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Recognition and enforcement of insolvency-related judgments: draft model law

Note by the Secretariat

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I. 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 judgments.¹
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 judgments, including the types of judgments 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), 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 judgment 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 draft articles 1 to 10 of the text and made a number of proposals with respect to the drafting (A/CN.9/835, paras. 47-69); draft articles 11 and 12 of that text were not reached due to lack of time and were included as draft articles 12 and 13 of the text considered at the forty-ninth session (A/CN.9/WG.V/WP.138). At its forty-eighth and forty-ninth sessions, the Working Group considered revised versions of the draft text, which reflected the decisions and proposals made at the forty-seventh and forty-eighth sessions respectively (A/CN.9/WG.V/WP.135 and 138).
5. The draft text below reflects the discussion at the forty-ninth session and the revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text. Notes and commentary to this draft text, indicated by a reference number in square brackets, are contained in A/CN.9/WG.V/WP.143/Add.1.

II. Draft model law on the recognition and enforcement of insolvency-related judgments

Article 1. Scope of application

1. [1] This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a proceeding taking place in a State that is different to the State where recognition and enforcement are sought.
2. This Law does not apply to [...].

¹ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 155.

Article 2. Definitions

For the purposes of this Law:

(a) [2] “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” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

(c) [3] “Judgment” means [any decision, whatever it may be called, issued by a court [or administrative authority, provided an administrative decision has the same effect as a court decision]. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court [provided that the determination relates to a decision that may be recognized [or] [and] enforced under this Law] [4];

(d) [5] “Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;

(e) [6] “Insolvency-related judgment” means a judgment that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. Insolvency-related judgments include, inter alia, judgments determining whether:

(i) An asset is [7] [part of] [included in], should be turned over to, or was properly disposed of by the insolvency estate;

(ii) [8] A transaction involving the debtor or assets of [the] [its] insolvency estate should be [overturned] [avoided] [because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate] [on the grounds that it had the effect of either reducing the value of the insolvency estate or upsetting the principle of equitable treatment of creditors];

(iii) A [9] [representative] [director] of the debtor is liable for action taken when the debtor was insolvent or in the [10] period approaching insolvency, [11] [and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor’s insolvency estate];

(iv) [Alternative A: Sums [12] [not covered by (i) or (ii)] are owed to or by the debtor or [its insolvency] estate;]

[Alternative B: Sums [not covered by (i) or (ii)] are owed to or by the debtor or [its insolvency] estate, and the cause of action [13] [relating to the recovery or payment of those sums] arose after insolvency proceedings commenced in respect of the debtor]; or

(v) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved.

For the purposes of this definition, an “insolvency-related judgment” includes instances in which the cause of action was pursued by:

- (i) A creditor with approval of the court, based upon the insolvency representative’s decision not to pursue that cause of action; or
- (ii) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

[and the judgment on that cause of action would otherwise be enforceable under this Law].

[Article 3. International obligations of this State [14]

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.]

[Article 3 bis. International obligations of this State

1. [15] This [Law] shall not apply to a judgment where there is a treaty [in force] concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after [this Law] comes into force), and that treaty applies to the judgment [or where the provisions of the law of this State on recognition [and enforcement] of insolvency proceedings apply to that judgment].

2. A judgment is to be treated for the purposes of paragraph 1 of this article as falling within the class of judgments to which a treaty applies even where the particular judgment is not enforceable under the treaty because of the particular circumstances of the case.

Article 4. Competent court or authority [16]

[17] The functions referred to in this Law relating to recognition and enforcement of insolvency-related judgments shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Article 5. Authorization to seek recognition and enforcement of an insolvency-related judgment in a foreign State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to seek recognition and enforcement of an insolvency-related judgment, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign representative under other laws of this State.

Article 7. Public policy exception [18]

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy [19] [of this State] including the fundamental principles of procedural fairness of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Article 9. Effect and enforceability of an insolvency-related judgment in the originating State [20]

1. An insolvency-related judgment shall be recognized and enforced only if it has effect and is enforceable in the originating State.

2. *Variant 1 of paragraph 2*

Recognition and enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make enforcement conditional on the provision of such security as it shall determine.

Variant 2 of paragraph 2 [21]

(a) If an insolvency-related judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired, the court may:

- (i) Grant recognition and enforcement;
- (ii) Postpone recognition and enforcement; or
- (iii) Refuse recognition and enforcement;

(b) The court may grant [conditional] recognition and enforcement under paragraph 2 (a) subject to the provision of such security as the court determines.

3. A refusal under paragraph [2] [2 (a)] does not prevent a subsequent application for recognition and enforcement of the judgment.

Article 10. Application for recognition and enforcement of an insolvency-related judgment

1. [22] A foreign representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may apply to the court in this State for recognition and enforcement of that judgment, including by way of defence.

2. An application for recognition and enforcement of an insolvency-related judgment shall be accompanied by:

- (a) A certified copy of the insolvency-related judgment;
- (b) *Variant 1 of subparagraph (b) [23]*

[Information relating to any current review of the insolvency-related judgment, including whether any notice of intended appeal has been received, the time limit (if any) for seeking review has expired in the originating State, and whether the judgment is enforceable in the originating State];

(b) *Variant 2 of subparagraph (b)*

Any documents necessary to establish that the insolvency-related judgment has effect and is enforceable in the originating State, including information on any current review of the judgment;

(c) Evidence [24] [as required by the law of this State] that the party against whom relief is sought was notified of the application in this State for recognition and enforcement of the insolvency-related judgment; and

(d) [25] [In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court].

3. The court may require translation of documents supplied in support of the application for recognition and enforcement of the insolvency-related judgment into an official language of this State.

4. The court is entitled to presume that documents submitted in support of the application for recognition and enforcement of the insolvency-related judgment are authentic, whether or not they have been legalized.

Article 11. Decision to recognize and enforce an insolvency-related judgment

An insolvency-related judgment shall be recognized and enforced provided:

(a) [26] It is effective and enforceable in the originating State;

(b) The person seeking recognition and enforcement of the insolvency-related judgment is a person within the meaning of article 2, subparagraph (b) or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

(c) The requirements of article 10, paragraph 2 are met;

(d) The court from which recognition and enforcement is sought is the court referred to in article 4, [27] [unless the requirement for recognition arises by way of a defence in another court]; and

(e) Articles 7 and 12 do not apply.

Article 12. Grounds to refuse recognition and enforcement of an insolvency-related judgment

Recognition and enforcement of an insolvency-related judgment may be refused if:

(a) [28] The party against whom the proceeding giving rise to the insolvency-related judgment 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;

(b) The insolvency-related judgment was obtained by fraud [29] [in connection with a matter of procedure];

(c) [30] The insolvency-related judgment is inconsistent with a [prior] judgment issued in this State in a dispute involving the same parties;

(d) The insolvency-related judgment is inconsistent with an earlier judgment issued in another State [in a dispute] involving the same parties [31] [and the same subject matter], provided that the earlier judgment fulfils the conditions necessary for its recognition [and enforcement] in this State;

(e) [32] Recognition and enforcement would interfere with the administration of the [debtor's] insolvency proceedings or would be inconsistent with a stay or other order issued in insolvency proceedings [relating to the same debtor] commenced in this State or another State;

(f) [33] The judgment falls within article 2, subparagraph (e)(v) and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) [The insolvency-related judgment was not issued by a court that] [The originating court does not satisfy one of the following conditions] [34]:

(i) Exercised jurisdiction based on the basis of the express consent of the party against whom the judgment was issued;

(ii) Exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction;

(iii) Exercised jurisdiction on a basis that was not inconsistent with the law of this State; [or]

States that have enacted the Model Law on Cross-Border Insolvency might wish to add subparagraphs (g) (iv) and (v) and subparagraph (h) [35]

[(iv) Was supervising a [foreign] main proceeding regarding the insolvency of the [party against whom the judgment was issued] [judgment debtor], or was another court in the State in which that [foreign] main proceeding was being conducted]; or

[(v) *Variant 1 of subparagraph (v) [36]*

Was supervising a [foreign] main proceeding [or was another court in the State in which that foreign main proceeding was being conducted] regarding the insolvency of a debtor for which the party against whom the judgment was issued was serving as a director, if the judgment was based on that party's conduct as a director, including breach of fiduciary duty.]

[(v) *Variant 2 of subparagraph (v)*]

Was supervising a foreign main proceeding or was another court in the State in which that foreign main proceeding was being conducted and the judgment was issued against a person who is, or had been, serving as a director of the debtor in the foreign main proceeding and was based on that person's conduct as a director, including any breach of a fiduciary duty.]

(h) [37] [The judgment was not issued in a proceeding that has been, or could have been, recognized under [*identify the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*],] [The judgment relates to a debtor that had neither the centre of its main interests nor an establishment in the originating State], unless the judgment relates solely to assets that were located in the originating State at the time the foreign proceeding commenced.]

Article 13. Equivalent effect [38]

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it has in the originating State.
2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 14. Severability [39]

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is applied for, or where only part of the judgment is capable of being recognized and enforced under this Law.

Article 15. Provisional relief [40]

From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, the court may, [at the request of a foreign representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment], where relief is urgently needed [to preserve the possibility of recognizing and enforcing an insolvency-related judgment] grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice.*]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgment is made.