

<b>Title</b>	<b>Private International Law Aspects of Restructuring and Insolvency: Update</b>
<b>Document</b>	<b>Prel. Doc. No 6 of January 2024</b>
<b>Author</b>	PB
<b>Agenda Item</b>	Item II.7
<b>Mandate(s)</b>	C&D Nos 10, 11 and 12 of CGAP 2023
<b>Objective</b>	To report on the progress made in the ongoing work of the PB in relation to private international law (PIL) aspects of restructuring and insolvency, including the cooperation between the PB and the Secretariat of UNCITRAL in the field of PIL and insolvency
<b>Action to be Taken</b>	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
<b>Annexes</b>	N/A
<b>Related Documents</b>	Prel. Doc. No 4 of February 2023 for CGAP 2023 – Private International Law and Insolvency: Update

# Private International Law Aspects of Restructuring and Insolvency: Update

## I. Introduction

- 1 At its March 2023 meeting, the Council on General Affairs and Policy (CGAP) of the HCCH reiterated its support for the Permanent Bureau (PB) to cooperate with the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) on matters relating to applicable law in insolvency proceedings, and to civil asset tracing and recovery in insolvency proceedings. Subject to available resources, CGAP encouraged the PB to continue cooperation with the UNCITRAL and International Institute for the Unification of Private Law (UNIDROIT) Secretariats on insolvency-related projects. Subject to available resources, CGAP also mandated the PB to continue to monitor developments with respect to private international law (PIL) issues in insolvency, including issues relating to the treatment of digital transactions and digital assets in insolvency proceedings. The PB will report to CGAP at its 2024 meeting.<sup>1</sup>
- 2 Section II of this document reports on the progress and developments in UNCITRAL Working Group V: Insolvency Law (UNCITRAL WG V), in which the PB participates as an observer. Section III provides information on developments in PIL issues relating to digital transactions and assets and their treatment in insolvency proceedings, noting that recent developments have pointed to the need to consider PIL aspects of restructuring proceedings (or, as termed in some jurisdictions, pre-insolvency proceedings). Section IV provides information about the PIL aspects of restructuring proceedings. Section V proposes ways forward for CGAP's consideration.

## II. Developments in UNCITRAL WG V

- 3 As endorsed by CGAP in 2020,<sup>2</sup> and then orally reported on to CGAP at its 2021 meeting, the PB, on 11 December 2020, jointly organised the Colloquium on Applicable Law in Insolvency Proceedings with the Secretariat of UNCITRAL. The Colloquium examined issues relating to applicable law in insolvency proceedings and the practical implications of applicable law in cross-border insolvency. At its 59<sup>th</sup> session in 2021, after considering the reports of both the above-mentioned Colloquium and the Colloquium on Civil Asset Tracing and Recovery, UNCITRAL agreed to refer both topics to UNCITRAL WG V. Since 2021, the PB has consistently participated as an observer in UNCITRAL WG V, although the collaboration between the HCCH and UNCITRAL on the topic has earlier roots.

### A. Asset Tracing and Recovery in Insolvency Proceedings

- 4 At its 62<sup>nd</sup> session, held from 17 to 20 April 2023, UNCITRAL WG V read through and considered various suggestions to the first draft of a descriptive informational draft text on civil asset tracing and recovery in insolvency proceedings,<sup>3</sup> also noting relevant developments at the HCCH and at UNIDROIT.<sup>4</sup> In relation to a proposed chapter on digital aspects, the WG noted that some digital aspects, such as those related to regulatory regimes, double counting, the use of non-fungible tokens (NFTs) as airdrops, artificial intelligence (AI), Internet of Things (IoT) and fraud prevention aspects, would need to be considered in due course.<sup>5</sup> Standards applicable to admissibility of data

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<sup>1</sup> Conclusions and Decisions (C&D) Nos 10-12 of CGAP 2023 available on the HCCH website at [www.hcch.net](http://www.hcch.net) under "Governance" then "Council on General Affairs and Policy" then "Archive (2000-2023)".

<sup>2</sup> C&D No 40 of CGAP 2020, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 1).

<sup>3</sup> UNCITRAL, Civil asset tracing and recovery tools used in insolvency proceedings, [A/CN.9/WG.V/WP.186](https://www.uncitral.org/uncitral/uncitral/working_group_v/working_group_v_wp_186.html), 6 February 2023.

<sup>4</sup> UNCITRAL, [Report of Working Group V \(Insolvency Law\) on the work of its sixty-second session](https://www.uncitral.org/uncitral/uncitral/working_group_v/working_group_v_report.html) (New York, 17-20 April 2023), A/CN.9/1133, 5 May 2023, paras 12 and 13.

<sup>5</sup> *Ibid.*, para. 14.

as evidence, including as they affected the stages of generation, collection, transmission, storage and use of data, as well as the possibility of verification of authenticity and integrity of data and the requirement of not using doubtful data on the standalone basis for ascertaining the facts were also discussed.<sup>6</sup>

- 5 At its 63<sup>rd</sup> session, held from 11 to 15 December 2023, UNCITRAL WG V discussed the second draft<sup>7</sup> of the descriptive text on civil asset tracing and recovery in insolvency proceedings,<sup>8</sup> as well as a toolkit that had been proposed earlier.

## B. Applicable Law in Insolvency Proceedings

- 6 At its 62<sup>nd</sup> session, UNCITRAL WG V expressed concern about a possibility of confusion and fragmentation arising from the adoption of a different definition of such a key concept as insolvency proceedings in different international forums.<sup>9</sup> UNCITRAL WG V agreed on the importance of avoiding unnecessary inconsistencies, and also heard proposals that the draft text on applicable law in insolvency proceedings<sup>10</sup> should be revised to ensure that it comprehensively addressed the governing law also in the context of cross-border recognition under the UNCITRAL insolvency model laws.<sup>11</sup> Comments were heard on the draft provisions, in particular those in relation to avoidance and secured transactions.<sup>12</sup> UNCITRAL WG V also discussed the interaction of the draft text with payment and settlement systems and regulated financial markets,<sup>13</sup> and ongoing or pending arbitral proceedings and litigation.<sup>14</sup>
- 7 At its 63<sup>rd</sup> session, UNCITRAL WG V discussed a revised draft of legislative provisions and accompanying commentary on the topic.<sup>15</sup>

## III. Developments Relating to the Treatment of Digital Transactions and Assets in Insolvency Proceedings

- 8 In line with the recommendations of experts speaking at the inaugural CODIFI Conference, held from 12 to 16 September 2022, and in line with the mandate that CGAP gave the PB pursuant to the outcome of the CODIFI Conference, the PB continued to monitor issues concerning the treatment of digital transactions and assets in insolvency proceedings. These issues include:
- a. qualification of the digital assets and choosing the applicable law;
  - b. whether or not insolvency involving distributed ledger technology or crypto-assets should be addressed with ordinary insolvency rules or with specialised guidance;
  - c. third-party effects of insolvency of digital asset service providers; and

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<sup>6</sup> *Ibid.*, para. 15.

<sup>7</sup> UNCITRAL, Civil asset tracing and recovery in insolvency proceedings: Note by the Secretariat, [A/CN.9/WG.V/WP.189](#), 28 August 2023.

<sup>8</sup> UNCITRAL, Annotated provisional agenda, [A/CN.9/WG.V/WP.188](#), 19 September 2023, para. 18. At the time of writing of this Prel. Doc., the Report of the 63<sup>rd</sup> session of UNCITRAL WG V had not been finalised.

<sup>9</sup> UNCITRAL, *supra* note 4, para. 24.

<sup>10</sup> UNCITRAL, Applicable law in insolvency proceedings: Note by the Secretariat, [A/CN.9/WG.V/WP.187](#), 7 February 2023.

<sup>11</sup> UNCITRAL, *supra* note 4, para. 27.

<sup>12</sup> UNCITRAL, *supra* note 4, paras 29-41.

<sup>13</sup> UNCITRAL, *supra* note 4, paras 43-46.

<sup>14</sup> UNCITRAL, *supra* note 4, paras 47-53.

<sup>15</sup> UNCITRAL, *supra* note 8, para. 23, referring to UNCITRAL, Applicable law in insolvency proceedings: Note by the Secretariat, [A/CN.9/WG.V/WP.190](#), 4 September 2023. At the time of writing of this Prel. Doc., the Report of the 63<sup>rd</sup> session of UNCITRAL WG V had not been finalised.

- d. the mechanisms of tracing and recovery of digital assets and techniques of injunctive relief, particularly when dealing with special features of digital assets such as pseudonymous users and the valuation of “unique” assets.<sup>16</sup>

- 9 In the documents prepared by the UNCITRAL Secretariat ahead of the 63<sup>rd</sup> session of UNCITRAL WG V, a separate section relating to digital assets was inserted for consideration. The section noted that some digital assets may be capable of being part of the insolvency estate, and that the “UNCITRAL texts on applicable law in insolvency proceedings defer issues related to the composition and scope of the insolvency estate to the *lex fori concursus*”.<sup>17</sup> The Note by the UNCITRAL Secretariat also stated that, “[w]hile many practical considerations for assessing feasibility and desirability of tracing and recovering digital assets for the benefit of all the creditors in insolvency proceedings will be the same as for other assets, tracing and recovering digital assets, because of inherent features of those assets and the characteristics of the environment where they circulate, raise distinct issues”.<sup>18</sup> At its 63<sup>rd</sup> session, UNCITRAL WG V discussed this Note, and agreed on seeking a mandate from the UNCITRAL Commission for an expanded mandate to look at the intersection of digital assets with insolvency.
- 10 In order to avoid overlapping with UNCITRAL WG V’s work on the intersection of digital assets with asset tracing and recovery, and applicable law, in insolvency proceedings, the PB continues to coordinate closely with the UNCITRAL Secretariat, and to contribute as an observer to UNCITRAL WG V.

#### IV. PIL Aspects of Restructuring

- 11 In consultations with the UNCITRAL Secretariat, the PB and the UNCITRAL Secretariat noted the growing importance of restructuring proceedings (in some jurisdictions, termed “pre-insolvency proceedings”). The UNCITRAL Secretariat confirmed to the PB that UNCITRAL WG V currently excludes any consideration of matters related to restructuring proceedings.
- 12 Recent developments due to global financial crises and the effects of the pandemic have led to domestic policy makers and international standard-setting institutions searching for novel rescue procedures to save viable but financially distressed businesses. There is also a greater recognition of the need for formal debt resolution procedures as an alternative to liquidation. Restructuring or pre-insolvency proceedings are “restructuring proceedings that corporate debtors can access before they become insolvent with the aim of avoiding insolvency”.<sup>19</sup> Such proceedings “entail a surgical debt restructuring and an early intervention at the first signs of distress, concentrating on financial creditors rather than creditors of the operating business, permitting no, or limited, court involvement, avoiding stigma and reputational damage”.<sup>20</sup>
- 13 It has been suggested that work on the PIL aspects of restructuring, in particular in relation to applicable law and jurisdiction, may be timely. There have been some considerations that point to the need for a different approach to applicable law for restructuring and pre-insolvency proceedings than insolvency proceedings,<sup>21</sup> in particular since the contemplated outcome of restructuring and pre-insolvency proceedings is a “reorganisation” rather than a liquidation of assets and distribution

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<sup>16</sup> “Private International Law and Insolvency: Update”, Prel. Doc. No 4 of February 2023 for CGAP 2023, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 1).

<sup>17</sup> UNCITRAL *supra* note 8, para. 236.

<sup>18</sup> UNCITRAL, *ibid.*, para. 240, citations omitted.

<sup>19</sup> I. Mevorach and A. Walters, “[The Characterization of Pre-Insolvency Proceedings in Private International Law](#)”, (2020) 21 *Eur. Bus. Org. Law Rev.* 855, p. 858.

<sup>20</sup> *Ibid.*

<sup>21</sup> For example, that restructuring or pre-insolvency proceedings would be opened without any prior insolvency test, and that they differ from full insolvency proceedings, see generally European Commission, [Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States’ relevant provisions and practices](#), May 2014.

of proceeds among creditors.<sup>22</sup> Other considerations that may lead to an applicable law analysis for restructuring proceedings that differ from insolvency proceedings include the coordination problems and holdout risks that may occur in traditional out-of-court workouts,<sup>23</sup> the narrow tranche of creditors that restructuring targets<sup>24</sup> (financial creditors rather than creditors of operating business),<sup>25</sup> and thus a possible issue relating to the criterion of collectivity.<sup>26</sup>

14 A recent trend was noted in relation to a hybrid of pre-insolvency or restructuring proceedings and a formal rehabilitation procedure, frequently referred to as a “re-organisation procedure”. This procedure, which found its roots in the United States Chapter 11 Bankruptcy Code,<sup>27</sup> allows a range of outcomes that range from skinny financial restructurings, to wholesale reorganisations and asset sales followed by a distribution.<sup>28</sup> A number of jurisdictions, including the European Union, Singapore and the United Kingdom, have amended their restructuring frameworks to implement restructuring mechanisms similar to that of the United States Chapter 11 Bankruptcy Code.<sup>29</sup>

15 There have been some proposals that applicable law questions need to be considered in light of the policy and macroeconomic considerations that surround restructuring and pre-insolvency proceedings, since pre-insolvency proceedings could arguably count as a *de facto* private resolution, meaning that they may fall within the framework of contractual workouts.<sup>30</sup> However, there are questions that arise in relation to the need for the universal recognition of restructuring proceedings, and the consequences that collectivising restructuring proceedings may run the risk of overriding the private autonomy of contract debtors and legitimate creditor expectations with respect to dispute resolution forum and governing law in restructuring proceedings.<sup>31</sup>

## V. Proposals for CGAP

16 Given the report above, and bearing in mind the available resources, the PB proposes the following C&Ds:

- CGAP welcomed the cooperation between the PB and the UNCITRAL Secretariat on matters relating to applicable law in insolvency proceedings, and to civil asset tracing and recovery in insolvency proceedings, and mandated the PB to continue contributing to UNCITRAL’s work on this topic. CGAP thanked Professor Francisco Garcimartín for his involvement, complementing the participation of the PB in these projects.
- Subject to available resources, CGAP encouraged the PB to continue cooperation with the UNCITRAL and UNIDROIT Secretariats on insolvency-related projects.
- Subject to available resources, CGAP also mandated the PB to continue to monitor developments with respect to PIL issues in insolvency and restructuring, including issues relating to the treatment of digital transactions and digital assets in insolvency and restructuring proceedings. The PB will report to CGAP at its 2025 meeting.

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<sup>22</sup> See, for an example of pre-insolvency arrangements as opposed to insolvency proceedings in Belgium, M. Vanmeenen, “Pre-Insolvency Arrangements: The Belgian Experience”, in R. Parry and P. Omar (eds.), [Reimagining Rescue](#), (2016: INSOL Europe) pp. 161-174 at p. 163.

<sup>23</sup> U.S. Das, M.G. Papaioannou and C. Trebesch, “[Restructuring Sovereign Debt: Lessons from Recent History](#)”, August 2012, p. 8, 20.

<sup>24</sup> H. Eidenmüller, “What is an insolvency proceeding?”, [2018] 92 Am. Bank. L.J. 53, pp. 54, 56.

<sup>25</sup> I. Mevorach and A. Walters, *supra* note 19, pp. 858, 864.

<sup>26</sup> *Ibid.*, pp. 876-881.

<sup>27</sup> *Ibid.*, p. 858.

<sup>28</sup> A. Gurrea-Martínez, “[The Future of Reorganization Procedures in the Era of Pre-insolvency Law](#)”, (2020) 21 Eur. Bus. Org. L.R. 829 at pp. 834-835

<sup>29</sup> *Ibid.*

<sup>30</sup> I. Mevorach and A. Walters, *supra* note 8, p. 874.

<sup>31</sup> H. Eidenmüller, *supra* note 24, pp. 67-68.