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Recognition and enforcement of insolvency-related judgments: commentary and notes on the draft model law

Note by the Secretariat

Contents

	<i>Page</i>
I. General drafting notes.	2
II. Notes on draft articles.	2
Article 1. Scope.	2
Article 2. Definitions	2
Article 3. International obligations of this State.	5
Article 3 bis. International obligations of this State.	6
Article 4, 5 and 6.	6
Article 7 [6 bis]. Public policy exception	6
Article 9 [7 bis and 8 bis]. Effect and enforceability of an insolvency-related judgment in the originating State	7
Article 10 [8]. Application for recognition and enforcement of an insolvency-related judgment	8
Article 11 [9]. Decision to recognize and enforce an insolvency-related judgment	8
Article 12 [10]. Grounds to refuse recognition and enforcement of an insolvency-related judgment	9
Article 13 [10 bis]. Equivalent effect	14
Article 14[12]. Severability	14
Article 15[13]. Provisional relief.	14



I. General drafting notes

1. The articles of the draft text set forth in A/CN.9/WG.V/WP.143 have been renumbered. Numbers/letters appearing below in parentheses following the article number indicate the origin of the article in the previous drafts of the text (A/CN.9/WG.V/WP.138 and 140). The previous order of the articles has been maintained in this revision of the text, but might need to be reviewed as the text develops.
2. To simplify the drafting, the State in which the judgment was issued is referred to throughout this draft of the text as the “originating State”, while the State in which recognition and enforcement is sought is referred to as the “receiving State”.
3. References to the debtor or the debtor’s insolvency estate should be read as references to the debtor in the insolvency proceeding to which the insolvency judgment is related. The “judgment debtor” refers to the party against whom the insolvency-related judgment was issued, which may be the debtor or another person.
4. The text refers to “recognition and enforcement” — see note [21] on whether a distinction might be drawn in some articles between recognition on the one hand, and enforcement on the other.
5. Articles not referred to in the following notes remain unchanged from the previous draft of this text.

II. Notes on draft articles

Article 1. Scope

[1] At the end of draft paragraph 1 the words “where recognition and enforcement are sought” reflect the decision of the Working Group at its forty-ninth session (A/CN.9/870, para. 52).

Article 2. Definitions

Subparagraph (a) “Foreign proceeding”

[2] As currently drafted, the definitions of “foreign proceeding” and “insolvency-related judgment” mean that the judgments covered by the draft text are only those issued in a proceeding outside the receiving State and closely related to a foreign proceeding; it does not cover judgments issued in a proceeding outside the receiving State, but closely related to an insolvency proceeding (of the type defined in subparagraph (a)),¹ taking place in the receiving State. If the Working Group is of the view that the text should also cover the second type of insolvency-related judgment, there may be several possible drafting solutions, including the following:

¹ Para. (a) provides that a foreign proceeding is “a collective judicial or administrative proceeding, 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 court for the purpose of reorganization or liquidation”; the glossary to the Legislative Guide, introduction, subpara. 12 (u), provides that insolvency proceedings are “collective proceedings, subject to court supervision, either for reorganization or liquidation”, where the term “court” means “a judicial or other authority competent to control or supervise insolvency proceedings”.

(i) To change subparagraph (a) to be a definition of a term such as “insolvency proceeding” and remove any reference to the “foreign” State or the “foreign” court as follows:

“(a) ‘Insolvency proceeding’ means a collective judicial or administrative proceeding, 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 court for the purpose of reorganization or liquidation;”

Other definitions would need to be conformed with that definition and the impact on several articles, such as article 12, subparagraph (h) (the only article that refers to “foreign proceeding”) and those articles that refer only to the “foreign representative” (e.g. article 10) would need to be considered.

(ii) To change the definition of insolvency-related judgment as follows:

“(d) ‘Insolvency-related judgment’ means a judgment that is closely related to a foreign proceeding [or to an insolvency proceeding taking place in the receiving State] and was issued after the commencement of that proceeding;”

If the second solution were to be adopted, the use of the words “insolvency proceeding” in the bracketed text would have to be understood as being “a collective judicial or administrative proceeding, 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 court for the purpose of reorganization or liquidation)”. As noted above, other definitions and articles would need to be conformed to that revision if it were to be adopted.

Subparagraph (c) “Judgment”

[3] 1. The definition of “judgment” is based upon the Working Group’s preference for variant 2 of the draft text contained in A/CN.9/WG.V/WP.138 as expressed at the forty-ninth session (A/CN.9/870, para. 55). The Secretariat was requested to prepare a revised text, taking into consideration the desirability of focusing on the nature of the decision rather than the body issuing it. On that basis, it might be desirable to return to the formulation “a judicial or administrative decision, including a decree ...” or to retain the words “any decision issued by a court or administrative authority” and delete the proviso language, which to some extent is addressed in draft article 9.

2. It was suggested at the forty-ninth session that language from the glossary of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide), paragraph 8 might be used, referring to an authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings and would not be regarded as within the meaning of the term “court” as that term is used in this text. That language may be too narrow for the purposes of this text, unless the judgments to be recognized are to be confined to those issued by a foreign court, as defined in article 2, subparagraph (d) i.e. the court competent to control or supervise insolvency proceedings (see also note 2 above). For example, the bankruptcy court in State A supervises and controls

insolvency proceedings. Other courts have jurisdiction with respect to matters connected with insolvency proceedings, such as the examples in article 2, subparagraph (e), and those decisions are closely connected with insolvency proceeding, but they do not have jurisdiction to supervise or control insolvency proceedings.

3. If the words “decree or order” are retained in the second sentence, the Working Group may wish to consider whether the words “whatever it may be called” are required in the first sentence.

[4] A guide to enactment might explain that the draft text refers to “recognition and enforcement” notwithstanding that there are judgments that will require only recognition (e.g. declarations as to the existence of rights), and not enforcement (see note [21]). Relevant explanatory material from the 2005 Convention on Choice of Court Agreements (the 2005 Convention) might be included.

Subparagraph (d) “Foreign court”

[5] A review of the draft text indicates that this term is not used and the definition thus not required, unless it is changed to be a note along the lines of the notes on use of the term “court” in the Legislative Guide (Glossary, para. 8).

Subparagraph (e) “Insolvency-related judgment” [art. 2, para. (d) of A/CN.9/WG.V/WP.140]

[6] 1. The drafting of this definition reflects a preference expressed at the forty-ninth session for the drafting of the version contained in A/CN.9/WG.V/WP.140. The drafting and format of the paragraphs has been revised to take account of that preference.

2. A guide to enactment might explain that a judgment may be considered to be “closely related to a foreign proceeding” when it has an effect upon the insolvency estate of the debtor and either is based on a law relating to insolvency or, due to the nature of its underlying claims, would not have been issued without the commencement of the foreign proceeding. A guide could further explain that an insolvency-related judgment would include any equitable relief, including the establishment of a constructive trust, provided in that judgment or required for its enforcement, but would not include a judgment imposing a criminal penalty.

3. A guide might also consider the relevance, if any, to interpretation of this text of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the EU Regulation recast) (art. 32) which refers to judgments that “derive directly from ... and are closely linked to” insolvency proceedings, as well as the examples of judgments held to fall within and outside that category of judgments, as set out in A/CN.9/WG.V/WP.126, paragraphs 21 and 22.

Subparagraph (e)(i)

[7] The Legislative Guide generally refers to assets that are “included in” the insolvency estate; for consistency it may be desirable to use that phrase in this text, rather than the words “part of”. “Insolvency estate” is defined in the Legislative Guide, glossary, subparagraph 12(t).

Subparagraph (e)(ii)

[8] 1. The chapeau of recommendation 87 of the Legislative Guide, on which this drafting is based, refers to the overturning of transactions, although what is being referred to in subparagraph (e)(ii) may be more readily apparent if the word “avoided” were to be used.

2. The second optional language in square brackets at the end of the definition is also consistent with drafting of recommendation 87, which it might be noted refers only to reduction of the value of the insolvency estate, rather than “improper” reduction of that value. The Working Group may wish to consider these drafting questions.

Subparagraph (e)(iii)

[9] The Working Group may wish to consider whether the word “representative” requires some further specificity; if what is intended is a person serving as a director, consistent with the usage of that term in recommendation 258 of part four of the Legislative Guide, being “any person formally appointed as a director and any other person exercising factual control and performing the functions of a director”, the word “director” might be used in this draft text. A guide to enactment might include or refer to the relevant material in the Legislative Guide.

[10] The words “vicinity of” have been replaced with the words “period approaching” for consistency with the terminology used in part four of the Legislative Guide.

[11] The draft paragraph is based on the definition contained in A/CN.9/WG.V/WP.140. The words in square brackets at the end of the draft paragraph relating to the party pursuing the cause of action were previously included in A/CN.9/WG.V/WP.138, reflecting a proposal made at the forty-eighth session (A/CN.9/864, paras. 68, 69). The words have been included in this draft in square brackets for further consideration.

Subparagraph (e)(iv) [(d)(ii) of A/CN.9/WG.V/WP.138 and (d)(v) of A/CN.9/WG.V/WP.140]

[12] Alternatives A and B have been retained for further consideration, in accordance with the decision of the Working Group at its forty-ninth session (A/CN.9/870, para. 57); the intention of the proposal to include both options was that enacting States could choose whichever was the most appropriate. The words in square brackets are intended to clarify that the sums referred to in this subparagraph are sums not already covered by the other items of subparagraph (e), specifically (i) and (ii). As a matter of drafting, the reference to “the estate” might be expanded to refer to “its insolvency estate” or “the debtor’s insolvency estate”.

[13] The additional language in alternative B is intended to clarify the reference to “the cause of action”.

Article 3. International obligations of this State

[14] At its forty-ninth session (A/CN.9/870, para. 62), the Working Group agreed to retain both article 3 and article 3 bis for further consideration.

Article 3 bis. International obligations of this State

[15] Draft article 3 bis has been revised in accordance with the decisions made at the forty-ninth session (A/CN.9/870, paras. 61-62). The words in square brackets at the end of paragraph 1 have been included, as proposed, with an added reference to the provisions “of the law of this State” to clarify the reference to “provisions”, on the assumption that that was what was intended by the proposal. The Working Group may wish to consider whether the reference to the “enforcement” of insolvency proceedings should be retained.

Articles 4, 5 and 6

[16] 1. Draft articles 4, 5, 6 and 8 are based on articles 4, 5, 7 and 8 of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and have been revised for consistency with the subject matter of this draft instrument. Article 5 has been revised in accordance with a decision at the forty-ninth session (A/CN.9/870, para. 65).

Article 4

2. The Working Group may wish to consider whether a footnote should be included in this draft text, along the lines of the footnote to article 4 of the Model Law (appropriately revised):

“A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

“Nothing in this Law affects the provisions in force in this State governing the authority of [*insert the title of the government-appointed person or body*].”

3. A guide to enactment might refer to the material in the Guide to Enactment and Interpretation of the Model Law on articles 4, 5 and 6, revised as appropriate for this instrument.

[17] Given that the chapeau of article 10 refers to the possibility that a judgment may be raised by way of defence, it may be appropriate either to note in any guide to enactment of draft article 4 that a judgment may be raised by way of defence in a court other than the one specified in this draft article or to include some reference to that issue in the drafting of this article.

Article 7 [6 bis]. Public policy exception

[18] 1. Draft article 7 is based upon article 6 of the Model Law, revised in accordance with the decisions of the Working Group at its forty-ninth session (A/CN.9/870, para. 67). As originally formulated, article 6 refers to the “public policy of this State”, but does not include the words referring to procedural fairness, which derive from article 9, subparagraph (e) of the 2005 Convention. The addition of those words is intended to focus attention on situations where there are serious procedural failings. The explanatory note to the draft text emanating from the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016) (Prel. Doc. No. 2 of April 2016 — Explanatory Note providing background on the proposed draft text and identifying outstanding issues,

para. 167) (the draft Hague Conference text) indicates that the wording relating to procedural fairness was included because not all States regard procedural fairness as part of public policy.

2. A guide to enactment might refer to the material in the Guide to Enactment and Interpretation of the Model Law on public policy, revised as appropriate for this instrument, as well as to any relevant explanatory material from the draft Hague Conference text.

[19] As formulated in article 6 of the Model Law, the words “of this State” refer to public policy. For clarification, given the addition of the final phrase, it may be desirable to retain two references to “this State” so that it is clear that both the public policy and the rules of procedural principles are those “of this State”, or to revise the drafting in some other manner to achieve that result. A reference to procedural fairness without a connection to the enacting State might be too broad and too vague.

Article 9 [7 bis and 8 bis]. Effect and enforceability of an insolvency-related judgment in the originating State

Generally

[20] Draft article 9, which gives effect to revisions agreed by the Working Group at its forty-ninth session (A/CN.9/870, para. 69), also reflects article 4, paragraph 3 of the draft Hague Conference text. It incorporates draft article 8 bis of the previous draft of this text, as contained in A/CN.9/WG.V/WP.138. The final sentence of variant 1 and paragraph 3 of variant 2 have been moved from footnote 24 of the previous draft of this article (A/CN.9/WG.V/WP.138), as decided by the Working Group at its forty-ninth session (A/CN.9/870, para. 72).

Paragraph 2

[21] 1. Variant 2 of draft article 9, paragraph 2 reflects the changes made to draft article 4, paragraph 4 of the draft Hague Conference text and clarifies that conditions might apply only where recognition and enforcement are granted under subparagraph 2(a). While the drafting proposed in variant 2 is essentially the same in substance as that in variant 1, the drafting in variant 1 is somewhat broader and suggests conditions might also apply in the case of postponement, which might seem inappropriate. The Working Group may wish to consider whether some distinction might be made in this draft article between recognition and enforcement e.g. recognition might be granted, but enforcement made subject to conditions, or postponed. As currently drafted, the article makes no such distinction, treating them as a single package.

2. A guide to enactment might include material based upon the explanatory note accompanying the draft Hague Conference text (Prel. Doc. No. 2 of April 2016 — Explanatory Note providing background on the proposed draft text and identifying outstanding issues, paras. 62 and 63).

Article 10 [8]. Application for recognition and enforcement of an insolvency-related judgment*Paragraph 1*

[22] The wording of the paragraph 1 of draft article 10 may require some clarification. As previously drafted (A/CN.9/WG.V/135, art. 8, variant 2), there was a second sentence to the effect that: “a judgment may be enforced by pleading the rights created or recognized by the judgment by way of defence.” The drafting change now suggests that the “application for recognition and enforcement may be made ... by way of defence”. The Working Group may wish to consider how that would be implemented in practice — e.g. when pleading a judgment by way of defence, is the procedure for applying for recognition and enforcement contained in the remainder of the article to be followed, or is a different procedure required? If the former, the article does not need to specify that an application may be made by way of defence and this matter can be addressed in a guide to enactment. If the latter, further drafting may be required.

Subparagraph 2(b)

[23] Variant 1 of subparagraph 2(b) reflects the previous draft as contained in A/CN.9/WG.V/WP.138, which was felt to be too broad and too detailed. Variant 2 is based upon the discussion at the forty-ninth session (A/CN.9/870, para. 71) and focuses only upon the requirement that the judgment is effective and enforceable and that information about any current review should be provided. The reference to “any documents” reflects the approach taken in article 11 of the draft Hague Conference text.

Subparagraph 2(c)

[24] The addition of the words in square brackets to article 10, subparagraph 2(c) was suggested at the forty-eighth session (A/CN.9/864, para. 74), but since the addition has not been considered by the Working Group, the words remain in square brackets.

Subparagraph 2(d)

[25] Subparagraph 2(d) of draft article 10 is included for the consideration of the Working Group. It repeats the substance of article 15, subparagraph 2(c) of the Model Law and article 11, paragraph 2 of the draft Hague Conference text.

Article 11 [9]. Decision to recognize and enforce an insolvency-related judgment*Subparagraph (a)*

[26] If article 11 should refer to all articles relevant to the decision to recognize, a cross-reference to article 9 might be appropriate, in addition to the references to articles 7 and 12. The substance may be repeated as suggested in subparagraph (a) or as a specific reference to article 9, paragraph 2.

Subparagraph (d)

[27] The words in square brackets have been added to draft article 11, subparagraph (d) to take account of the issue noted above in notes [17] and [22].

Article 12 [10]. Grounds to refuse recognition and enforcement of an insolvency-related judgment

The following explanatory notes are included to assist discussion of the various paragraphs of draft article 12. They could be included in any guide to enactment of the draft text.

Subparagraph (a)

[28] Subparagraph (a) permits the court to refuse recognition and enforcement if the defendant in the proceedings giving rise to the judgment was not properly notified of that proceeding. Subparagraph (a)(i) is concerned with the interests of the defendant, while subparagraph (a)(ii) is concerned with the interests of the receiving State, provided that the receiving State is the State in which the defendant was notified of the proceeding giving rise to the judgment.

Subparagraph (b) [art. 10 (c), A/CN.9/WG.V.WP.138]

Subparagraph (b) deals with the situation where the judgment was obtained by fraud in connection with a matter of procedure. While in some legal systems procedural fraud may fall within the scope of the public policy exception, this is not the case for all, hence the inclusion of this provision.

[29] The words “in connection with a matter of procedure” were deleted from the equivalent provision — article 7, subparagraph 1(b) — of the draft Hague Conference text. The basis of that deletion was that the limitation was not necessarily reflected in domestic law or bilateral agreements (although it was noted that it was included in the 2005 Convention), and that fraud should not be restricted to matters of procedure. It was also noted, however, that the originating court may be in a better position than the receiving court to address evidentiary matters related to substantive fraud. The Working Group may wish to consider whether this language should be retained in this draft article.

Subparagraphs (c) and (d) [art. 10 (g), A/CN.9/WG.V.WP.138]

[30] 1. Subparagraphs (c) and (d) are both concerned with the situation where there is a conflict between the judgment for which recognition and enforcement is sought and another judgment given in a dispute between the same parties. Subparagraph (c) addresses the situation where the inconsistent judgment was issued by a court in the receiving State. As currently drafted, the judgment of the receiving State can only take precedence over the foreign judgment if it was issued before the foreign judgment. It might be noted that the draft Hague Conference text (art. 7, subpara. 1 (e)) refers only to inconsistency between the receiving State judgment and the foreign judgment, irrespective of the time of issue of the two judgments. If the word “prior” were to be deleted from subparagraph (c), the receiving State judgment could always take precedence over the foreign judgment, irrespective of the time of its issue relative to the foreign judgment. The Working Group may wish to consider that issue.

2. The parties to the conflicting judgments must be the same, but that requirement may be satisfied if the parties bound by the judgment are the same, even if the parties to the proceedings are different.

3. Subparagraph (d) is concerned with the situation where both judgments are given by foreign courts. Recognition and enforcement of the later of those judgments may be refused, provided the parties are the same, the subject matter is the same and the earlier conflicting judgment fulfils the conditions necessary for recognition and enforcement.

[31] The requirement in subparagraph (d) that the earlier judgment refer not only to the same parties, but also to the same subject matter, is included in article 7, subparagraph 1(f) of the draft Hague Conference text, as it is in the 2005 Convention. It has been added here for consideration by the Working Group.

Subparagraph (e) [art. 10 (h), A/CN.9/WG.V/WP.138]

[32] 1. The first part of subparagraph (e) deals with the desirability of avoiding interference with the conduct and administration of the foreign proceeding, a concept found in article 19, paragraph 4 of the Model Law and concerning the granting of relief. It is explained in paragraph 175 of the Guide to Enactment and Interpretation of the Model Law as having the objective, in the event there is a foreign main proceeding pending, that any relief granted in favour of a foreign non-main proceeding is consistent (or does not interfere) with the foreign main proceeding.

2. In this draft, however, it is somewhat broader and refers both to interference with administration of the debtor's insolvency proceedings and inconsistency with a stay or other order in the insolvency proceedings. The concept of interference is somewhat broad and may cover instances where recognition of the insolvency-related judgment might upset the cooperation between multiple proceedings or give effect to a judgment that should have been pursued in the jurisdiction of the foreign proceeding (e.g. the foreign proceeding is a main proceeding or the foreign proceeding is taking place in the State in which the assets the subject of the judgment are located). It should not be possible, however, that the drafting could allow selective recognition of foreign judgments on the basis that, for example, the judgment creditor was the debtor in the foreign proceeding and thus the value of the insolvency estate could be increased, while judgments where the judgment creditor was a creditor might deplete the value of the estate and thus be refused recognition on this ground of interference.

3. The second part of subparagraph (e) addresses the situation of concurrent insolvency proceedings, where one of those proceedings is taking place in the receiving State. The concurrent proceedings must relate to the same debtor i.e. the debtor subject to the foreign proceeding to which the insolvency judgment is related. Inconsistency with a stay issued in such proceedings might arise where the stay permitted individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition or enforcement of that judgment or where the stay did not permit such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay.

4. The words "relating to the same debtor" have been added to the subparagraph clarify which insolvency proceedings are being referred to.

Subparagraph (f) [11 (j) A/CN.9/WG.V.WP.138 and 12 (j), A/CN.9/WG.V.WP.140]

[33] 1. Subparagraph (f) applies only to those judgments falling within article 2, subparagraph (e)(v) as those judgments can directly affect the rights of creditors or other stakeholders and their interests should have been taken into account in the proceeding giving rise to the judgment. It is intended to reflect the types of protection available under article 22 of the Model Law. It does not apply more generally to other types of insolvency-related judgments that resolve bilateral disputes; even though creditors and other stakeholders may be affected by those judgments, those effects are indirect (e.g. through the judgment's effect on the size of the estate).

2. At its forty-ninth session, the Working Group expressed a preference for subparagraph (j) as drafted in A/CN.9/WG.V.WP.140. The inclusion of this paragraph replaces draft article 11 as it was included in A/CN.9/WG.V/WP.138: "In recognizing and enforcing an insolvency-related judgment under article ..., the court must be satisfied that the interests of the creditors and other interested persons, including the judgment debtor, are adequately protected."

Subparagraph (g) [10 (i), A/CN.9/WG.V.WP.138 and 140]

[34] 1. As currently drafted, article 12 provides a long list of grounds upon which recognition and enforcement might be refused. Several of these grounds, like subparagraph (g), involve complex negatives. To facilitate clarity, an alternative drafting of the chapeau of subparagraph (g) is offered in the second set of square brackets. If drafting along those lines is preferred, the subparagraphs might be drafted, for example, as follows: "(i) The basis of the court's jurisdiction was the express consent of the party against whom the judgment was issued;"

2. Subparagraph (g) permits refusal of recognition and enforcement if the originating court exercised jurisdiction over the judgment debtor on grounds other than those listed; in other words, if the originating court exercised jurisdiction on one of the grounds listed, subparagraph (g) does not apply. As such, subparagraph (g) works differently to the other paragraphs of article 12, each of which create a free-standing discretionary ground on which the court may refuse recognition of a judgment; if one of them is met, the judgment can be refused.

3. Subparagraph (g) can thus be seen as a broad exception, permitting refusal on grounds of inadequate jurisdiction in the originating court (as determined by the receiving court) with four "safe harbours" that render the provision inapplicable if the originating court satisfies any one of them.

Subparagraphs (g)(i)-(iii)

4. The text of subparagraphs (g)(i)-(iii) has been revised in accordance with the discussion at the forty-ninth session (A/CN.9/870, para. 76).

5. Subparagraph (g)(i) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor expressly consented to that exercise of jurisdiction; the judgment debtor cannot subsequently resist recognition and enforcement by claiming that the originating court did not have jurisdiction.

6. Subparagraph (g)(ii) provides that the originating court's exercise of jurisdiction must be seen as adequate if it exercised jurisdiction on a basis on which the receiving court could have exercised jurisdiction had an analogous dispute taken place in the receiving State. If the law of the receiving State would have permitted a court to exercise jurisdiction in parallel circumstances, the receiving court cannot refuse recognition and enforcement on the basis that the originating court did not properly exercise jurisdiction.

7. Subparagraph (g)(iii) is similar to subparagraph (g)(ii), but broader. While subparagraph (g)(ii) is limited to jurisdictional grounds explicitly permitted under the law of the receiving State, subparagraph (g)(iii) applies to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the law of the receiving State. The purpose is to discourage courts from refusing recognition and enforcement under subparagraph (g) in cases in which the originating court's exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State, provided it was not incompatible with the central tenets of procedural fairness in the receiving State.

Subparagraphs (iv)-(v)

[35] 1. Subparagraphs (g)(iv) and (v) are optional provisions intended for enactment in States that have already implemented the Model Law, based as they are upon the concept of foreign main proceedings from the Model Law. In subparagraph (g)(iv), if the originating court or another court in the originating State was supervising a foreign main proceeding concerning the judgment debtor, subparagraph (g) does not apply as a ground to refuse recognition.

2. Subparagraph (g)(v) addresses situations in which a judgment is issued against a director of an insolvent company by a court located at that company's centre of main interests. Provided the judgment was based on the director's conduct as a director, the court's exercise of jurisdiction would not provide grounds for refusal. If the judgment relates to something other than that conduct (e.g. the director as a creditor of the debtor company), subparagraph (g) could provide a basis for refusal of recognition. As in subparagraph (g)(iv), the subparagraph also clarifies that recognition and enforcement should not be refused for jurisdictional reasons solely because the judgment came from a court in the debtor's centre of main interests other than the court actually supervising the main proceeding.

3. The reference to "main proceeding" in subparagraphs (g)(iv) and (v) is based on the definition in the Model Law, article 2, subparagraph (b). Since the defined term is "foreign main proceeding" it may be appropriate to include the word "foreign" in this draft article or to include a definition of "main proceeding" in this draft text.

[36] 1. Variant 1 of subparagraph (g)(v) reflects the draft text as presented in A/CN.9/WG.V/WP.140, with the words "was supervising a main proceeding regarding the insolvency of" removed from the chapeau and placed in the text of the subparagraph. Variant 2 is an attempt to make the text easier to understand. The words "or another court in the State in which that foreign main proceeding was being conducted" have been added to both variants to accommodate the possibility

that the insolvency-related judgment might not always be issued by the court that has the power to control or supervise an insolvency proceeding in a particular State.

2. The Working Group may wish to consider subparagraph (g)(v) and the example of an “insolvency-related judgment” in article 2, subparagraph (e)(ii). The latter refers specifically to the period approaching insolvency, the former does not and is thus potentially much broader. It might be recalled that part four of the Legislative Guide focuses on that period approaching insolvency on the basis that such causes of action can be addressed in the insolvency law and pursued once insolvency proceedings commence. Broader aspects of director conduct typically would be covered by law other than insolvency law. It may be helpful for reasons of consistency to align the language of both provisions or to indicate in a guide to enactment why they are not the same or do not need to be the same.

Subparagraph (h) [10 (k), A/CN.9/WG.V/WP.140]

[37] 1. Article 12, subparagraph (h) reflects the drafting as presented to the Working Group in A/CN.9/WG.V/WP.140 and for which a preference was expressed at the forty-ninth session (A/CN.9/870, para. 76). Like subparagraphs (g)(iv) and (v), this paragraph is also intended primarily for use by States that have enacted the Model Law, as it relies upon the Model Law framework of recognition of specific types of foreign proceeding (i.e. main or non-main proceedings). If the judgment was issued in a type of proceeding that cannot be recognized under the Model Law, recognition of the judgment can be refused unless it relates only to assets that were located in the originating State. The provision is designed to help ensure that the Model Law framework is not undermined by the recognition and enforcement of judgments resolving issues that should have been resolved in the State where the debtor had its centre of main interests or an establishment (i.e. the foreign main or non-main proceedings). In the circumstances where the judgment addresses only assets located in the originating State it may be useful, notwithstanding that that State is not the location of a main or non-main proceeding, for that judgment to be recognized — for example, it may resolve issues of ownership that are relevant to the insolvency estate.

2. The reference to “assets located in the originating State” may be sufficiently broad to cover, for example, intellectual property registered in the originating State where it is neither the centre of the debtor’s main interests nor a State in which the debtor has an establishment. The broad definition of “assets of the debtor” in the Legislative Guide might be noted; even though not applicable to all circumstances arising under the current text, it does provide a broad definition of what the reference to “assets” might include.

3. Subparagraph (h) may be a specific example of circumstances that could be covered more generally by subparagraph (e). The Working Group may recall that this subparagraph was originally added to the text as an alternative to restricting the draft text to recognition of judgments originating only from a main or non-main proceeding (see A/CN.9/829, para. 70). If subparagraph (h) can be regarded as a specific example of subparagraph (e), the substance of subparagraph (h) might be included in a guide to enactment, explaining the context in which a State that has enacted the Model Law might wish to interpret draft subparagraph (e).

Article 13 [10 bis]. Equivalent effect

[38] The Working Group agreed at its forty-ninth session (A/CN.9/870, para. 78) to retain this draft article and remove the square brackets.

Article 14 [12]. Severability

[39] Draft article 14 is based on article 14 of the draft Hague Conference text. At its forty-ninth session (A/CN.9/870, para. 80-81), the Working Group agreed to retain the draft article without square brackets.

Article 15 [13]. Provisional relief

[40] 1. The words in square brackets in the chapeau of paragraph 1 respond to some of the requests at the forty-ninth session to add various elements to the draft text (A/CN.9/870, para. 82). Paragraph 2 adopts the approach of the Model Law on provisional relief (art. 19), leaving it to domestic law to address that issue of procedure.

2. The Working Group may wish to consider how the suggestion made at the forty-ninth session (A/CN.9/870, para. 82) to provide additional examples of relief, including orders not addressed to any particular party, but rather in respect of assets, might be addressed in the draft article. The request to address the procedure for obtaining relief, including whether there would be a hearing, is not addressed on the basis that that is a matter of local law, which UNCITRAL texts typically do not cover (see, for example, art. 19 of the Model Law). The request to address requirements for notice is already covered by paragraph 2.

Additional matters

1. In response to a suggestion at the forty-ninth session that an article should be added to the draft text along the lines of article 12 of the draft Hague Conference text, the Working Group felt that it might be addressed in part by article 1, but could be considered further in its deliberations on the revised draft of this text. Article 12 of the draft Hague Conference text provides:

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are governed by the law of the requested States unless this Convention provides otherwise. The court addressed shall act expeditiously.

2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

2. The first sentence of paragraph 1 would appear to be inappropriate for inclusion in a model law which, once enacted, becomes the law of the enacting State. The second sentence of paragraph 1, which echoes article 17, paragraph 3 of the Model Law, is not currently addressed in this draft text. The substance of paragraph 2 is also not addressed in this text, except to the extent it is covered by article 12, subparagraph (h).