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Insolvency Law

Cross-border recognition and enforcement of insolvency- related judgements

Note by the Secretariat

Contents

| | <i>Page</i> |
|---|-------------|
| Introduction | 3 |
| Draft model law on the recognition and enforcement of insolvency-related judgements | 4 |
| Article 1. Scope of application | 4 |
| A. Draft provisions | 4 |
| B. Notes | 4 |
| Article 2. Definitions | 4 |
| A. Draft provisions — subparagraphs (a)-(c) | 4 |
| B. Notes | 5 |
| C. Draft provisions — subparagraph (d) | 7 |
| D. Notes | 8 |
| Possible additions to draft article 2 | 10 |
| A. Draft provisions | 10 |

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| | |
|--|----|
| B. Notes | 10 |
| Article 8. Recognition and enforcement of an insolvency-related judgement | 11 |
| A. Draft provisions | 11 |
| B. Notes | 12 |
| Article 9. Decision to recognize and enforce an insolvency-related judgement. | 13 |
| A. Draft provisions | 13 |
| B. Notes | 13 |
| Article 10. Grounds to refuse recognition of an insolvency-related judgement. | 13 |
| A. Draft provisions | 13 |
| B. Notes | 15 |

Introduction

1. At its forty-seventh session (2014), the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgements.
2. At its forty-sixth session in December 2014, Working Group V (Insolvency Law) considered a number of issues relevant to the development of a legislative text on the recognition and enforcement of insolvency-related judgements, including the types of judgements that might be covered, procedures for recognition and grounds to refuse recognition. The Working Group agreed that the text should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law),¹ but that the Model Law provided an appropriate context for the new instrument.
3. At its forty-seventh session, the Working Group considered the first draft of a model law to be given effect through enactment by a State (A/CN.9/WG.V/WP.130). The content and structure of the draft text drew upon the Model Law, as suggested by the Working Group at its forty-sixth session (A/CN.9/829, para. 63) and sought to give effect to the conclusions of the Working Group at its forty-sixth session relating to the types of judgement to be included (A/CN.9/829, paras. 54 to 58), procedures for obtaining recognition and enforcement (A/CN.9/829, paras. 65 to 67) and the grounds for refusal of recognition (A/CN.9/829, paras. 68 to 71).
4. At its forty-seventh session, the Working Group had a preliminary exchange of views on articles 1 to 10 of the draft text and made a number of proposals with respect to the drafting (A/CN.9/835, paras. 47-69); articles 11 and 12 were not reached due to lack of time. The Working Group's proposals are reflected as additional variants and square bracketed text in the draft provisions set forth below. Only those draft articles for which revisions were proposed are included in this draft; the text of omitted articles remains the same as set forth in A/CN.9/WG.V/WP.130. The text of each draft article is followed by notes which indicate the source of the revision and offer additional explanation.
5. Issues not addressed by the current draft text that the Working Group may wish to consider include: the treatment of judgements arising in what might be considered competing insolvency proceedings (see A/CN.9/829, para. 75) and termination or variation of recognition (see Model Law article 17, para. 4).

¹ A/CN.9/829, paras. 60 and 74.

Draft model law on the recognition and enforcement of insolvency-related judgements

Article 1. Scope of application

A. Draft provisions

Variant 1 (as set forth in A/CN.9/WG.V/WP.130)

1. This Law applies where:

(a) Recognition and enforcement of an insolvency-related judgement is sought in this State by a foreign representative or other person entitled to seek enforcement of such a judgement in connection with a foreign proceeding; or

(b) Recognition and enforcement of an insolvency-related judgement is sought in a foreign State in connection with a proceeding under the law of this State.

Variant 2

1. [This Law applies to the recognition and enforcement of an insolvency-related judgement on the application of a foreign representative or other person entitled to seek recognition and enforcement of such a judgement.]

Variant 3

1. [This Law applies to the recognition and enforcement of an insolvency-related judgement given in a proceeding taking place in a State that is different to the State of execution.]

2. This Law does not apply to [...].

B. Notes

Variants 2 and 3 of paragraph 1 were proposed at the forty-seventh session (A/CN.9/835, paras. 51-52). Since some support was expressed in favour of retaining subparagraph 1 (b), it is included as part of variant 1 for further consideration. No comments were made with respect to paragraph 2 dealing with possible exclusions from the application of the draft text, so it is retained as drafted for consideration.

Article 2. Definitions

A. Draft provisions — subparagraphs (a)-(c)

For the purposes of this Law:

(a) “Foreign proceeding” means a collective judicial or administrative proceeding [in a foreign State,] [including an interim proceeding,] pursuant to a law relating to insolvency in which [proceeding] the assets and affairs of a debtor are or were subject to control or supervision by [a foreign] court for the purpose of reorganization or liquidation;

(b) “Foreign representative” (*as set forth in A/CN.9/WG.V/WP.130*);

(c) “Judgement” means any [final] judicial or administrative decision, whatever it may be called, including a decree or order, and a determination of costs and expenses provided that the determination related to a judicial or administrative decision,² and any decision ordering [provisional] or [protective [and conservatory] measures].³

B. Notes

Subparagraph (a)

1. This definition is based on the Model Law, article 2, subparagraph (a). Suggestions were made at the forty-seventh session that this definition should be aligned with that of the corresponding term in the Model Law (A/CN.9/835, para. 54). The elements omitted in the previous version have now been included in square brackets. As some support was expressed in favour of retaining the words “or were”, the square brackets have been deleted.

Subparagraph (c)

2. At the forty-seventh session (A/CN.9/835, para. 56) some support was expressed in favour of requiring the judgement to be final, although it was noted that that would be inconsistent with the inclusion of provisional or protective measures. Concerns were also expressed with respect to the inclusion of administrative decisions and provisional measures. It was noted however, that deleting administrative decisions might create a gap in some jurisdictions. It was also suggested that the only provisional measures that should be included were protective or conservatory measures.

3. It might be noted that draft article 3, paragraph 1 of the preliminary draft text emanating from the fourth meeting of the Hague Conference on Private International Law (the Hague Conference) working group on the judgements project (February 2015) does not require a judgement to be final; the draft text includes, in draft article 4, subparagraph 4 provision for postponement of recognition where a judgement is subject to review. It does exclude interim measure of protection:⁴

“In this Convention, ‘judgement’ means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognized or enforced under this Convention. An interim measure of protection is not a judgement.”

² This definition is taken from the Convention of 30 June 2005 on Choice of Court Agreements (2005 Hague Convention), art. 4.

³ This last phrase relating to provisional measures is taken from the draft global judgements convention prepared by The Hague Conference on Private International Law, 2001 version, art. 23.

⁴ The preliminary draft text emanating from the fourth meeting (February 2015) of the Hague Conference on Private International Law’s working group on the judgements project, available at www.hcch.net/upload/wop/gap2015pd07b_en.pdf (last visited 21/09/2015).

4. It may also be noted that Article 32 of the recast EC Insolvency Regulation 1346/2000⁵ (Regulation (EU) 2015/848 of the European Parliament and of the Council) (the recast EIR) provides for recognition of judgements relating to preservation measures taken after the request for the commencement of insolvency proceedings or in connection with it:

“Article 32. Recognition and enforceability of other judgements

“1. Judgements handed down by a court whose judgement concerning the opening of proceedings is recognized in accordance with Article 19 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall also be recognized with no further formalities. Such judgements shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Regulation (EU) No. 1215/2012.

“The first subparagraph shall also apply to judgements deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

“The first subparagraph shall also apply to judgements relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.

“2. The recognition and enforcement of judgements other than those referred to in paragraph 1 of this Article shall be governed by Regulation (EU) No. 1215/2012 provided that that Regulation is applicable.”

5. Paragraphs 21 and 22 of document A/CN.9/WG.V/WP.126 indicate the judgements that have been held to fall within⁶ and outside⁷ the provisions of article 32.

⁵ Adopted by the Council on 12 March 2015, available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.141.01.0019.01.ENG (last visited 21/09/2015). The recast EIR will enter into force in June 2017.

⁶ For example, judgements held to fall within article 32 have included: avoidance actions, insolvency law-related lawsuits on the personal liability of directors and officers; lawsuits concerning the priority of a claim; disputes between an insolvency representative and debtor on inclusion of an asset in the insolvency estate; approval of a reorganization plan; discharge of residual debt; actions on the insolvency representative's liability for damages, if exclusively based on the carrying out of the insolvency proceedings; action by a creditor aiming at the nullification of an insolvency representative's decision to recognize another creditor's claim; and claims by an insolvency representative based on specific insolvency law privilege.

⁷ For example, judgements held to fall outside article 32 have included: actions by and against an insolvency representative which would have been possible also without the insolvency proceedings; criminal proceedings in connection with insolvency; an action to recover property in the possession of the debtor; an action to determine the legal validity or amount of a claim pursuant to general laws; claims by creditors with a right for segregation of assets; claims by creditors with a right for separate satisfaction (secured creditors); and an avoidance action filed not by an insolvency representative, but by a legal successor or assignee.

C. Draft provisions — subparagraph (d) — article 2 continued

(d) “Insolvency-related judgement” means

Chapeau — variant 1

[a judgement that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. A judgement is presumed to be “closely related to a foreign proceeding”⁸ if it has an effect upon the insolvency estate of the debtor and either: (i) is based on a law relating to insolvency; or (ii) due to the nature of its underlying claims, would not have been issued without the commencement of the foreign proceeding.⁹ An insolvency-related judgement would include any equitable relief, including the establishment of a constructive trust, provided in that judgement or required for its enforcement. Insolvency-related judgements may include, [inter alia,] judgements concerning any of the following matters:]

Chapeau — variant 2

[*First sentence remains the same as variant 1*]. A judgement is presumed to be “closely related to a foreign proceeding” if it has an effect upon the insolvency estate of the debtor, [such as reducing the value of the estate or upsetting the principle of equitable treatment of creditors]. Insolvency-related judgements may include, [inter alia,] judgements concerning any of the following matters:]

- (i) Turnover of property of the insolvency estate;
- (ii) Sums due to the insolvency estate;
- (iii) Sale of assets by the insolvency estate;
- (iv) Requirements for accounting related to the insolvency proceeding;
- (v) *Variant 1 (as set forth in A/CN.9/WG.V/WP.130)*

Overturn of transactions involving the debtor or assets of the insolvency estate that have the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors;¹⁰

Variant 2 (as set forth in A/CN.9/WG.V/WP.130)

Resolution of actions to avoid or otherwise render ineffective acts detrimental to creditors,¹¹ including undervalued transactions, preferential transactions and

⁸ The recast EIR uses the phrase “actions which derive directly from the insolvency proceedings and are closely linked with them” (recital 35). The recital notes that “these actions should include avoidance actions and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for the costs of the proceeding. In contrast, actions for the performance of obligations under a contract concluded by the debtor prior to the opening of the proceedings do not derive directly from the proceedings.”

⁹ The draft article might indicate that for the purposes of this model law, an insolvency-related judgement would not include a judgement imposing a criminal penalty.

¹⁰ The wording of this variant is based on the UNCITRAL Legislative Guide on Insolvency Law, rec. 87.

¹¹ The wording of this variant is based on the UNCITRAL Model Law on Cross-Border Insolvency, art. 23.

transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors;¹²

(vi) Modification or enforcement of a stay of actions in a foreign proceeding;¹³

(vii) Validity of a secured claim;

(viii) A cause of action pursued by a creditor with approval of the court, based on [an insolvency] [a foreign] representative's decision not to pursue that cause of action;

(ix) Liability of a director in the period approaching insolvency;¹⁴

(x) Confirmation of a plan of reorganization or liquidation or approval of a [composition] [voluntary restructuring agreement];

(xi) The discharge of a particular debt;

(xii) Recognition of the discharge of a debtor;

(xiii) [A cause of action [related to insolvency] pursued by the party to whom it has been assigned by the foreign representative in accordance with the applicable law]; and

(xiv) [Any judgement related to insolvency that is not enforceable under another instrument].

D. Notes

Subparagraph (d), chapeau variant 1

6. Variant 1 of the chapeau reflects a suggestion made at the forty-seventh session (A/CN.9/835, para. 57) to delete the words "and legal basis" in subparagraph (d) (ii) of draft article 2, and include the words "inter alia" in the last sentence of subparagraph (d). It was noted that the statement included in footnote 9 concerning judgements imposing a criminal penalty could be included in any guide to enactment prepared for this draft text.

Subparagraph (d), chapeau variant 2

7. Variant 2 of the chapeau reflects a proposal made at the forty-seventh session (A/CN.9/835, para. 57) to simplify the chapeau of the draft definition. Variant 2 also includes language from variant 1 of subparagraph (d) (v) of draft article 2, to explain the phrase "effect upon the insolvency estate of the debtor".

Subparagraph (d) (ii)

8. At the forty-seventh session (A/CN.9/835, para. 58) various suggestions were made with respect to the subparagraphs of the definition of "insolvency-related

¹² This wording is taken from the Legislative Guide, rec. 87.

¹³ Some consideration might be given to the issue of possible overlap with provisions of the Model Law, such as art. 22, para. 3.

¹⁴ See Legislative Guide, part four dealing with the obligations of directors of a company in the period approaching insolvency, recs. 255, 259 and 260.

judgement”, including deleting subparagraph (d) (ii) on the ground that any judgement arising from a contractual dispute concerning sums owed under the contract should be enforceable under general rules rather than under this model law. However, “sums due to the insolvency estate” is somewhat ambiguous as to scope. It might cover, for example, sums due other than under contract, such as tort claims or sums recovered under an avoidance action (which may or may not be covered by subparagraph (v)). It is retained for further consideration.

Subparagraph (d) (vi) and (vii)

9. At the forty-seventh session (A/CN.9/835, para. 58) suggestions made with respect to the subparagraphs of the definition of “insolvency-related judgement”, included deleting subparagraphs (d) (vi) and (d) (vii) on the grounds that those matters were closely related to the question of recognition of foreign proceedings under the Model Law. While that may be the case in some jurisdictions, it may not necessarily be the case in all jurisdictions that have enacted legislation based on the Model Law, as previously noted in A/CN.9/829, paragraph 58. Including those types of judgement in this text may be helpful for States that have not enacted the Model Law. The relationship between this text and the Model Law and issues that might need to be considered in enacting this text could perhaps be more effectively addressed in a guide to enactment of this text, than in the substance of its provisions.

Subparagraph (d) (x)

10. At the forty-seventh session (A/CN.9/835, para. 58) suggestions made with respect to the subparagraphs of the definition of “insolvency-related judgement” included deleting subparagraph (d) (x) on the grounds that that matter was closely related to the question of recognition of foreign proceedings under the Model Law, as noted above with respect to subparagraphs (vi) and (vii). The same considerations as notes above in paragraph 9 might be applicable to subparagraph (d) (x).

Subparagraph (d) (xii)

11. For the same reasons as cited above with respect to subparagraphs (d) (vi), (vii) and (x), it was suggested at the forty-seventh session (A/CN.9/835, para. 58) that subparagraph (xii) should also be deleted. It might be recalled however, that specific mention of the need to include the substance of subparagraphs (d) (x) and (xii) was made at both the forty-fourth and forty-sixth sessions of the Working Group (A/CN.9/798, para. 28 and A/CN.9/829, para. 60 respectively). Accordingly, the Working Group may wish to further consider those subparagraphs before agreeing to their deletion.

Subparagraphs (d) (xiii) and (xiv)

12. Two new subparagraphs (d) (xiii) and (xiv) have been added to reflect suggestions made at the forty-seventh session (A/CN.9/835, paras. 59 and 60).

Possible additions to draft article 2**A. Draft provisions**

[(e) “Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding];

(f) [“Proceeding” means

Variant 1: [a judicial contest to determine and enforce legal rights];

Variant 2: [any action involving or carried out by a court of law];

Variant 3: [procedures and hearings before a court or administrative body that performs a judicial function];

[(g) “Recognition” means to [acknowledge] [confirm] the existence, validity or legality of an insolvency-related judgement];

[(h) “Enforcement” means to compel observance of a recognized insolvency-related judgement by the judgement debtor. [Note for guide: not all judgements will require enforcement to be effective.]]

B. Notes*Additional definition (e)*

1. Inclusion of additional definitions was proposed at the forty-seventh session (A/CN.9/835, paras. 54 and 63(d)). The definition of “foreign court” is the same as the definition of that term in the Model Law and is limited to the court with jurisdiction over insolvency proceedings. As currently drafted, this term is only used in the definition of “foreign proceeding” and in draft article 10, subparagraph (i) of the draft model law.

Additional definitions (f), (g) and (h)

2. Inclusion of these additional terms was also proposed at the forty-seventh session (A/CN.9/835, paras. 54 and 63(d)). The definition of “proceeding” includes various alternatives the Working Group may wish to consider. The term is used in the draft text in the context of the phrase “foreign proceeding” and the “proceeding” in which the insolvency-related judgement was given.

3. The definitions of “recognition” and “enforcement” seek to clarify that while recognition is required in order to enforce a foreign insolvency-related judgement, not all recognized judgements will require enforcement to be effective. Accordingly, the definition of “enforcement” goes beyond what might be required to make the judgement effective in the recognizing State and focuses on compelling compliance with, or observance of, the judgement by the judgement debtor.

Article 3. International obligations of this State**Article 4. Competent court or authority****Article 5. Authorization to seek enforcement of an insolvency-related judgement in a foreign State****Article 6. Additional assistance under other laws****Article 7. Interpretation****Notes on articles 3-7**

Articles 3-7 of the draft model law set forth in A/CN.9/WG.V/WP.130 are essentially the same as articles 3-7 of the Model Law and are not repeated in this working paper. The Working Group made no comments on those articles at its forty-seventh session (A/CN.9/835, para. 61); should it wish to include articles along these lines in the draft model law they can be added at a later stage.

Article 8. Recognition and enforcement of an insolvency-related judgement¹⁵**A. Draft provisions***Variant 1 (as set forth in A/CN.9/WG.V/WP.130)*

1. A foreign representative or other person entitled under the law of the State in which the insolvency-related judgement was given to seek enforcement of that judgement may request the court in this State to recognize and enforce that judgement.¹⁶

2. A party seeking recognition and enforcement of an insolvency-related judgement shall provide:

(a) A copy of the insolvency-related judgement;

(b) A certified statement of whether the insolvency-related judgement is a final judgement or, if not, the identification of the appellate court where any appeal is pending, and the status of the appeal;

(c) Evidence that the party against whom relief is sought received notice of the proceeding in which the insolvency-related judgement was issued and had an opportunity to be heard prior to the issue of the judgement; and

(d) Evidence that the party against whom relief is sought was provided notice of the request in this State for recognition and enforcement of the insolvency-related judgement.

Variant 2

[1. A foreign representative or other person entitled under the law of the State in which the judgement was given to seek enforcement of an insolvency-related judgement may request the court in this State to recognize and enforce that

¹⁵ This draft article is based on art. 15 of the Model Law, paras. 1, 2 and 4. Draft para. 4 of this article is based on art. 16, para. 2 of the Model Law.

¹⁶ An insolvency-related judgement may also be raised as a defence to an action concerning the same matter/claim in the enacting or another State.

judgement. A judgement may be enforced by pleading the rights created or recognized by the judgement by way of defence. A party seeking recognition and enforcement of an insolvency-related judgement shall provide:]

- (a) A [certified] copy of the insolvency-related judgement;
 - (b) A certified statement of the [final character of the] insolvency-related judgement;
 - (c) [*Same as for variant 1 above*]; and
 - (d) [*Same as for variant 1 above*].
2. The court may require translation of documents supplied in support of recognition of the insolvency-related judgement into an official language of this State.
3. The court is entitled to presume that documents submitted in support of a request for recognition of the insolvency-related judgement are authentic, whether or not they have been legalized.

B. Notes

1. The revisions to draft article 8 were proposed at the forty-seventh session (A/CN.9/835, paras. 62-63). Variant 2 of paragraph 1 incorporates the substance of footnote 16 to variant 1 of paragraph 1 and merges paragraphs 1 and 2 of variant 1. In subparagraph 1 (a) of variant 2, the copy of the judgement to be provided should be a “certified” copy, consistent with article 15, subparagraph 2 (a) of the Model Law.
2. Draft subparagraph 1 (b) of variant 2 has been revised to indicate that the insolvency-related judgement should be a final judgement. The references in subparagraph 2 (b) of variant 1 to an appeal and the details of that appeal have been deleted. An alternative means of addressing that issue of finality, should the Working Group decide that only final judgements are to be covered by the draft text, might be to include finality as a requirement in the definition of “insolvency-related judgement”.
3. An alternative approach to the issue of finality might be to consider the approach of draft article 4, paragraphs 3 and 4 of the preliminary draft text emanating from the fourth meeting (February 2015) of the Hague Conference working group on the judgements project:¹⁷
- “3. A judgement shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
- “4. Recognition or enforcement may be postponed or refused if the judgement is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgement. In such cases, the court addressed may also make enforcement conditional on the provision of such security as it shall determine.”

¹⁷ The draft text is available as indicated in footnote 4 above.

4. Draft paragraphs 2 and 3 (previously 3 and 4) of draft article 8 are unchanged from the previous draft set forth in A/CN.9/WG.V/WP.130.

Article 9. Decision to recognize and enforce an insolvency-related judgement¹⁸

A. Draft provisions

An insolvency-related judgement shall be recognized and may, upon recognition, be enforced without review of the merits of the judgement provided:

- (a) [deleted];
- (b) The person seeking enforcement of the insolvency-related judgement is a person within the meaning of article 2, subparagraph (b)¹⁹ or another person entitled to seek enforcement of the judgement under article 8, paragraph 1;
- (c) The requirements of article 8, paragraph [...] are met;
- (d) The court from which recognition is sought is the court referred to in article [...];
- (e) Article 10 does not apply; and
- (f) [Where recognition of the underlying foreign proceeding [is] [has been] sought, it has not been refused on the ground that such recognition would be manifestly contrary to public policy.]

B. Notes

The revisions to draft article 9 reflect suggestions made at the forty-seventh session (A/CN.9/835, para. 64). Subparagraph (a) has been deleted as redundant. The cross-reference in subparagraph (c) will be to the paragraph of draft article 8 setting forth the conditions for recognition. A new subparagraph (f) has been added to align the result under this text with the result under the Model Law, so that recognition of an insolvency-related judgement is dependent upon recognition of the underlying insolvency proceedings not having been refused on public policy grounds under article 6 of the Model Law. An alternative means of addressing that issue might be to include it as a ground for refusal of recognition under draft article 10.

Article 10. Grounds to refuse recognition of an insolvency-related judgement²⁰

A. Draft provisions

The court may decline to recognize an insolvency-related judgement if the party against whom relief is sought demonstrates that:

- (a) The insolvency-related judgement is subject to review in the originating State or the time limit for seeking review has not expired and the originating State would not enforce the insolvency-related judgement because of the availability of such review;

¹⁸ This draft article is based on art. 17 of the Model Law.

¹⁹ That is, the foreign representative.

²⁰ These grounds are based upon those discussed and agreed upon at the Working Group's forty-sixth session (A/CN.9/829, paras. 68-71).

(b) The party against whom the proceeding giving rise to the insolvency-related judgement was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(c) The insolvency-related judgement was obtained by fraud in connection with a matter of procedure;

(d) Recognition and enforcement of the [content of the] insolvency-related judgement would be manifestly contrary to the public policy of this State;

(e) The proceeding in which the insolvency-related judgement was issued was manifestly contrary to the fundamental principles of procedural fairness of this State;

(f) The insolvency-related judgement is inconsistent with a prior [final, binding] judgement given in this State in a dispute between the same parties;

(g) The insolvency-related judgement is inconsistent with an earlier [final, binding] judgement given in another State involving the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in this State;

(h) *Variant 1 (as set forth in A/CN.9/WG.V/WP.130)*

Recognition and enforcement of the insolvency-related judgement would interfere with the administration of the debtor's insolvency proceedings²¹ or would be inconsistent with a stay or other order entered in insolvency proceedings in this or another State;

(h) *Variant 2*

[Recognition of the insolvency-related judgement has been refused by a judgement given in the State where the foreign proceeding has commenced, or if no judgement on recognition has been given in that State, the court from which recognition is sought determines that the insolvency-related judgement is not susceptible of recognition under the laws of the State where the foreign proceeding commenced;]

(i) *Variant 1 (as set forth in A/CN.9/WG.V/WP.130)*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on a

²¹ At the forty-sixth session, it was suggested that this ground might be included as an alternative to restricting recognition to judgements emanating from proceedings that might be regarded as main or non-main proceedings (A/CN.9/829, para. 70).

basis that was unreasonable or unfair. A basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State;

(i) *Variant 2 (as set forth in A/CN.9/WG.V/WP.130)*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on one of the following grounds:

- (i) The presence of that party's property in the jurisdiction of the foreign court, when the property is unrelated to the insolvency-related judgement;
- (ii) The nationality of a different party; or
- (iii) Any other basis that was unreasonable or unfair; a basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State;

(i) *Variant 3*

[Where the party against whom recognition is sought is the debtor in the proceedings giving rise to the insolvency-related judgement, if such proceedings were not initiated at the debtor's centre of main interests. In all other cases, where the judgement party did not have its centre of main interests in, or where it did not consent to the exercise of the jurisdiction of, the State in which the insolvency-related judgement was given.]

- (j) The requirements of article 8, paragraph [...] have not been met].

B. Notes

Subparagraphs (c), (d) and (e)

1. At the forty-seventh session (A/CN.9/835, para. 68), it was proposed that the potential overlap between subparagraphs (c), (d) and (e) should be addressed. On the basis that subparagraph (d) is the most broadly framed and might be interpreted as including the elements of both subparagraphs (c) and (e), those two subparagraphs might be deleted and only subparagraph (d) retained; the content of subparagraphs (c) and (e) might be reflected in any guide to enactment of the draft instrument. It might be noted that subparagraph (d), which uses the phrase from article 6 of the Model Law "manifestly contrary to the public policy of this State" has been augmented by a reference to enforcement of the "content of" the insolvency-related judgement as requested.

2. It might be noted that draft article 5, subparagraphs 1 (b) and (c) of the preliminary draft text emanating from the fourth meeting (February 2015) of the Hague Conference working group on the judgements project retains the essence of subparagraph (c) of draft article 10 above as a separate ground for refusal and combines subparagraphs (d) and (e) of draft article 10, providing that recognition or enforcement might be refused if:

- "(b) The judgement was obtained by fraud in connection with a matter of procedure;

“(c) Recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgement were incompatible with fundamental principles of procedural fairness of that State;”²²

3. It might be further noted that Article 33 of the recast EIR provides:

“Any Member State may refuse to recognize insolvency proceedings opened in another Member State or to enforce a judgement handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.”²³

Subparagraphs (f) and (g)

4. Subparagraphs (f) and (g), as proposed at the forty-seventh session (A/CN.9/835, para. 68), require the earlier judgements, with which the insolvency-related judgement for which recognition is sought might be inconsistent, to be final and binding.

5. It might be noted that the preliminary draft text emanating from the fourth meeting of the Hague Conference working group on the judgements project includes grounds the same as set forth above in draft subparagraphs (f) and (g),²⁴ but does not specifically require the earlier judgements to be final.

Subparagraph (h)

6. As proposed at the forty-seventh session (A/CN.9/835, para. 67), a new variant 2 of subparagraph (h) has been added. Variant 1 of subparagraph (h) focuses more broadly on interference with existing insolvency proceedings or inconsistency with a stay or other order granted in those proceedings. Variant 2 focuses more specifically on refusal of recognition in the commencing State or, in the absence of a judgement on the matter in that State, a determination by a court in another State (in which recognition of the judgement is sought) that the insolvency-related judgement was not susceptible of recognition under the laws of the commencing State.

Subparagraph (i)

7. A new variant 3 of subparagraph (i) has been added as proposed at the forty-seventh session (A/CN.9/835, para. 67). While the proposal to add that variant received some support, the report of the forty-seventh session indicates (A/CN.9/835, para. 66) that “serious reservations as to its inclusion were expressed, in particular, that a blanket refusal to recognize on the basis that the insolvency-

²² The text is available as indicated in footnote 4 above.

²³ The text is available as indicated in footnote 5 above.

²⁴ The draft text is available as indicated in footnote 4 above: see draft article 5, subparagraphs 1(d) and (e): “(d) the judgement is inconsistent with a judgement given in the requested State in a dispute between the same parties; or (e) the judgement is inconsistent with an earlier judgement given in another State between the same parties on the same cause of action, provided that the earlier judgement fulfills the conditions necessary for its recognition in the requested State”.

related judgement did not emanate from the debtor's centre of main interests would be too restrictive to be useful in practice."

8. It might be noted that the preliminary draft text emanating from the fourth meeting (February 2015) of the Hague Conference working group on the judgements project provides for recognition of judgements arising in States where the judgement debtor has a branch, agency or other establishment provided the claim giving rise to the judgement arose out of the activities of that branch, agency or establishment (art. 5 (3) (c). Subparagraphs (3) (e) and (f) of draft article 5 provide:

"(e) [The judgement ruled on a contractual obligation and the [defendant] [person against whom the judgement was rendered] intentionally engaged in frequent or significant activity in the State of origin related to the obligation at issue;

"(f) The judgement ruled on a contractual obligation and it was rendered by a court in the State in which performance of that contractual obligation by [defendant] [the person against whom the judgement was rendered] occurred, or in which the parties to the contract agreed that it should occur. This agreement should derive from the provisions of the contract. This shall not apply if the contractual obligation consists of a payment of money, unless such payment constituted the main obligation of the contract;]"²⁵

Subparagraph (j)

9. New subparagraph (j), proposed at the forty-seventh session (A/CN.9/835, para. 68) reflects the ground included in the Model Law, article 17, subparagraph 1 (c) that permits denial of recognition where the application fails to satisfy the specified evidentiary requirements.

²⁵ The draft text is available as indicated in footnote 4 above.