

DOCUMENT D'INFORMATION
ET QUESTIONNAIRE

INFORMATION DOCUMENT
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novembre / November 2003



**DOCUMENT D'INFORMATION RELATIF AU
PROJET DE GUIDE LÉGISLATIF DE LA CNUDCI SUR LE DROIT DE L'INSOLVABILITÉ ET
QUESTIONNAIRE RELATIF À
LA LOI APPLICABLE EN MATIÈRE DE PROCÉDURES D'INSOLVABILITÉ**

établi par Philippe Lortie
Premier Secrétaire

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**INFORMATION DOCUMENT ON THE UNCITRAL DRAFT LEGISLATIVE GUIDE
ON INSOLVENCY AND QUESTIONNAIRE IN RELATION TO THE
LAW APPLICABLE TO INSOLVENCY PROCEEDINGS**

drawn up by Philippe Lortie
First Secretary

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I - BACKGROUND INFORMATION ON THE UNCITRAL DRAFT LEGISLATIVE GUIDE ON INSOLVENCY

The purpose of the Guide is to assist in the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. It is intended to be used as a reference by national authorities and legislative bodies when preparing new laws or reviewing existing laws and regulations. The advice provided in the Guide aims at achieving a balance between the need to address the debtor's financial difficulty as quickly and efficiently as possible with the interests of the various parties directly concerned with that financial difficulty, principally creditors and other parties with a stake in the debtor's business, as well as with public policy concerns. The Guide discusses a number of issues central to the design of an effective and efficient insolvency law, which despite numerous differences of policy and legislative treatment, are recognized in many legal systems. It focuses on insolvency proceedings with an emphasis on reorganization, but also discusses the increasing use and importance of restructuring negotiations entered into voluntarily between a debtor and its creditors. In addition to addressing the requirements of domestic insolvency laws, the Guide includes the text and Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

The Guide does not provide a single set of model solutions to address the issues central to an effective and efficient insolvency law, but it assists the reader to evaluate different approaches available and to choose the one most suitable in the national or local context. The first section of each chapter of the Guide contains a commentary identifying the key issues for consideration and discussing and analysing the various approaches adopted by insolvency laws. The second part of each chapter contains a set of recommended legislative principles. These recommendations are intended to assist in the establishment of a legislative framework for insolvency that is both efficient and effective and reflects modern developments and trends in the area of insolvency. The user is advised to read the legislative recommendations together with the commentary, which provides detailed background information to enhance understanding of the legislative recommendations, as well as a discussion of issues not included as recommendations.¹ In view of the key importance of secured creditors to insolvency proceedings and the policy considerations associated with their treatment under an insolvency law, the user of this Guide is also encouraged to consider the UNCITRAL Legislative Guide on Secured Transactions.

The recommendations included in the Guide deal with core issues that it is important to address in legislation specifically concerned with insolvency. They do not deal with other areas of law, which, as discussed throughout the Guide, have an impact on both the design of an insolvency law and insolvency proceedings commenced under that law. Moreover, the successful implementation of an insolvency regime requires various measures beyond the establishment of an appropriate legislative framework, especially an adequate institutional infrastructure, organizational capacity, technical professional expertise, and appropriate human and financial resources. Although these matters are discussed in the commentary, they are generally not addressed in the legislative recommendations, except where they relate to the insolvency professional appointed to administer the insolvency estate.

¹ Please note that at this stage the part of the Draft Guide dealing with the law applicable is not yet accompanied by commentaries.

II – QUESTIONNAIRE IN RELATION TO THE LAW APPLICABLE TO INSOLVENCY PROCEEDINGS

Part I – Provision of specific applicable law rules

1) Does the law of your country provide for applicable law rules in relation to insolvency? Please respond by YES or NO.

2) If you have replied YES to Question 1), please specify if these rules are found in the insolvency legislation or, for example, in other norms of a more general nature or the common law.

Part II – Principles, scope and object of the law applicable in insolvency proceedings

3) Does the insolvency law in your country abide to the following general rule on conflict of laws: the law of the country of the opening of the insolvency proceedings should be applicable (*i.e. lex concursus*)? Please respond by YES or NO. If NO, please explain. See Part III below for exceptions to the general rule.

4) If you have replied YES to Question 3), please specify the connecting factors used to determine the competent jurisdiction (*i.e.* where the debtor is habitually resident, e.g. the jurisdiction: where it has its statutory seat; under whose law it is incorporated or formed; where it has its central administration; where it has its principal place of business; etc.).

5) If you have replied YES to Question 3), please confirm / explain if the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.

6) If you have replied YES to Question 3), please confirm / explain if the *lex concursus* governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

7) Does the insolvency law in your country provide for exceptional conflict of laws rules in relation to insolvency proceedings involving specific types of debtors such as, for example, credit institutions, insurance companies. Please respond by YES or NO. If YES, please specify.

8) If you have replied YES to Question 3), please indicate if the *lex concursus* rule is valid both for main proceedings and for secondary proceedings in your country within the meaning of the *UNCITRAL Model Law on Cross-border Insolvency*. Please respond by YES or NO. If NO please explain.

9) The 30 September 2003 version of Legislative Provision No 179 of the UNCITRAL Draft Legislative Guide on Insolvency Law (*text available only in English*) provides that:

“(179) The insolvency law should provide [that the law] of the place where insolvency proceedings are commenced should apply to all aspects of the conduct, administration and conclusion of those insolvency proceedings, including:

- (a) eligibility and commencement criteria;
- (b) creation and scope of the insolvency estate;
- (c) treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;
- (d) costs and expenses;

- (e) proposal, approval, confirmation and implementation of a plan of reorganization;
- (f) the voidness, voidability or unenforceability of legal acts detrimental to creditors;
- (g) effect of the commencement of the proceedings upon contracts under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts;
- (h) conditions under which setoff can occur after commencement of insolvency proceedings;
- (i) rights and obligations of the debtor, insolvency representative, creditors and creditors' committee;
- (j) claims and their treatment;
- (k) priorities for ranking of claims;
- (l) distribution of proceeds of liquidation; and
- (m) resolution and conclusion of the proceedings."

Question: Do you have any views on this list and the items included therein? Would you add other items? If so, please provide examples.

Part III – Exceptions to the general applicable law rule

10) Does the insolvency law of your country provide for exceptions to the *lex concursus* rule? Please respond by YES or NO. If NO, please explain.

11) Does the insolvency law of your country provide for a specific rule in the case of rights *in rem* over assets located abroad? Please respond by YES or NO. If NO, please explain.

12) If you have replied YES to Question 11), please confirm / explain if the effects of the opening of insolvency proceedings are determined by other conflict of laws rules applicable outside of insolvency (e.g. *lex rei sitae*) or if the opening of insolvency proceedings does not affect rights *in rem* located abroad.

13) If you have replied YES to Question 11), please confirm / explain if the special rules designed for rights *in rem* also apply to intangibles (receivables).

14) Does the insolvency law of your country provide for special rules for foreign payment systems and financial markets (e.g. position-closing agreements, netting agreements, sale of securities and the guarantees provided for such transactions)? Please respond by YES or NO. If NO, please explain.

15) Does the insolvency law of your country provide for special rules in relation to the set-off of a transaction,² governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

² The use of the word "transaction" in this section is intended to refer generally to the wide range of legal acts by which assets may be disposed of or obligations incurred including by way of a transfer, a payment, a security, a guarantee, a loan or a release [or an action making a security interest effective against third parties] and may include a composite series of transactions.

16) Does the insolvency law of your country provide for special rules in relation to the avoidance of a transaction,³ governed by a foreign law, which occurred before the application for the opening or the opening of insolvency proceedings? Please respond by YES or NO. If YES, please explain.

17) Does the insolvency law of your country provide for special protection in relation to employment contracts and relationships governed by a foreign law? Please respond by YES or NO. In both cases, please explain.

18) Does the insolvency law of your country provide for other exceptions? Please respond by YES or NO. If YES, please explain and provide examples.

Part IV – Other information

19) Does the insolvency law of your country apply to both natural persons and legal persons? Please respond by YES or NO. In both cases, please explain.

20) Does the insolvency law of your country provide special rules in relation to consumers? Please respond by YES or NO. If YES, please explain.

21) Please indicate / explain if, according to the insolvency law of your country, a contractual provision, to which the debtor is a party, indicating the law applicable to the contract could be set aside by virtue of a public policy exception.

22) Please feel free to provide any other views, comments or information that would be relevant to the issue under study.

³ Ibid.

ANNEX A**Experts invited by
the Permanent Bureau and the UNCITRAL Secretariat
to the Vienna meeting, 11-12 December 2003**

The experts invited by the Permanent Bureau of the Hague Conference are:

Johan Willem Byvanck, Lawyer, Netherlands
Dr. Francisco Garcimartín, Professor, Universidad De Castilla, Spain
Jean-Pierre Remery, Président de chambre à la Cour d'appel d'Orléans, France

The experts invited by UNCITRAL Secretariat include:

Susan Block-Lieb, Professor, Fordham Law School, United States of America
Alexander Markus, Ministry of Justice, Switzerland
Chris Redmond, Husch & Eppenberger, LLC, United States of America
Ed Smith, Bingham Dana, United States of America
Jean-Luc Vallens, Magistrat, France
Catherine Walsh, Professor, McGill University, Canada