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Work programme

Proposal by the European Union

Note by the Secretariat

The European Union has submitted to the Secretariat a proposal in support of future work by UNCITRAL on harmonizing applicable law in insolvency proceedings. The English, French and Spanish versions of that proposal were submitted to the Secretariat on 26 April 2019. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.



Annex

FUTURE WORK OF UNCITRAL – INSOLVENCY LAW

European Union Proposal on harmonizing applicable law in insolvency proceedings

1. The need for a project on applicable law in insolvency proceedings

The topic of applicable law was already discussed by UNCITRAL Working Group V at its 44th session in December 2013, among several other topics for future work. In paragraph 30 of the report of that session,¹ choice of law was retained as a topic which should be addressed with priority.

The proposal, if adopted, would remedy a perceived gap in the present two (and soon to be three) UNCITRAL Model laws relating to cross-order insolvency. These Model laws already address important areas of cross-border insolvency law including access, recognition, and relief (including enforcement of judgments, coordination, centralization and cooperation in cases of enterprise groups insolvency) but they do not address choice of law, or applicable law issues. The divergent approaches in national laws lead to inconsistency and lack of predictability in cross-border insolvency cases.

In view of the European Union, a harmonized approach to choice of law issues in cross-border insolvency cases has the potential to significantly improve the coordination of liquidation and rescue of cross-border enterprises. **Harmonization of choice of law rules in cross-border insolvency cases would result in increased consistency, certainty, and predictability and improve and rationalize the content of the relevant choice of law rules which would consequently have a positive effect on trade and commerce.**

2. Form of the instrument

While Working Group V of UNCITRAL is one of the most appropriate international bodies to take up the development of such Model Law, cooperation and coordination with other international and regional expert organizations, such as The Hague Conference on Private International Law and with the European Union, would be welcomed.²

The form of the future instrument could be that of a Model Law, either as a stand-alone text or as a supplement to the current Model Law on cross-border insolvency. It should be reminded that UNCITRAL already discussed a proposal by the *Union Internationale des Avocats* on a possible international convention in the field of international insolvency law, which was to cover applicable law as well, making a potential international instrument a *convention triple*. The European Union also recalls that the direction of travel in the Working Group V has been to prefer new stand-alone provisions, even though this means that the interaction between the different model laws may not always be as smooth as it could be for those legislating to implement them. It is noted, however, that the Working Group V Secretariat has agreed previously to address this point by commissioning a document the purpose of which is to explain how the instruments can be implemented consistently together, as an aid to legislators. A similar approach could be adopted in this instance.

3. Ratione materiae of the proposed rules

Nearly two decades of positive experience surrounding the European Insolvency Regulation,³ imply that the model rules on applicable law could draw inspiration, for

¹ UNCITRAL document number: A/CN.9/798, <http://undocs.org/en/A/CN.9/798> (paras. 24 and 30).

² UNCITRAL document number: A/CN.9/WG.V/WP.117 (para. 16).

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02015R0848-20180726>.

instance, from Articles 7 to 18 of that Regulation. However, an open stance should be kept with regard to other concepts, in particular the ones from other successful national or international legal instruments, while taking into account recent developments in the field of insolvency and relevant provisions of the existing UNCITRAL Legislative Guide on Insolvency Law.

In terms of subject matter, the rules complementing the existing model laws could cover issues like:

- Minimum scope of the *lex fori concursus*
- Applicable law to avoidance actions
- Applicable law to provisions on automatic termination of contracts (or on provisions prohibiting “insolvency termination clauses”)
- Applicable law to rights *in rem*
- Applicable law to set-off rights and limitations.

This list is non-exhaustive and it shall ultimately be up to UNCITRAL to identify the areas or situations that need special attention and are ripe for regulation.

In accordance with the principle of “modified universalism” which has guided the relevant UNCITRAL model laws and the European Insolvency Regulation, the prevailing applicable law in matters relating to insolvency should be the law of the opening of the insolvency proceedings (i.e. the law of the centre of main interest of the debtor – COMI). However, due to widely differing national substantive laws, it is not practical to introduce insolvency proceedings with universal scope. The application without exception of the law of the State of the opening of proceedings would therefore frequently lead to difficulties. Notorious examples of such difficulties are, for instance, widely differing national laws on security interests or completely different national preferential rights enjoyed by some creditors in insolvency proceedings. The working group could usefully explore those complex issues, even if they seem difficult to solve at a first glance.

Against that background, **several exceptions** would need to be foreseen, for example in respect of rights *in rem*. The topics that could be addressed are applicable law for ranking unsecured claims or choice of law for intellectual property or other intangible property rights. Those issues have been raised in many cross-border insolvency cases and serious problems in the consistency and predictability of approaches persist. It is also necessary to reflect on whether special rules need to be made with respect to labour contracts. The question whether financial contracts should be excluded from the Model Law or not, needs to be carefully addressed as well.

However, when regulating the applicable law in international insolvency law, the issue of forum shopping should always be kept in mind. Despite the fact that the “*lex fori concursus*” principle generally leaves little leeway for forum shopping, the more exceptions of this principle are foreseen, the more opportunities are given to debtors to transfer their assets or judicial proceedings from one State to another in order for them to obtain a more favourable legal position to the detriment of their creditors.

In the light of all these considerations the European Union supported by the EU Member States which are members of UNCITRAL proposes that Working Group V should resume discussions on this matter with a view that the UNCITRAL Commission grants a mandate to Working Group V to begin exploration of this topic, so that work could proceed alongside work with the other ongoing issues, since the current projects on enterprise groups and duties of directors have been substantively concluded.