the Project, see Prel. Doc. No 14 of December 2019, “Future joint work of UNCITRAL and the HCCH on Insolvency” for the attention of CGAP 2020, available on the HCCH website at < www.hcch.net > (see path indicated in note 1).

³ C&D No 40 of CGAP 2020, available on the HCCH website at < www.hcch.net > (see path indicated in note 1).

⁴ The report of the Colloquium on Applicable Law in Insolvency Proceedings (Vienna, 11 December 2020) is available at A/CN.9/1060.

B. Recent Cooperation and Developments

5. As mandated by CGAP, the PB continued to closely coordinate and cooperate with the UNCITRAL Secretariat on this project. Given the complexity of the topic and the necessity for high level expertise in this area, the UNCITRAL Secretariat further organised an Experts' Group meeting on the applicable law in insolvency proceedings. In preparation for the meeting, the PB nominated a number of experts, particularly from the Asia Pacific and Latin American regions, while taking into account gender and regional representation balance. At the Experts' Group meeting, which was held online on 15 and 16 September 2021, the PB was represented by Professor Francisco Garcimartín (Spain) and Ms Haemin Lee (Judge from the Republic of Korea, currently seconded to the PB). The experts discussed the nature, scope and content of a possible instrument in the field of applicable law in insolvency.
6. Furthermore, the PB and its representative Ms Lee attended Working Group V's session from 13 to 17 December 2021 online, as an observer. The Working Group agreed to, and followed, a step-by-step approach proposed by the UNCITRAL Secretariat, before deciding the form and direction of the work. Namely, (a) to use recommendations 30–34 and accompanying commentary of the UNCITRAL Legislative Guide on Insolvency Law,⁵ which was originally produced with the cooperation of the HCCH,⁶ as the starting point for its deliberations on the topic; and (b) to focus first on *lex fori concursus* and exceptions thereto in the context of a simple scenario (an insolvency proceeding with respect to a single debtor) and then take up any other issues of applicable law in insolvency proceedings, *i.e.*, those arising from concurrent insolvency proceedings and enterprise group insolvency, at later stages.
7. It was suggested that some of the more complex issues would be subject to a separate study that would need to be undertaken in close cooperation with the HCCH, depending on future considerations by Working Group V.⁷ Regarding the format of the instrument and ways forward, it was suggested that supplementary provisions and commentaries to the existing UNCITRAL model laws could be considered.

III. Civil Asset Tracing and Recovery in Insolvency Proceedings

A. Adoption of the project and progress made

8. At the fifty-second session of UNCITRAL, the United States of America (USA) submitted a proposal for Working Group V to prepare model legislative provisions on civil asset tracing and recovery in insolvency proceedings, by using a toolbox approach.⁸ It was followed by another proposal by the USA at the same session, which called for a colloquium to expand the inventory of asset tracing and recovery tools for both common and civil law jurisdictions, and to delineate the relationship between civil and criminal procedures.⁹ The Commission agreed on the importance of the topic and requested its Secretariat to organise a colloquium, in cooperation with other relevant international organisations, to further clarify and refine various aspects of the Commission's possible work in that area.

⁵ 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.

⁶ For information on the history of earlier cooperation, please see, C&D No 12 of CGAP 2021, available on the HCCH website at < www.hcch.net > under "Governance" then "Council on General Affairs and Policy".

⁷ A note by the Secretariat on applicable law insolvency proceedings (4 October 2021) is available at [A/CN.9/WG.V/WP.176](https://www.uncitral.org/uncitral/uncitral/working_group_v/working_group_v_wp176.html).

⁸ Proposal for future work submitted by the United States of America– Note of the Secretariat is available at [A/CN.9/WG.V/WP.154](https://www.uncitral.org/uncitral/uncitral/working_group_v/working_group_v_wp154.html).

⁹ Proposal for future work submitted by the United States of America– Note of the Secretariat is available at [A/CN.9/996](https://www.uncitral.org/uncitral/uncitral/working_group_v/working_group_v_wp196.html).

9. A Colloquium on Asset Tracing and Recovery was held on 6 December 2019 in Vienna, with a view to examining both criminal and civil law tracing and recovery as well as to collect more information on tools developed for insolvency and for other areas of law, to be submitted for consideration by the Commission at its fifty-third session in 2020. This Colloquium introduced the main legal issues arising from asset tracing and recovery in various legal fields, and discussed the differences and similarities in tools used in different contexts, along with the feasibility and desirability of UNCITRAL's work on this project.¹⁰
10. The PB followed these developments and concluded that the UNCITRAL project on Civil Asset Tracing and Recovery may be of relevance to the work of the HCCH as it is related to the operation of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (1970 Evidence Convention) and the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2019 Judgments Convention). The asset tracing and recovery tools which will be explored in the UNCITRAL project, if not limited to insolvency proceedings, could be a useful complement to the 2019 Judgments Convention in cross-border judgments' enforcement. In addition, the 1970 Evidence Convention could be used as a valuable tool for identifying and tracing debtors and / or assets in civil or commercial cases.
11. UNCITRAL noted the relevance of the 1970 Evidence Convention in this project, and invited the PB to share its views at the above Colloquium.¹¹ Since the scope and utility of the 1970 Evidence Convention for the purpose of asset tracing remain to be delineated, the PB continued to follow the UNCITRAL discussions, so as to avoid overlaps with HCCH relevant instruments, and to provide technical support where relevant.

B. Recent Cooperation and Development

12. As the project was referred to Working Group V (Insolvency), the UNCITRAL Secretariat convened another Experts' Group meeting on civil asset tracing and recovery in insolvency proceedings in September 2021, in which the PB participated as an observer.¹²
13. At its following fifty-ninth session, which the PB followed as an observer, Working Group V expressed support for developing an instrument to provide effective tools in the field of civil asset tracing and recovery, although there were different views as to whether the task should aim to be an educational best practice / legislative guide or if it could aim further.
14. Working Group V carried out a discussion based on the recommendations of the UNCITRAL Legislative Guide on Insolvency Law while exploring the relationship of the ongoing work with the former UNCITRAL Model Laws. It was proposed by some delegates that inter-sessional experts' group meetings should be established in order to expedite the process. Delegations also noted the need to maintain close coordination with the HCCH and UNIDROIT, so as to avoid any overlap or duplication, particularly in relation to the ongoing work of the UNIDROIT Working Group on Best Practices for Effective Enforcement, aimed at providing general practice guidance on domestic judicial, and possibly non-judicial, enforcement, including those related to insolvency.

¹⁰ The Report of the Colloquium on Applicable Law in Insolvency Proceedings (Vienna, 11 December 2020) is available at [A/CN.9/1060](#).

¹¹ The Report of the Colloquium on Civil Asset Tracing and Recovery (Vienna, 6 December 2019) is available at [A/CN.9/1008](#).

¹² A note by the UNCITRAL Secretariat on civil asset tracing and recovery in insolvency proceedings (4 October 2021) is available at [A/CN.9/WG.V/WP.175](#).

IV. Proposal for CGAP

15. Given the above developments, namely, that the envisaged work by UNCITRAL, both on applicable law in insolvency proceedings and on civil asset tracing and recovery in insolvency proceedings, is likely to be based on existing instruments or to create new soft law instruments; having in mind the available resources at the PB and the work programme assigned to the Transnational Litigation Team; and considering the very specialised expertise required on this subject matter; the PB proposes the following conclusions and decisions:

CGAP took note of the cooperation between the PB and the UNCITRAL Secretariat on matters related to applicable law in insolvency proceedings and to civil asset tracing and recovery in insolvency proceedings. CGAP thanked Professor Francisco Garcimartín (Spain) for his generous contributions to the participation of the PB in these projects. CGAP mandates the PB to continue the cooperation with the Secretariat of UNCITRAL on insolvency related projects, upon its request, whenever existing HCCH instruments are of relevance, resources permitting and subject to the availability of *pro bono* contributions by external experts.