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| Title | Private International Law and Insolvency: Update |
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| Author | PB |
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| Mandate(s) | C&D No 12 of CGAP 2021 C&D Nos 8 and 9 of CGAP 2022 |
| Objective | To report on the progress made in the ongoing work of the PB, as well as the cooperation between the PB and the Secretariat of UNCITRAL in the field of PIL and insolvency |
| Action to be Taken | <div>For Decision <input checked="" type="checkbox"/></div> <div>For Approval <input type="checkbox"/></div> <div>For Discussion <input type="checkbox"/></div> <div>For Action / Completion <input type="checkbox"/></div> <div>For Information <input type="checkbox"/></div> |
| Annexes | N/A |
| Related Documents | Prel. Doc. No 6 of December 2021 for CGAP 2022 |

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Private International Law and Insolvency: Update

I. Introduction

- 1 At its March 2022 meeting, the Council on General Affairs and Policy of the HCCH (CGAP) reiterated its support for the Permanent Bureau (PB) to coordinate and cooperate with the Secretariat of 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 also encouraged the PB to continue cooperation with the UNCITRAL and UNIDROIT Secretariats on insolvency related projects where existing HCCH instruments are of relevance. To support this cooperation, CGAP invited *pro bono* contributions by external experts to assist the PB.¹ In line with this mandate, 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 fulfilment of Conclusion and Decision (C&D) No 33 and following CGAP's mandate in March 2022,² the inaugural HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI) was successfully held online from 12 to 16 September 2022. Within the CODIFI Conference discussions on existing HCCH instruments and emerging matters raised by the digital economy, experts suggested further study of PIL issues in relation to digital transactions and digital assets, including their relevance to insolvency proceedings. Following on the outcomes of the CODIFI Conference, this Prel. Doc. also addresses the connections between insolvency and digital transactions and assets, and suggests possible topics and areas for future work. The report of the CODIFI Conference is provided as Annex I of Prel. Doc. No 3A for the attention of the 2023 CGAP meeting.³
- 3 Section II 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 on PIL issues relating to digital transactions and assets and their treatment in insolvency proceedings, including the outcomes of the CODIFI Conference. Section IV proposes ways forward for CGAP's consideration.

II. Developments in UNCITRAL WG V

- 4 As endorsed by CGAP in 2020,⁴ and then orally reported to CGAP at its 2021 meeting, the PB jointly organised the Colloquium on Applicable Law in Insolvency Proceedings with the Secretariat of UNCITRAL, which took place on 11 December 2020. The Colloquium examined issues relating to applicable law in insolvency proceedings and the practical implications of applicable law in cross-border insolvency. At its 54th Session in 2021, after considering the reports of both Colloquiums on Applicable Law and on Civil Asset Tracing and Recovery, UNCITRAL agreed to refer both topics to UNCITRAL WG V.

¹ Conclusions and Decisions (C&D) Nos 8 and 9 of CGAP 2022 available on the HCCH website at www.hcch.net under "Governance" then "Council on General Affairs and Policy" then "Archive (2000-2022)".

² C&D No 33 of CGAP 2022; see also C&D No 38 of CGAP 2021, available on the HCCH website www.hcch.net (see path indicated in note 1).

³ "Digital Economy and the HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI Conference): Report", Prel. Doc. No 3A of January 2023 for the attention of CGAP 2023, available on the HCCH website at www.hcch.net under "Governance" then "Council on General Affairs and Policy".

⁴ C&D No 40 of CGAP 2020, available on the HCCH website at www.hcch.net (see path indicated in note 1).

A. Applicable Law in Insolvency Proceedings

- 5 UNCITRAL WG V recently considered the role of PIL within its project on applicable law in insolvency proceedings. In its Note of the 59th Session discussing the possible scope of the project, the UNCITRAL Secretariat wrote that “rules for localisation of assets, law applicable to the rights and claims existing at the time of the commencement of insolvency proceedings [...] or other rules of private international law” may be outside the scope of UNCITRAL WG V’s project, which is focused on recommendations 31 to 34 of the UNCITRAL Legislative Guide on Insolvency Law.⁵ Further, it was noted that, depending on the WG’s decision on the scope of the project, these matters could “become the subject of a separate study that would need to be undertaken in close cooperation with the Hague Conference on Private International Law”.⁶
- 6 In its commentary on recommendation 31, “Law applicable in insolvency proceedings: *lex fori concursus*”, the Secretariat suggested that “law” generally refers to a State’s substantive law and not its PIL rules.⁷ In addition, the relevance of PIL was also raised in discussions on the form of instrument to be prepared by the WG. While “views differed on the form of an instrument to be prepared on the topic”, one supported position was “[p]reparing an annex or supplement to existing UNCITRAL cross-border insolvency model laws ... because it was considered that an instrument to be prepared on the topic would have a private international law rather than a substantive domestic insolvency law nature”.⁸
- 7 In the 60th Session of UNCITRAL WG V, UNCITRAL reported that “[d]ifferent views were expressed on whether [PIL] rules were also intended to be captured” within the meaning of *lex fori concursus*. “The prevailing view was that *renvoi* should be excluded” but additional “[e]xamples of when PIL rules might nevertheless apply in the insolvency proceedings were provided, including with respect to claims, set-off and labour contracts.”⁹ Consequently, general PIL matters have been set aside from UNCITRAL WG V’s initial examination of applicable law in insolvency proceedings, as the WG focuses its project on targeted applicable law rules in insolvency supplementing existing UNCITRAL model laws.
- 8 In its 61st Session, UNCITRAL WG V discussed the inclusion of a provision in the draft instrument that the instrument to be prepared would not determine the law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings. That provision would emphasise that the law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings would remain to be determined by the PIL rules of the State in which insolvency proceedings are commenced, as contemplated in recommendation 30 of the UNCITRAL Legislative Guide on Insolvency Law.¹⁰

B. Asset Tracing and Recovery in Insolvency Proceedings

- 9 UNCITRAL WG V has discussed various issues arising from cross-border insolvency in relation to digital transactions and assets in the context of the second project it is currently working on, namely Asset-tracing and Recovery. In particular, UNCITRAL WG V discussed that the *lex fori concursus* should apply to the treatment of digital assets, intellectual property (IP) rights

⁵ UNCITRAL Working Group V (Insolvency Law), Secretariat Note of the Fifty-ninth Session, A/CN.9/WG.V/WP.176, para. 2.

⁶ *Ibid.*

⁷ *Ibid.*, para. 16.

⁸ UNCITRAL Report of Working Group V (Insolvency Law) on the work of its Fifty-ninth Session (Vienna, 13-17 December 2021), A/CN.9/1088, paras 92-93.

⁹ UNCITRAL Report of Working Group V (Insolvency Law) on the work of its Sixtieth Session (New York, 18-21 April 2022), A/CN.9/1094, para. 70.

¹⁰ A/CN.9/1126, para. 60 (forthcoming). UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two (2004), p. 72, available from https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.

and licences as part of the debtor's insolvency estate. UNCITRAL WG V noted that the UNCITRAL Legislative Guide on Insolvency Law specifically refers to IP rights when describing "intangible assets" constituting the insolvency estate, though it does not contain any reference to "digital assets".¹¹ The UNCITRAL Secretariat suggested that the WG may wish to consider that digital assets would fall under the same category and should receive the same treatment as IP rights.¹² At its 61st Session, UNCITRAL WG V agreed that no exception to the *lex fori concursus* with respect to the treatment of IP rights and licences in insolvency proceedings would be required.¹³ In relation to digital assets, UNCITRAL WG V took note of domestic, regional and international developments with respect to regulation of digital assets, including in UNIDROIT and the Organisation for Economic Co-operation and Development (OECD). UNCITRAL WG V agreed to wait for the results of the work of UNIDROIT before the final determination on this point is made.¹⁴

- 10 The project on legal issues arising from civil asset tracing and recovery in insolvency proceedings also considered the treatment of digital transactions and assets in insolvency. At the 59th Session of UNCITRAL WG V, "complexities arising from tracing financial assets and digital assets were in particular noted".¹⁵ At the 61st Session of UNCITRAL WG V, specific issues arising from tracing and recovering digital assets were discussed, in particular that "not all digital platforms were subject to regulation; where they were, platform operators tended to comply with disclosure obligations. It was noted, however, that many jurisdictions lacked standards for operation of digital platforms, and that private wallets raised additional challenges for asset tracing and recovery".¹⁶ The WG agreed that consideration of those issues should await the results of work in other forums.¹⁷

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

- 11 The volatility of digital assets based on distributed ledger technology (DLT) has raised concerns regarding the need for legal certainty and predictability in these markets. Most recently, in November 2022, the collapse and subsequent insolvency of FTX, one of the world's then-leading crypto exchanges, resulted in widespread ramifications that triggered other cryptocurrency exchanges to suspend withdrawals amidst further possible bankruptcies.¹⁸ Other failures of products include "stablecoins", such as TerraUSD (UST) which was linked to its sister token Luna. These tokens were designed to maintain value against price fluctuations but drew mainstream attention when automated valuation algorithms failed to hold their peg against the US dollar and token prices consequently collapsed.¹⁹ These assets dropped as much as 99% in value, leading to a chain of bankruptcies and ripple effects in retail investor

¹¹ UNCITRAL Working Group V (Insolvency Law), Secretariat Note of the Sixtieth Session, A/CN.9/WG.V/WP.179, para. 19.

¹² *Ibid.*

¹³ A/CN.9/1126, para. 38.

¹⁴ A/CN.9/1126, para. 39.

¹⁵ A/CN.9/1088, para. 32.

¹⁶ A/CN.9/1126, para. 22.

¹⁷ *Ibid.*

¹⁸ M. Sigalos (November 2022), "Sam Bankman-Fried Steps Down as FTX CEO as his Crypto Exchange Files for Bankruptcy", CNBC, available at: <https://www.cnbc.com/2022/11/11/sam-bankman-frieds-cryptocurrency-exchange-ftx-files-for-bankruptcy.html>. See also <https://web3isgoinggreat.com/>: Entities that had ceased customer withdrawal of funds and other related services following the collapse of FTX include: BlockFi, the Hong Kong-based cryptocurrency exchange AAX, Huobi Exchange, the crypto-lending firm SALT, the Australian crypto exchange Digital Surge, crypto-lending service Genesis Global Trading, the cryptocurrency platform Gemini and French crypto broker Coinhouse.

¹⁹ A. John, E. Howcraft and H. Lang (May 2022), "Collapsed stablecoin TerraUSD announces recovery plan as token flounders", Reuters, <https://www.reuters.com/technology/dollar-pegged-stablecoin-terrausd-falls-30-cents-2022-05-11/>. See also: A. Briola, D. Vidal-Tomás, Y. Wang, T. Aste, "Anatomy of a Stablecoin's Failure: The Terra-Luna Case" available at SSRN: <https://ssrn.com/abstract=4184502>.

portfolios and cryptocurrency-focused hedge funds.²⁰ The cross-border nature of these insolvency proceedings inevitably raise many unresolved PIL questions.

12 At the CODIFI Conference, expert discussions highlighted a number of cross-border issues concerning the treatment of digital transactions and assets. These issues are pertinent in insolvencies of businesses, as described above, and in insolvency proceedings more generally, and may include PIL considerations. Experts noted that the challenges with cross-border dimensions include:

- qualification of the digital assets and choosing the applicable law for the purposes of insolvency;²¹
- whether or not insolvency involving DLT or crypto-assets should be addressed with ordinary insolvency rules or with specialised guidance;²²
- third-party effects of insolvency of digital asset service providers, requiring consideration of consumer protection and insolvency matters;²³ and
- 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.²⁴

13 In light of developments relating to digital assets and the conclusions of experts at the CODIFI Conference as summarised in this Section, subject to available resources, CGAP is invited to consider mandating the PB to monitor developments with respect to PIL issues in insolvency, including issues relating to the treatment of digital transactions and digital assets in insolvency proceedings.

IV. Proposal for CGAP

14 Given the expert recommendations of the CODIFI Conference, bearing in mind that the work by UNCITRAL is likely to continue to be based on existing instruments or to create new soft law instruments, and having in mind the available resources at the PB and the work programme assigned to the International Commercial, Digital and Financial Law Team, the PB proposes the following C&D:

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. CGAP thanked Professor Francisco Garcimartín for his involvement, complementing the participation of the PB in these projects.

²⁰ L. Wintermeyer (May 2022), “From Hero to Zero: How Terra was Toppled in Crypto’s Darkest Hour”, *Forbes Digital Assets*, available at: <https://www.forbes.com/sites/lawrencewintermeyer/2022/05/25/from-hero-to-zero-how-terra-was-toppled-in-cryptos-darkest-hour/>. See also: A. Kharpal (June 2022), “Crypto hedge fund Three Arrows Capital plunges into liquidation as market crash takes toll”, *CNBC*, available at: <https://www.cnbc.com/2022/06/29/crypto-hedge-fund-three-arrows-capital-plunges-into-liquidation.html>; S. Patel, S. Cruise and T. Wilson (July 2022), “Crypto Lender Voyager Digital Files for Bankruptcy”, *Reuters*, available at: <https://www.reuters.com/technology/crypto-lender-voyager-files-bankruptcy-2022-07-06/>; H. Lang (July 2022), “Crypto Lender Celsius Network Reveals \$1.19b Hole in Bankruptcy Filing”, *Reuters*, available at: <https://www.reuters.com/business/finance/crypto-lender-celsius-network-reveals-119-billion-hole-bankruptcy-filing-2022-07-14/>.

²¹ CODIFI, M. Haentjens and J. Estrella Faria, “Digital Economy Frameworks Closing: Concurrent Design Facility”, 16 September 2022.

²² CODIFI, F. Heindler, “PIL & DLT: What Challenges Lie Ahead?”, 15 September 2022.

²³ CODIFI, K. Low, “Digital Economy Frameworks Closing: Concurrent Design Facility”, 16 September 2022.

²⁴ A. Hinkes, H. Liu, and C. Reyes, “Digital Economy Relationships/ Digital Assets Remedies”, 15 September 2022.

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, 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.