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Recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law

Note by the Secretariat

Contents

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I. Introduction

1. The draft text set out below provides guidance on application and interpretation of the draft model law on recognition and enforcement of insolvency-related judgments, which is set out in document A/CN.9/WG.V/WP.150. It follows the same format as the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), and draws upon that Guide as applicable; a number of the articles of the draft model law are the same as, or similar to, articles of the MLCBI and the relevant explanations for those articles set out below are therefore based upon the explanations contained in the MLCBI Guide.

2. It is intended that the text of the articles of the model law will be included in the final version of the guide to enactment once the drafting of those articles is finalized. This document should thus be read together with A/CN.9/WG.V/WP.150, which contains the current draft of the articles. As far as possible, the draft guide is based upon the text as revised following the fifty-first session of Working Group V (May 2017) and does not reflect further changes proposed for consideration at the fifty-second session.

II. DRAFT Guide to Enactment of the UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

1. The UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments, adopted in … is designed to assist States to equip their laws with provisions that will provide a framework for recognizing and enforcing insolvency-related foreign judgments, thus facilitating the conduct of cross-border insolvency proceedings and complementing the UNCITRAL Model Law on Cross-Border Insolvency (the MLCBI).

B. Origin of the Model Law

2. The suggestion to take up work on this topic had its origin in certain judicial decisions[1] that led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under the MLCBI, to recognize and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceedings, on the basis that neither article 7 nor 21 of the MLCBI explicitly provided the necessary authority.

3. Moreover, in those States that had enacted article 8 of the MLCBI concerning international effect, decisions by foreign courts determining the lack of such explicit authority in the MLCBI for recognition and enforcement of insolvency-related foreign judgments might have been regarded as persuasive authority. The absence of any applicable international convention or other regime to address the recognition and enforcement of insolvency-related judgments, together with a concern that the uncertainty created by the judgments might have had a chilling effect on further adoption of the MLCBI, led to the proposal in 2014 to develop a model law or model legislative provisions on the recognition and enforcement of insolvency-related foreign judgments.

4. The law of recognition and enforcement of judgments is arguably becoming more and more important in a world in which persons and assets can easily be moved

[1] For example, Rubin v Eurofinance SA, [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971); CLOUT case No. 1270. See also decision of the Supreme Court of Korea of 25 March 2010 (case No.: 2009Ma1600).

across borders. Although there is a general tendency towards more liberal recognition of foreign judgments, it is reflected in treaties requiring such recognition in specific subject areas (e.g. conventions relating to family matters, transportation and nuclear accidents) and in a narrower interpretation of the exceptions to recognition in treaties and domestic laws. Under applicable national regimes, some States will only enforce foreign judgments pursuant to a treaty regime, while others will enforce foreign judgments more or less to the same extent as local judgments. Between those two positions there are many different national approaches. However, very few States have recognition and enforcement regimes that specifically address insolvency-related judgments. Even in States that do have such regimes, they may not cover all orders that might broadly be considered to relate to insolvency proceedings.

5. With respect to an international regime dealing more generally with recognition and enforcement of judgments, in 1992, the Hague Conference commenced work on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of judgments abroad (the Judgments Project). The focus of the Judgments Project was initially on developing a broad convention to replace a 1971 Convention developed by the Hague Conference, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which would deal with the two issues noted above. Two draft instruments were prepared — the 1999 preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (1999 preliminary draft Convention) and the 2001 Interim Text. The project was then scaled down to focus on international cases involving choice of court agreements, leading to the Convention of 30 June 2005 on Choice of Court Agreements (2005 Choice of Court Convention), which entered into force on 1 October 2015. In 2011, exploratory work was undertaken to assess the merits of resuming the project to develop a global judgments convention. In 2015 an expert group completed work on a Proposed Draft Text and in 2016 a Special Commission was held to prepare a draft convention. A second Special Commission was held in February 2017 and a third in November 2017. [*to be updated*]

6. Insolvency decisions are typically excluded from the Hague Conference instruments, on the grounds, for example, that those matters may be seen as very specialized and best dealt with by specific international arrangements, or as closely intertwined with issues of public law. Article 1, subparagraph 5, of the 1971 Hague Convention, for example, provides that the convention does not apply to "questions of bankruptcy, composition or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor." Article 2, subparagraph 2 (e), of the 2005 Choice of Court Convention provides that it does not apply to "insolvency, composition and analogous matters". The draft text on recognition and enforcement of judgments is based on the exclusion in the 2005 Convention (art. 2, subpara. 2 (e)), with the additional exclusion of "resolution of financial institutions".

7. In the context of the Hague Conference texts, the term "insolvency"[2] is intended to cover both the bankruptcy of individual persons and the winding up or liquidation of corporate entities which are insolvent. It does not cover the winding up or liquidation of corporations for reasons other than insolvency, which is addressed in article 2, subparagraph 2 (m). It does not matter whether the process is initiated or carried out by creditors or by the insolvent person or entity itself with or without the involvement of a court. The term "composition" refers to procedures in which the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term "analogous proceedings" covers a broad range of other methods in which insolvent persons or entities can be assisted to regain solvency while continuing to trade, such as

[2] Convention of 30 June 1005 on Choice of Court Agreements: Explanatory Report by Trevor Hartley and Masato Dogauchi, [56]. There is an identical provision in art. 1 (2) (e) of the preliminary draft Convention of 1999, and its scope is further examined at paras. 38 to 39 of the Nygh/Pocar Report.

chapter 11 of the United States Federal Bankruptcy Code and Part II of the United Kingdom Insolvency Act 1986.

C. Preparatory work and adoption

8. In 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.[3] The Model Law was negotiated between December 2014 and …, the Working Group having devoted part of … sessions (46th -) to work on the project.

9. The final negotiations on the draft text took place during the … session of UNCITRAL, held in … from … to … UNCITRAL adopted the Model Law by consensus on …. In addition to the 60 States members of UNCITRAL, representatives of … observer States and … international organizations participated in the deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution …/… of … (see annex), in which it expressed its appreciation for UNCITRAL completing and adopting the Model Law.

II. Purpose of the Guide to Enactment

10. The Guide to Enactment is designed to provide background and explanatory information on the Model Law and its interpretation and application. That information is primarily directed to executive branches of Governments and legislators preparing the necessary legislative revisions, but may also provide useful insight to those charged with interpretation and application of the Model Law, such as judges, and other users of the text, such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions might be adapted to address particular national circumstances.

11. The present Guide was considered by Working Group V at its fifty-second (December 2017) and … sessions. It is based on the deliberations and decisions of the Working Group at those sessions and of the Commission at its … session, when the Model Law was adopted.

III. A model law as a vehicle for the harmonization of laws

12. A model law is a legislative text recommended to States for incorporation into their national law. Unlike an international convention, a model law does not require the State enacting it to notify the United Nations or other States that may have also enacted it.

A. Flexibility of a model law

13. In incorporating the text of a model law into its legal system, a State may modify or elect not to incorporate some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as “reservations”) is much more restricted; in particular, trade law conventions usually either totally prohibit reservations or allow only specified ones. The flexibility inherent in a model law, on the other hand, is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected, in particular, when the uniform text is closely related to the national court and procedural system.

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

B. Fitting the Model Law into existing national law

14. With its scope limited to recognition and enforcement of insolvency-related foreign judgments, the Model Law is intended to operate as an integral part of the existing law of the enacting State.

15. The only new legal term introduced in the Model Law is specific to its subject matter, namely "insolvency-related foreign judgment". Other terms, such as "insolvency representative" and "insolvency proceeding" are used in other UNCITRAL insolvency texts and are unlikely to be in conflict with terminology in existing law. Moreover, where the expression used is likely to vary from country to country, the Model Law, instead of using a particular term, indicates the meaning of the term in italics within square brackets and calls upon the drafters of the national law to use the appropriate term.

16. The Model Law preserves the possibility of excluding or limiting any action on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used (article 7).

17. The flexibility that enables the Model Law to be adapted to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see paras. … below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency-related matters. Modification means that the degree of, and certainty about, harmonization achieved through a model law may be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible when incorporating the Model Law into their legal systems. This will assist in making the national law as transparent and predictable as possible for foreign users. The advantage of uniformity and transparency is that it will make it easier for enacting States to demonstrate the basis of their national law on recognition and enforcement of insolvency-related foreign judgments.

18. If the enacting State decides to incorporate the provisions of the Model Law into an existing national insolvency statute, the title of the enacted provisions would have to be adjusted accordingly and the word "Law", which appears at various places in the title and in the text of the Model Law, would have to be replaced by the appropriate expression.

C. Use of terminology

"*Insolvency*"

19. Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, "insolvency proceeding" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent, with the goal of liquidating or reorganizing the debtor as a commercial entity. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2, subparagraph (a) are not insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress. The use of the term "insolvency" in the Model Law is consistent with its use in other UNCITRAL insolvency texts, specifically the MLCBI and the Legislative Guide.[4]

20. It should be noted that in some jurisdictions the expression "insolvency proceedings" has a narrow technical meaning in that it may refer, for example, only

[4] Introd., para. 12 (s): "'Insolvency': when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets."

to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Law, since the Model Law is designed to be applicable to foreign judgments related to proceedings addressing the insolvency of both natural and legal persons as the debtor. If, in the enacting State, the word "insolvency" may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.

"State"

21. The words "this State" are used throughout the Model Law to refer to the entity that enacts the Model Law (i.e. the enacting State). The term should be understood as referring to a State in the international sense and not as referring to, for example, a territorial unit in a State with a federal system. The words "originating State" are also used throughout the Model Law to refer to the State in which the insolvency-related foreign judgment was issued.

"Recognition and enforcement"[5]

22. The Model Law refers to "recognition and enforcement" of an insolvency-related judgment as a single concept, however that drafting approach should not be regarded as requiring enforcement of all judgments that have been recognized where enforcement is not required.

23. Under some national laws, recognition and enforcement are two separate processes and may be covered by different laws. In some federal jurisdictions, for example, recognition may be subject to national law, while enforcement is subject to the law of a territorial or sub-federal unit. Recognition may have the effect of making the foreign judgment a local judgment that can then be enforced under local law. Thus while enforcement may presuppose recognition of a foreign judgment, it goes beyond recognition. Confusion may be caused in some States as to whether both can be achieved through a single application or whether two separate applications are required. The Model Law does not specifically address that procedural requirement, but provisions that might be of specific relevance to the issue of enforcement should be noted, for example, article 9, paragraph 2 which refers to conditional recognition or enforcement.

24. In the case of some judgments, recognition might be sufficient and enforcement may not be needed, for example, for declarations of rights or some non-monetary judgments, such as the discharge of a debtor or a judgment determining that the defendant did not owe any money to the plaintiff. The receiving court may simply recognize that finding and if the plaintiff were to sue the defendant again on the same claim before that court, the recognition already accorded would be enough to dispose of the case. Thus while enforcement must be preceded by recognition, recognition need not always be accompanied or followed by enforcement.

Documents referred to in this Guide

(a) "MLCBI": UNCITRAL Model Law on Cross-Border Insolvency (1997);

(b) "Guide to Enactment and Interpretation": Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency as revised and adopted by the Commission on 18 July 2013;

(c) "Practice Guide": UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(d) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including parts three (2010) and four (2013);

[5] See paras. 73 and 74 below for further explanation of the meaning of these terms.

(e) "Judicial Perspective": UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (updated 2013);

(f) 2005 Choice of Court Convention: Hague Conference on Private International Law Convention of 30 June 2005 on Choice of Court Agreements; and

(g) Hartley/Dogauchi report: Explanatory Report on the 2005 Choice of Court Convention by Trevor Hartley and Masato Dogauchi.

IV. Main features of the Model Law

A. Scope of application

25. The Model Law applies to an insolvency-related foreign judgment that was issued in a proceeding taking place in a State different to the State in which recognition and enforcement is sought. That would include a foreign judgment for which recognition and enforcement is sought in the enacting State, where both the proceeding giving rise to the judgment and the insolvency proceeding to which it relates are taking place in another State. It would also include a foreign judgment for which recognition and enforcement is sought in the enacting State, which is also the State in which the insolvency proceeding to which the judgment relates is taking place.

B. Types of judgment covered

26. To fall within the scope of the Model Law a foreign judgment needs to possess certain attributes. These are, firstly, that it is [related to] [derives directly from or is closely connected to] [stems intrinsically from or is materially associated with] an insolvency proceeding (as defined in art. 2, subpara. (a)) and, second, that it was issued on or after the commencement of that insolvency proceeding (the definition does not however include the judgment commencing an insolvency proceeding, as noted in the preamble, subpara. 2 (d) and in art. 2, para. (d) 2). An interim measure of protection is not to be considered a judgment for the purposes of the Model Law.

27. The Model Law clarifies that the cause of action giving rise to the judgment may be pursued by the debtor or the insolvency representative in the insolvency proceeding. It may also be pursued by a creditor, with the approval of the court, in circumstances where the insolvency representative has decided not to pursue that cause of action, or by a party to whom the cause of action was assigned by the insolvency representative in accordance with applicable law. In both instances, the judgment must be otherwise enforceable under the Model Law.

28. For the information of enacting States, a number of examples of the types of judgment that might fall within the definition of "insolvency-related foreign judgment" are provided below; the list is not intended to be exhaustive (see para. …).

C. Relationship between the Model Law and the MLCBI

29. The subject matter of the Model Law is related to that of the MLCBI; both texts use similar terminology and definitions (e.g. the definition of "insolvency proceeding" is based upon the definition of "foreign proceeding" in the MLCBI), a number of the general articles of the MLCBI are repeated in the Model Law (arts. 3 to 8) and the Preamble, as well as articles 13, subparagraph (h) and X, refer specifically to the relationship of the text of the Model Law to the MLCBI. The Preamble, as noted below (para. ...), clarifies that the Model Law is not intended to replace or displace legislation enacting the MLCBI. States that have enacted or are considering enacting the MLCBI may wish to note the following guidance on the complementary nature of the two texts.

30. The MLCBI applies to the recognition of specified foreign insolvency proceedings (that is, those that are a type of proceeding covered by the definition of "foreign proceeding" and can be considered to be either a foreign main or a foreign

non-main proceeding). Other types of proceeding, such as those commenced on the basis of presence of assets or those that are not a collective proceeding (as explained in paras. 69-72 of the Guide to Enactment and Interpretation of the MLCBI) do not fall within the types of proceeding eligible for recognition under the MLCBI. The Model Law, in comparison, addresses the recognition and enforcement of insolvency-related judgments, that is, judgments that bear the necessary relationship, as defined in article 2, subparagraph (d), to an insolvency proceeding (as defined in art. 2, subpara. (a)), although the decision commencing the insolvency proceeding, which is the subject of the MLCBI's recognition regime, is specifically excluded from the definition of "insolvency-related judgment" for the purposes of the Model Law (Preamble, subpara. 2 (d) and art. 2, para. (d) 2).

31. Like the MLCBI, the Model Law establishes a framework for seeking cross-border recognition, in this case of an insolvency-related judgment. That procedure seeks to establish a clear, simple procedure that avoids unnecessary complexity, such as requirements for legalization. Like the analogous provisions for provisional relief in the MLCBI, the Model Law also provides for provisional relief to preserve the possibility of recognizing and enforcing an insolvency-related judgment between the time recognition and enforcement are sought and the time the court issues its decision. Like the MLCBI, the Model Law also seeks to establish certainty with respect to the outcome of the recognition and enforcement procedure, so that if the relevant documents are provided, the judgment satisfies the requirements for effectiveness and enforceability in the originating State, the person seeking recognition and enforcement is the appropriate person and there are insufficient or no grounds for refusing recognition and enforcement, the judgment should be recognized and enforced.

32. As discussed in more detail in the article-by-article remarks below, the Model Law permits recognition of an insolvency-related foreign judgment to be refused when the judgment originates from a State whose insolvency proceeding is not susceptible of recognition under the MLCBI; this may be because that State is neither the location of the insolvency debtor's centre of main interests (COMI) nor of an establishment of the debtor. This principle is contained in article 13, subparagraph (h), which is an optional provision for consideration by States that have enacted (or are considering enactment of) the MLCBI. The substance of the article provides an exception to that general principle, which permits recognition of a judgment issued in a State that is neither the location of the COMI nor of an establishment of the debtor, where the judgment relates only to assets that were located in the issuing State, provided certain conditions are met. The exception could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. Such an exception is not available in the MLCBI.

33. A requirement for protection of the interests of creditors and other interested persons, including the debtor is included in both the Model Law and the MLCBI, but in different situations. The MLCBI requires the recognizing court to ensure that those interests are considered when granting, modifying or terminating provisional or discretionary relief under the MLCBI. As the Guide to Enactment and Interpretation of the MLCBI explains, the idea underlying that requirement (art. 22) is that there should be a balance between relief that might be granted to the foreign representative and the interests of the persons that may be affected by that relief.[6] The Model Law is more narrowly focused; the issue of such protection is relevant only in so far as article 13, subparagraph (f) gives rise to a ground for refusing recognition and enforcement where those interests were not adequately protected in the proceeding giving rise to certain types of judgment, for example a judgment confirming a plan of reorganization. As discussed further below (see paras. …), the rationale is that the types of judgment specified in article 13, subparagraph (f) directly affect the rights of creditors and other stakeholders collectively. Although other types of

[6] See Guide to Enactment and Interpretation, paras. 196-199.

insolvency-related judgments that resolve bilateral disputes between two parties may also affect creditors and other stakeholders, those effects are typically indirect (e.g., via the judgment's effect on the size of the insolvency estate) and in those circumstances a separate analysis of the adequate protection of third-party interests is not considered to be necessary and could lead to unnecessary litigation and delay.

34. Another element of the relationship between the Model Law and the MLCBI concerns article X, which concerns the interpretation of article 21 of the MLCBI. This is a further optional provision that States which have enacted the MLCBI may wish to consider. Pursuant to the clarification provided by article X, the discretionary available relief under the MLCBI to support a recognized foreign proceeding (covering both main and non-main proceedings) should be interpreted as including the recognition and enforcement of a judgment, notwithstanding any interpretation to the contrary.

V. Article-by-article remarks

Title

"Model Law"

35. If the enacting State decides to incorporate the provisions of the Model Law into an existing national statute, the title of the enacted provisions would have to be adjusted accordingly, and the word "Law", which appears in various articles, would have to be replaced by the appropriate phrase.

36. In enacting the Model Law, it is advisable to adhere as much as possible to the uniform text in order to make the national law as transparent as possible for foreign users of the national law (see also section III above).

Preamble

37. Paragraph 1 of the Preamble is drafted to provide a succinct statement of the basic policy objectives of the Model Law. It is not intended to create substantive rights, but rather to provide a general orientation for users of the Model Law and to assist with its interpretation.

38. In States where it is not customary to include in legislation an introductory statement of the policy on which the legislation is based, consideration might nevertheless be given to including a statement of objectives as contained in the Preamble to the Model Law either in the body of the statute or in a separate document, in order to provide a useful reference for interpretation of the law.

39. Paragraph 2 of the Preamble is intended to clarify certain issues concerning the relationship of the Model Law to other national legislation dealing with the recognition of insolvency proceedings that might also address the recognition of insolvency-related judgments, including, for example, the MLCBI (see also art. 13, subpara. (h)), where it has been enacted. It is clear from subparagraph 2 (f) of the Preamble that the Model Law is intended to complement the MLCBI and subparagraph 2 (c) of the Preamble clarifies that the Model Law is not intended to replace [or displace] legislation enacting the MLCBI or to limit the interpretation of that legislation. So, for example, where a State interprets that legislation as facilitating the recognition of insolvency-related judgments, enactment of the Model Law should not automatically supersede that legislation unless that result is intended by the State. Subparagraph 2 (d) of the Preamble confirms that the Model Law is not intended to apply to a judgment commencing an insolvency proceeding, as that judgment is the subject of recognition under the MLCBI.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 48
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 58, 76
A/CN.9/WG.V/WP.150

Article 1. Scope of application

Paragraph 1

40. Article 1, paragraph 1 confirms that the Model Law is intended to address the recognition and enforcement in one State of an insolvency-related judgment issued in a different State i.e. in a cross-border context. It should be noted, however, that the insolvency proceeding to which the judgment is related might be taking place in the State in which recognition and enforcement are sought or in another State. The Law is limited in its application to a foreign judgment related to an insolvency proceeding, as those terms are defined in article 2.

Paragraph 2

41. Article 1, paragraph 2 indicates that the enacting State might decide to exclude certain types of judgment, such as those raising public policy considerations. These might include, for example, judgments concerning foreign revenue claims. With a view to making the national law based on this Model Law more transparent for the benefit of foreign users, exclusions from the scope of the law might usefully be mentioned in paragraph 2.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 49-53
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 55-60
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 32
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [1]
A/CN.9/898, para. 11
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 59-63
A/CN.9/WG.V/WP.150

Article 2. Definitions

Subparagraph (a) "Insolvency proceeding"

42. This definition draws upon on the definition of "foreign proceeding" in the MLCBI.[7] A judgment will fall within the scope of the Model Law if it is related to an insolvency proceeding that meets the definition in article 2, subparagraph (a). The attributes required for that proceeding to fall within the definition include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. For a proceeding to be considered an "insolvency proceeding" it must possess all of these elements. The definition refers to assets that "are or were subject to control" to address the situation where the insolvency

[7] MLCBI, art. 2 (a): (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 the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

proceeding has closed at the time recognition of the insolvency-related judgment is sought. This is discussed in more detail below with respect to the definition of "insolvency-related foreign judgment" (see para. …).

43. A detailed explanation of the elements required for a proceeding to be considered an "insolvency proceeding" is provided in the Guide to Enactment and Interpretation of the MLCBI.[8]

Subparagraph (b) "Insolvency representative"

44. This definition draws upon the definition of "foreign representative" in the MLCBI[9] and "insolvency representative" in the Legislative Guide.[10] Article 2, subparagraph (b) recognizes that the insolvency representative may be a person authorized in insolvency proceedings to administer those proceedings and, in the case of proceedings taking place in a State other than the enacting State, the "insolvency representative" may also include a person authorized specifically for the purposes of representing those proceedings.

45. The Model Law does not specify that the insolvency representative must be authorized by a court and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointments made on an interim basis. An appointment on that basis is included to reflect the practice in many countries of often, or even usually, commencing insolvency proceedings on an "interim" or "provisional" basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition of "insolvency proceeding" in article 2, subparagraph (a). Such proceedings are often conducted for weeks or months as "interim" proceedings under the administration of persons appointed on an "interim" basis, and only at some later time would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The definition in subparagraph (b) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph (c) "Judgment"

46. The Model Law adopts a broad definition of what constitutes a judgment, explaining what the term might include in the second sentence of article 2, subparagraph (c). The focus is upon judgments issued by a court, which might generally be described as an authority exercising judicial functions or by an administrative authority, provided the decision of the latter has the same effect as a court decision. Administrative authorities are included on the basis that some insolvency regimes are administered by specialized authorities and decisions issued by those authorities in the course of insolvency proceedings merit recognition on the same basis as judicial decisions. However, while the Model Law applies to judgments issued by the court that is competent to control or supervise an insolvency proceeding, not all States have specialized courts with insolvency jurisdiction and there are many instances in which a judgment covered by the Model Law could be issued by a court that did not have such competence. This is also supported by the focus upon "insolvency-related" judgments. For those reasons, the definition is intentionally broader than the use of the word "court" in both the MLCBI and the Legislative Guide.[11]

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[8] Guide to Enactment and Interpretation, paras. 69-80.

[9] Ibid., art. 2 (d): "'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."

[10] Legislative Guide, Introd., subpara. 12 (v): "'Insolvency representative': a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate."

[11] Ibid., Introd., para. 8: For purposes of simplicity, the Legislative Guide uses the word "court" in

47. The reference to costs and expenses of the court has been added to restrict the enforcement of costs orders to those given in relation to judgments that can be recognized and enforced under the Model Law.

48. Interim measures of protection should not be considered to be judgments for the purposes of the Law. The Model Law does not define what is intended by the term "interim measures". In the international context, few definitions of what constitute interim, provisional, protective or precautionary measures exist and legal systems differ on how those measures should be characterized.

49. Interim measures may serve two principal purposes: to maintain the status quo pending determination of the issues at trial and to provide a preliminary means of securing assets out of which an ultimate judgment may be satisfied. In addition, they may share certain characteristics; for example, they are temporary in nature, they may be sought on an urgent basis, or they may be issued on an ex parte basis. However, if an order for such measures is confirmed after the respondent has been served with the order and had the opportunity to appear and seek the discharge of the order, it may cease to be regarded as a provisional or interim measure.

50. Legal effects that might apply by operation of law, such as a stay applicable automatically on commencement of insolvency proceedings pursuant to the relevant law relating to insolvency, may not, without more, be considered a judgment for the purposes of the Model Law.

Subparagraph (d) "Insolvency-related foreign judgment"

51. The types of judgment to be covered by the Model Law are those that can be considered to be [related to] [deriving directly from or closely connected to] [stemming intrinsically from or materially associated with] an insolvency proceeding (as defined in art. 2, subpara. (a)), that are issued by a court or relevant administrative authority on or after the commencement of that insolvency proceeding and that have an effect upon the insolvency estate of the debtor. 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.

52. Judgments issued on commencement of insolvency proceedings would include any judgments that might in some jurisdictions be described as first day orders and could be made at the time the proceedings commenced, but would not typically include the decision commencing the insolvency proceeding. This exclusion is confirmed by paragraph 2 of the definition. The decision commencing an insolvency proceeding is specifically the subject of recognition under the MLCBI. It might be noted that should recognition of the commencement decision be required, it is most likely to be in circumstances where the relief available under the MLCBI is also required. Should a commencement decision be susceptible of recognition under this Model Law, it would carry no possibility of obtaining automatic or discretionary relief of the kind available under articles 20 and 21 of the MLCBI.

53. The words following article 2, subparagraph (d) (iii) of the definition of "insolvency-related foreign judgment" clarify that an insolvency-related foreign judgment issued after the proceedings to which it relates have closed, can still be considered an insolvency-related judgment for the purposes of the Model Law. In some jurisdictions, for example, actions for avoidance may be pursued after a reorganization plan has been approved and confirmed by the court, where that confirmation is considered the conclusion of the proceedings. Insolvency laws take

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the same way as art. 2, subpara. (e), of the MLCBI to refer to "a judicial or other authority competent to control or supervise" insolvency proceedings. An authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term "court" as that term is used in the Guide. The MLCBI, art. 2 subpara. (e), provides: (e) "'Foreign court' means a judicial or other authority competent to control or supervise a foreign proceeding."

different approaches to conclusion of insolvency proceedings, as discussed in the Legislative Guide, part two, chapter VI, paragraphs 16-19.

54. The following list, which is not intended to be exhaustive, provides some examples of the types of judgment that might be considered insolvency-related foreign judgments:

(a) A judgment dealing with constitution and disposal of assets of the insolvency estate, such as whether an asset is part of, should be turned over to, or was properly (or improperly) disposed of by the insolvency estate;

(b) A judgment determining whether a transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors (preferential transactions) or improperly reduced the value of the estate (transactions at an undervalue);

(c) A judgment determining that a representative or director of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, 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 under the law relating to insolvency, in line with part four of the Legislative Guide;

(d) A judgment determining that sums not covered by (a) or (b) above are owed to or by the debtor or its insolvency estate; some States may consider that a judgment would fall into this category only where the cause of action relating to the recovery or payment of those sums arose after the commencement of insolvency proceedings in respect of the debtor; or

(e) A judgment (i) confirming a plan of reorganization or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement. The types of agreement referred to in subparagraph (iii) are typically not regulated by the insolvency law and may be reached through informal negotiation to address a consensual modification of the claims of all participating creditors. In this Model Law, the reference is to such agreements that are ultimately referred to the court for approval in formal proceedings, such as an expedited proceeding of the type addressed in the Legislative Guide.[12]

55. Article 2, subparagraph (d) 1 of the definition clarifies that the cause of action leading to the judgment need not necessarily be pursued by the debtor or its insolvency representative. "Cause of action" should be interpreted broadly to refer to the subject matter of the litigation. The insolvency representative may have decided not to pursue the action, but rather to assign it to a third party or to permit it to be pursued by creditors with the approval of the court. The fact that the cause of action was pursued by another party will not affect the recognizability or enforceability of any resulting judgment, provided it is of a type otherwise enforceable under the Model Law.

56. Subparagraph (d) 2, as noted above (paras. …), confirms that the definition does not include the decision commencing an insolvency proceeding on the basis that it is the subject of a recognition regime under the MLCBI. Other decisions, such as the decision appointing the insolvency representative, are not excluded from the Model Law, as recognition of that appointment is often a critical factor in demonstrating that the insolvency representative has standing to apply for recognition and enforcement of the judgment (art. 10) or for relief associated with such recognition and enforcement (art. 11).

[12] Ibid., see chap. IV, section B.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 54-60
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 61-70
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 3-5
A/CN.9/870, paras. 53-60
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [2]-[13]
A/CN.9/898, paras. 48-60
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 64-73, 77
A/CN.9/WG.V/WP.150

Article 3. International obligations of this State

57. Article 3, paragraph 1, expressing the principle of supremacy of international obligations of the enacting State over internal law, has been modelled on similar provisions in other model laws prepared by UNCITRAL, including the MLCBI.

58. Article 3, paragraph 2 provides that where there is a treaty in force for the enacting State and that treaty applies to the recognition and enforcement of civil and commercial judgments, if the judgment in question falls within the terms of the treaty then the treaty should cover its recognition and enforcement, rather than the Model Law. The article confirms that the treaty will prevail irrespective of the time at which it came into force for the enacting State relative to the enactment of the Model Law i.e. whether before or after that enactment and entry into force. Binding legal obligations issued by regional economic integration organizations that are applicable to members of that organization might be treated as obligations arising from an international treaty.

59. In some States binding international treaties are self-executing. In other States, however, those treaties, with certain exceptions, are not self-executing as they require internal legislation in order to become enforceable law. In view of the normal practice of the latter group of States with respect to international treaties and agreements, it might be inappropriate or unnecessary to enact article 3 or it might be appropriate to enact it in a modified form.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 61-63
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [14]-[15]
A/CN.9/898, paras. 13-17
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 17-20, 78
A/CN.9/WG.V/WP.150

Article 4. Competent court or authority

60. The competence for the judicial functions dealt with in the Model Law may lie with different courts in the enacting State and the enacting State would tailor the text of the article to its own system of court competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the legislation for the benefit of, in particular, foreign insolvency representatives and

others authorized under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment. If, in the enacting State, any of the functions relating to recognition and enforcement of an insolvency-related foreign judgment are performed by an authority other than a court, the State would insert in article 4, and in other appropriate places in the enacting legislation, the name of the competent authority.

61. In defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State. In particular, as the article makes clear, the issue of recognition may be raised by way of defence or as an incidental question in a proceeding in which the main issue for determination is not that of recognition and enforcement of such a judgment. In those cases, that issue may be raised in a court other than the court specified in accordance with the first part of article 4.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 64
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [16]-[17]
A/CN.9/898, paras. 18-20
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 21
A/CN.9/WG.V/WP.150

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

62. The intent of article 5 is to ensure insolvency representatives or other authorities appointed in insolvency proceedings commenced in the enacting State are authorized to act abroad with respect to an insolvency-related judgment. An enacting State in which insolvency representatives are already equipped to act in that regard may decide to forgo inclusion of article 5, although retaining that article would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.

63. Article 5 is formulated to make it clear that the scope of the power exercised abroad by the insolvency representative would depend upon the foreign law and courts. Action that the insolvency representative appointed in the enacting State may wish to take in a foreign country will be action of the type dealt with in the Model Law, such as seeking recognition or enforcement of an insolvency-related judgment or associated relief, but the authority to act in a foreign country does not depend on whether that country has enacted legislation based on the Model Law.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 65
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145

A/CN.9/903, para. 22
A/CN.9/WG.V/WP.150

Article 6. Additional assistance under other laws

64. The purpose of the Model Law is to increase and harmonize cross-border assistance available in the enacting State to foreign insolvency representatives with respect to the recognition and enforcement of an insolvency-related foreign judgment. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a foreign insolvency representative could obtain that assistance and since it is not the purpose of the Law to replace or displace those provisions to the extent that they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether article 6 is needed to make that point clear. Article X is also relevant in this regard in so far as it provides clarification as to the scope of article 21 of the MLCBI and the relief that should be available under that article.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 66
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 23
A/CN.9/WG.V/WP.150

Article 7. Public policy

65. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 7.

66. In some States the expression “public policy” may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do so would contravene those fundamental principles.[13]

67. The purpose of the expression “manifestly”, which is also used in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 7 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. In some States, that may include situations where the security or sovereignty of the State has been infringed.

68. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public

[13] For relevant cases under the MLCBI see, for example, the Judicial Perspective III.B.5 “The ‘public policy’ exception”.

policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if "public policy" were to be understood in an expansive manner.

69. The second part of the provision referring to procedural fairness is intended to focus attention on serious procedural failings. It was drafted to accommodate those States with a relatively narrow concept of public policy (and which treat procedural fairness and natural justice as distinct from public policy) that may wish to include language about procedural fairness in legislation enacting the Model Law.[14]

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, para. 67
A/CN.9/WG.V/WP.143
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.143/Add.1, notes [18]-[19]
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 24
A/CN.9/WG.V/WP.150

Article 8. Interpretation

70. A provision similar to the one contained in article 8 appears in a number of private law treaties (e.g. art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods). More recently, it has been recognized that such a provision would also be useful in a non-treaty text, such as a model law, on the basis that a State enacting a model law would have an interest in its harmonized interpretation. Article 8 is modelled on the corresponding article of the MLCBI.

71. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL (for further information about the system, see para. … below).

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 68
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 22
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 25
A/CN.9/WG.V/WP.150

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

72. Article 9, paragraph 1, provides that a judgment will only be recognized if it has effect in the originating State, and will only be enforced if it is enforceable in the originating State.[15] Having effect generally means that the judgment is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. It is possible that a judgment is effective in the

[14] Cf. article 9 (e) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, paras. 189-190.
[15] Cf. article 8 (3) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 171.

originating State without being enforceable because, for example, it has been suspended pending the outcome of an appeal. If a judgment does not have effect or is not enforceable in the originating State or if it ceases to have effect or be enforceable in the originating State, it should not be recognized or enforced (or continue to be recognized or enforced) in another State under the Model Law. The question of effect and enforceability must thus be determined by reference to the law of the originating State, recognizing that different States have different rules on finality and conclusiveness of judgments.

73. This discussion raises the distinction between recognition of a judgment and its enforcement.[16] As noted above, recognition means that the receiving court will give effect to the originating court's determination of legal rights and obligations reflected in the judgment. For example, if the originating court held that the plaintiff had, or did not have, a certain right, the receiving court would accept that determination. Enforcement, on the other hand, means the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court. Thus, if the originating court ruled that the defendant owed the plaintiff a certain sum of money, the receiving court would ensure that the money was paid to the plaintiff. Since that would be legally indefensible if the defendant did not owe that sum of money to the plaintiff, a decision to enforce the judgment must, for the purposes of the Model Law, be preceded or accompanied by recognition of the judgment.

74. In contrast, recognition need not be accompanied or followed by enforcement. For example, if the originating court held that one party owed money to the other or that one party had a certain right, the receiving court may simply recognize that finding. If the same claim was further pursued in the receiving State, recognition of the foreign judgment would be sufficient to dispose of the case.

75. The use of the word "review" might have different meanings depending on national law; in some jurisdictions, it might initially include both the possibility of a review by the issuing court, as well as review by an appellate court. For example, an originating court may have a short period before an appeal is made to a higher court in which to review its own judgment; once the appeal is made, the originating court no longer has that ability. Both situations would be covered by the use of the word "review". "Ordinary review" describes, in some legal systems, a review that is subject to a time limit and conceived as an appeal with a full review (of facts and law). It differentiates those cases from "extraordinary" reviews, such as an appeal to a court of human rights or internal appeals for violation of fundamental rights.

76. Article 9, paragraph 2 provides that if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review has not expired, the receiving court has the discretion to adopt various approaches to the judgment. For example, it can refuse to recognize the judgment; postpone recognition and enforcement until it is clear whether the judgment is to be affirmed; set aside or amended in the originating State; proceed to recognize the judgment, but postpone enforcement; or recognize and enforce the judgment. This flexibility allows the court to deal with a variety of different situations, including, for example, where the judgment debtor pursues an appeal in order to delay enforcement, where the appeal may otherwise be considered frivolous or the judgment may be provisionally enforced in the originating State. If the court decides to recognize and enforce the judgment notwithstanding the review or to recognize the judgment but postpone enforcement, the court can require the provision of some form of security to ensure that the relevant party is not prejudiced pending the outcome of the review. If the judgment is subsequently set aside or amended or ceases to become effective or enforceable in the originating State, the receiving State should rescind or amend any recognition or enforcement granted in accordance with relevant procedures established under domestic law.

[16] Ibid., para. 170.

77. If the court decides to refuse recognition and enforcement because of the pending review, it should not prevent a new request for recognition and enforcement once that review had been determined. Refusal in that instance would mean dismissal without prejudice.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 69, 72
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [20]-[21]
A/CN.9/898, paras. 23-24
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 26-27
A/CN.9/WG.V/WP.150

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related foreign judgment

78. Article 10 defines the core procedural requirements for recognition and enforcement of an insolvency-related foreign judgment. In incorporating the provision into national law, it is desirable not to encumber the process with additional requirements beyond those referred to. Articles 10 and 11 are intended to provide a simple, expeditious structure to be used for obtaining recognition and enforcement.

Paragraph 1

79. Recognition and enforcement of an insolvency-related foreign judgment can be sought by either an insolvency representative or a person authorized to act on behalf of an insolvency proceeding within the meaning of article 2, subparagraph (b). It may also be sought by any person entitled under the law of the originating State to seek such recognition and enforcement. Such a person might include a creditor whose interests are affected by the judgment. Paragraph 1 repeats article 4, noting that the question of recognition may also be raised by way of defence or as an incidental question in the course of a proceeding. In such cases, enforcement may not be required. Where the issue arises in those circumstances, the requirements of article 10 should be met in order to obtain recognition of the judgment. Moreover, the person raising the question in that manner should be a person referred to in the first sentence of article 10, paragraph 1.

Paragraph 2

80. Article 10, paragraph 2 lists the documents or evidence that must be produced by the party seeking recognition and enforcement of an insolvency-related judgment. Subparagraph 2 (a) requires the production of a certified copy of the judgment. What constitutes a “certified copy” should be determined by reference to the law of the State in which the judgment was issued. Subparagraph 2 (b) requires the provision of any documents necessary to satisfy the condition that the judgment is effective and enforceable in the originating State, including information as to any current review of the judgment (see para. … on art. 9, para. 2 above), which could include information concerning the time limits for review.

81. In order to avoid refusal of recognition because of non-compliance with a mere technicality (e.g. where the applicant is unable to submit documents that in all details meet the requirements of art. 10, subparas. 2 (a) and (b)), subparagraph (c) allows evidence other than that specified in subparagraphs 2 (a) and (b) to be taken into account. That provision, however, does not compromise the court’s power to insist on the presentation of evidence acceptable to it. It is advisable to maintain that flexibility in enacting the Model Law.

Paragraph 3

82. Paragraph 3 entitles, but does not compel, the court to require a translation of some or all of the documents submitted under paragraph 2. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time if the court is in a position to consider the request without the need for translation of the documents. The Model Law presumes that documents submitted in support of recognition and enforcement need not be authenticated in any special way, in particular by legalization: according to article 10, paragraph 4, the court is entitled to presume that those documents are authentic whether or not they have been legalized. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

Paragraph 4

83. It follows from article 10, paragraph 4, (according to which the court "is entitled to presume" the authenticity of documents submitted pursuant to paragraph 2) that the court retains discretion to decline to rely on the presumption of authenticity in the event of any doubt arising as to that authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, in particular when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g. because in some States they involve various authorities at different levels).

84. In respect of the provision relaxing any requirement of legalization, the question may arise whether that is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Documents of 1961 [United Nations, Treaty Series, vol. 527, No. 7625] adopted under the auspices of the Hague Conference on Private International Law and providing specific, simplified procedures for the legalization of documents originating from signatory States. In many instances, however, the treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore, a conflict is unlikely to arise. For example, as stated in article 3, paragraph 2, of the above-mentioned convention:

> "However, [legalisation] cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation."

85. According to article 3 of the Model Law, if there is still a conflict between the Model Law and a treaty, the treaty will prevail.

Paragraph 5

86. Article 10, paragraph 5, requires the court to ensure that the party against whom the relief provided in the judgment is sought has the right to be heard on the application for recognition and enforcement. To ensure that the right can be enforced, the judgment debtor will require notice of the application for recognition and enforcement and of the details of the hearing. The Model Law leaves it up to the law of the enacting State to determine how that notice should be provided.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 62-63
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 72-75
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 70-71
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [22]-[25]
A/CN.9/898, paras. 25-26
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 28-32
A/CN.9/WG.V/WP.150

Article 11. Provisional relief

87. Article 11 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available as of the moment recognition is sought. The rationale for making such relief available is to preserve the possibility that if the judgment is recognized and enforced, assets will be available to satisfy it, whether they are assets of the debtor in the insolvency proceeding to which the judgment relates or of the judgment debtor. The urgency of the measures is alluded to in the opening words of paragraph 1, while subparagraph 1 (a) restricts the stay to the disposition of assets of any party against whom the judgment was issued. Subparagraph 1 (b) provides for other relief, both legal and equitable, to be granted provided it is within the scope of the judgment for which recognition is sought. As drafted, paragraph 1 should be flexible enough to encompass an ex parte application for relief, where local law permits such a request. This is also reflected in paragraph 2.

Paragraph 2

88. The laws of many States contain requirements for notice to be given (either by the insolvency representative upon the order of the court or by the court itself) when relief of the type mentioned in article 11 is granted, except where it is sought on an ex parte basis (if that is permitted in the enacting State). Paragraph 2 is the appropriate place for the enacting State to make provision for such notice where it is required.

Paragraph 3

89. Relief available under article 11 is provisional in that, as provided in paragraph 3, it terminates when the issue of recognition is decided, unless extended by the court. The court might wish to do so, for example, to avoid a hiatus between any provisional measure issued before recognition and any measure that might be issued on or after recognition.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 82-83
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [40]
A/CN.9/898, para. 45
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 52-53
A/CN.9/WG.V/WP.150

Article 12. Decision to recognize and enforce an insolvency-related foreign judgment

90. The purpose of article 12 is to establish clear and predictable criteria for recognition and enforcement of an insolvency-related foreign judgment. If (a) the judgment is an "insolvency-related foreign judgment" (as defined in art. 2, subpara. (d)); (b) the requirements for recognition and enforcement have been met (i.e. the judgment is effective and enforceable in the originating State under art. 9); (c) recognition is sought by a person referred to in article 10, paragraph 1; (d) the documents or evidence required under article 10, paragraph 2 have been provided; (e) recognition is not contrary to public policy (art. 7); and (f) the judgment is not subject to any of the grounds for refusal (art. 13), recognition should be granted as a matter of course.

91. In deciding whether an insolvency-related foreign judgment should be recognized and enforced, the receiving court is limited to the preconditions set out in the Model Law. No provision is made for the receiving court to embark on a consideration of the merits of the foreign court's decision to issue the insolvency-related foreign judgment or issues related to the commencement of the insolvency proceeding to which the judgment is related. Nevertheless, in reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any information that may have been presented to the originating court. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to satisfy itself independently that the insolvency-related foreign judgment meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumption in article 10, paragraph 4 (see para. …), on the information in the certificates and documents provided in support of the request for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 64
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76-77
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 73
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [26]-[27]
A/CN.9/898, paras. 27-29
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 33
A/CN.9/WG.V/WP.150

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related foreign judgment

92. Article 13 sets out the specific grounds on which recognition and enforcement of an insolvency-related foreign judgment might be refused. The list of grounds is intended to be exhaustive, so that grounds not mentioned would not apply. As noted above, provided the judgment meets the conditions of article 12, recognition is not prohibited under article 7, and the grounds set forth in article 13 do not apply, recognition of the judgment should follow. Although article 7 provides the basis for refusing recognition on the ground of public policy, article 13 repeats that limitation to emphasize the existence of that ground in addition to those specified in article 13. By indicating that recognition and enforcement may be refused, article 13 makes it clear that, even if one of the provisions of article 13 is applicable, the court is not obliged to refuse recognition and enforcement. In principle, the onus of establishing one or more of the grounds set out under article 13 rests upon the party opposing recognition or enforcement of the judgment.

Subparagraph (a) — notification of proceedings giving rise to the insolvency-related foreign judgment

93. Article 13, subparagraph (a) permits the court to refuse recognition and enforcement if the defendant in the proceeding giving rise to the insolvency-related foreign judgment was not properly notified of that proceeding. Two rules are involved: the first, in subparagraph (a) (i), is concerned with the interests of the defendant; the second, in subparagraph (a) (ii), is concerned with the interests of the receiving State.[17]

94. Subparagraph (a) (i) addresses failure to notify the defendant in sufficient time and in such a manner as to enable them to arrange a defence. This provision encompasses notification not only of the fact of the institution of the proceedings, but also of the essential elements of the claims made against the defendant in order to enable them to arrange their defence. The use of the word "notified" has no technical legal meaning, and simply requires the defendant to be placed in a position to inform him or herself of the claim and the content of the documentation relating to the institution of the proceedings. The test of whether notification has been given in sufficient time is purely a question of fact which depends on the circumstances of each case. The procedural rules of the originating court may afford guidance as to what might be required to satisfy the requirement, but would not be conclusive. Unfamiliarity with the local law and language and problems in finding a suitable lawyer may require a longer period than is prescribed under the law and practice of the originating court. The notification should also be effected "in such a manner" as to enable the defendant to arrange a defence, which may require that documents written in a language that the defendant is unlikely to understand will have to be accompanied by an accurate translation. The defendant would have to show not merely that notice was insufficient, but that the fact of insufficiency deprived them of a substantial defence or evidence which, as a matter of certainty and not merely of speculation, would have made a material difference to the outcome of the originating litigation. If that is not the case, it cannot be argued that the defendant was not enabled to arrange a defence.

95. The rule in subparagraph (a) (i) does not apply if the defendant entered an appearance and presented their case without contesting notification, even if they had insufficient time to prepare their case properly. This is to prevent the defendant raising issues at the enforcement stage that they could have raised in the original proceedings. In such a situation, the obvious remedy would have been for the defendant to seek an adjournment of the originating proceeding. If they failed to do this, they should not be entitled to put forward the lack of proper notification as a ground for non-recognition of the ensuing judgment. This rule does not apply if it was not possible to contest notification in the court of origin.

96. Subparagraph (a) (ii) addresses notification in a manner that was incompatible with fundamental principles of the receiving State concerning service of documents, but only applies where the receiving State is the State in which that notification took place. Many States have no objection to the service of a foreign writ on their territory without any participation by their authorities, as it is seen as a matter of conveying information. A foreign person can serve a writ in those jurisdictions simply by going there and handing it to the relevant person. Other States take a different view, considering that the service of a writ is a sovereign or official act and thus service on their territory without permission is an infringement of sovereignty. Permission would normally be given through an international agreement laying down the procedure to be followed. Such States would be unwilling to recognize a foreign judgment if the writ was served in a way that was regarded as an infringement of their sovereignty. Subparagraph (a) (ii) takes account of this point of view by providing that the court addressed may refuse to recognize and enforce the judgment if the writ was notified to the defendant in the receiving State in a manner that was incompatible with

[17] Cf. art. 9, subparas. (c) (i) to (ii) of the 2005 Choice of Court Convention; this explanation is based on the Hartley/Dogauchi report, paras. 185-187.

fundamental principles of that State concerning service of documents. Procedural irregularities that are capable of being cured retrospectively by the court in the receiving State would not be sufficient to justify refusal under this ground.

Subparagraph (b) — fraud

97. Article 13, subparagraph (b) sets out the ground of refusal that the judgment was obtained by fraud, which refers to a fraud committed in the course of the proceedings giving rise to the judgment.[18] It can be a fraud, which is sometimes collusive, as to the jurisdiction of the court. More often, it is a fraud practised by one party to the proceedings on the court or on the other party by producing false evidence or deliberately suppressing material evidence. Fraud involves a deliberate act; mere negligence does not suffice. Examples might include where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the requesting party (typically the plaintiff) deliberately gives the party to be notified (typically the defendant) incorrect information as to the time and place of the hearing; or where either party seeks to corrupt or mislead a judge, juror or witness, or deliberately conceals key evidence. While in some legal systems fraud may be considered as falling within the scope of the public policy provision, this is not true for all legal systems. Accordingly, this provision is included as a form of clarification.

Subparagraphs (c)-(d) — inconsistency with another judgment

98. Article 13, subparagraphs (c) and (d) concern the situation in which 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.[19] Subparagraphs (c) and (d) are satisfied where the two judgments are inconsistent, where inconsistency would mean that the findings of fact or conclusions of law in relation to the same issues on which the judgments are based are mutually exclusive. The subparagraphs, however, operate in different ways.

99. Article 13, subparagraph (c) is concerned with the case where the inconsistent judgment was issued by a court in the receiving State. In such a situation, the receiving court is permitted to give preference to a judgment issued by a court in its own State, even if that judgment was issued after the conflicting judgment was issued by the originating court. For this provision to be satisfied, the parties must be the same, but it is not necessary for the cause of action to be the same. The requirement that the parties must be the same will be satisfied if the parties bound by the judgments are the same, even if the parties to the proceedings giving rise to the judgment are different, for example, where one judgment is against a particular person and the other judgment is against the successor to that person.[20]

100. Article 13, subparagraph (d) is concerned with the situation in which both judgments were issued by foreign courts. In that situation, a judgment may be refused recognition and enforcement only if (a) it was given after the conflicting judgment, so that priority in time is a relevant consideration; (b) the parties to the dispute are the same; (c) the subject matter is the same; and (d) the earlier conflicting judgment fulfils the conditions necessary for its recognition in the enacting State, whether under this Law, other national law or under a convention regime.

Subparagraph (e) — interference with insolvency proceedings

101. The first part of the subparagraph addresses the desirability of avoiding interference with the conduct and administration of the insolvency proceeding to which the judgment is related or other insolvency proceedings concerning the same insolvency debtor. The concept of interference is somewhat broad and may cover

[18] Cf. article 9, para. (d) of the 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 188.

[19] Cf. article 9, paras. (f) and (g) of the 2005 Choice of Court Convention; the explanation of these grounds is based on the Hartley/Dogauchi report, paras. 191-193.

[20] Hartley/Dogauchi report, footnote 231.

instances where recognition of the insolvency-related foreign judgment might upset cooperation between multiple insolvency proceedings or result in giving effect to a judgment on a matter or cause of action that should have been pursued in the jurisdiction of the insolvency proceeding (e.g. because the insolvency proceeding is the main proceeding or is taking place in the State in which the assets that are the subject of the judgment are located). However, this ground should not be used as a basis for selective recognition of foreign judgments. It would not be justified as the sole reason for denying recognition and enforcement because, for example, it would deplete the value of the insolvency estate.

102. The second part of the subparagraph addresses the situation of concurrent insolvency proceedings, where insolvency proceedings have commenced in the receiving State or another State (distinct from the State of the proceeding giving rise to the judgment). Those insolvency proceedings must relate to the same debtor i.e. the debtor that is the subject of the insolvency proceeding to which the judgment is related. Inconsistency with a stay would typically arise where the stay permitted the commencement or continuation of individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition and enforcement of any ensuing judgment or where the stay did not permit the commencement or continuation of such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay (and was thus potentially in violation of the stay).

Subparagraph (f) — judgments implicating the interests of creditors and other stakeholders

103. Subparagraph (f) would only apply to the judgments specified i.e., judgments directly affecting the rights of creditors and other stakeholders. The provision allows the receiving court to refuse recognition of such judgments where the interests of those parties were not taken into account and adequately protected in the proceeding giving rise to the judgment. The creditors and other stakeholders referred to would only be those whose interests might be affected by the foreign judgment. A creditor whose interests remain unaffected by, for example, a plan of reorganization or a voluntary restructuring agreement (e.g., because their claims are paid in full) would not have a right to oppose recognition and enforcement of a judgment under the provision.

104. Subparagraph (f) does not apply more generally to other types of insolvency-related judgments that resolve bilateral disputes between two parties. Even though such judgments may also affect creditors and other stakeholders, those effects are only indirect (e.g., via the judgment's effect on the size of the insolvency estate). In those instances, permitting a judgment debtor to resist recognition and enforcement by citing third-party interests could unnecessarily generate opportunities for wasteful relitigation of the cause of action giving rise to the judgment. For example, if a court in jurisdiction A determined that the debtor owned a particular asset and issued a judgment against a local creditor resolving that ownership dispute, and the insolvency representative then sought to enforce that judgment in jurisdiction B, the creditor should not be able to resist enforcement in B by raising arguments about the interests of other creditors and stakeholders that are not relevant to that dispute.

Subparagraph (g) — basis of jurisdiction of the originating court

105. Article 13, subparagraph (g) permits refusal of recognition and enforcement if the originating court did not satisfy one of the conditions listed in subparagraphs (i) to (iv); in other words, if the originating court exercised jurisdiction on a ground other than the ones listed, recognition and enforcement may be refused. As such, subparagraph (g) works differently to the other subparagraphs of article 13, each of which create a freestanding discretionary ground on which the court may refuse recognition and enforcement of a judgment; under subparagraph (g) one of the grounds must be met or recognition and enforcement of the judgment can be refused.

106. 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 "safe harbours" that render the provision inapplicable if the originating court satisfies any one of them.

107. Subparagraph (g) (i) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor explicitly consented to that exercise of jurisdiction.

108. Subparagraph (g) (ii) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor submitted to the jurisdiction of the originating court by presenting their case without objecting to jurisdiction within any time frame applicable to such an objection, unless it was evident that such an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under the law of the originating State. In the above circumstances, the judgment debtor cannot resist recognition and enforcement by claiming that the originating court did not have jurisdiction. The method of raising the objection to jurisdiction is a matter for the law of the originating State. The decision by the defendant not to contest the jurisdiction must be made freely and on an informed basis. While the receiving court may not be under any obligation to satisfy itself independently that this was the case, it does not prevent a receiving court, in an appropriate case, from making inquiries where matters giving rise to concern become apparent.

109. Subparagraph (g) (iii) 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 if an analogous dispute had 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.

110. Subparagraph (g) (iv) is similar to subparagraph (g) (iii), but broader. While subparagraph (g) (iii) is limited to jurisdictional grounds explicitly permitted under the law of the receiving State, subparagraph (g) (iv) 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 of subparagraph (g) (iv) is to discourage courts from refusing recognition and enforcement of a judgment 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.

Subparagraph (h) — judgments originating in certain States and relating only to assets

111. This subparagraph is an optional provision that States enacting the MLCBI might wish to consider adopting. It relies upon the MLCBI framework of recognition of specific types of foreign proceedings (i.e. main or non-main proceedings) and addresses the situation of a judgment issued in a State that is not the location of either the COMI or an establishment of the debtor, where the judgment relates only to assets that were located in that State at the time the originating proceeding commenced. In those circumstances it may be useful for that judgment to be recognized because, for example, it resolves issues of ownership that are relevant to the insolvency estate and that could only be resolved in that jurisdiction, rather than in the jurisdiction of the debtor's COMI or establishment. By facilitating the recognition and enforcement of such judgments, the Model Law could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. The provision is nevertheless 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 has or had its COMI or an establishment.

112. The chapeau of article 13, subparagraph (h) establishes the key principle that recognition of an insolvency-related foreign judgment can be refused when the judgment originates from a State whose insolvency proceeding is not susceptible of recognition under the MLCBI; this may because that State is neither the location of the insolvency debtor's COMI nor of an establishment. The language of the chapeau does not require an insolvency proceeding to have actually commenced in the State from which the judgment originates, only that were such a proceeding to commence in that State it would be susceptible of recognition. For example, an insolvency debtor has its COMI in State A and an establishment in State B, but only a main proceeding in A has commenced and no non-main insolvency proceeding has yet commenced in B. Some other litigation in B results in an insolvency-related judgment that is relevant to the insolvency estate. The insolvency representative from A wants to seek recognition or enforcement of the insolvency-related judgment from B in State C, which has enacted the Model Law and the MLCBI. The court in C would see that the judgment comes from a State whose [insolvency] proceeding would be recognizable under the MLCBI (i.e. the debtor has an establishment in B and a non-main proceeding could thus be commenced), even though no such recognizable proceeding has yet commenced in B. The receiving court thus cannot refuse recognition on the basis of article 13, subparagraph (h).

113. Subparagraphs (h) (i) and (ii) outline two conditions that must be met in order to establish an exception to the general principle of non-recognition. Subparagraph (h) (i) requires the insolvency representative of an insolvency proceeding that is or could have been recognized under the law giving effect to the MLCBI in the enacting State (i.e. the insolvency representative of a main or non-main proceeding) to have participated in the proceeding giving rise to the judgment, where that participation involved engaging with the substantive merits of the cause of action being pursued. Subparagraph (h) (ii), which adds to the requirement in subparagraph (h) (i), requires the judgment in question to have related only to assets that were located in the State in which the judgment was issued at the time of commencement of the proceeding giving rise to the judgment.

114. With regard to the reference to "assets", the broad definition of "assets of the debtor" (meaning the insolvency debtor) in the Legislative Guide[21] might be noted, even though it may not be applicable to all circumstances arising under the current tex. It may be sufficiently broad to cover, for example, intellectual property registered in the originating State where it is neither the debtor's COMI nor a State in which the debtor has an establishment.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 65-69
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76-77
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 6-9
A/CN.9/870, paras. 73, 76, 79
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [28]-[37]
A/CN.9/898, paras. 27-29
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 34-48, 79-82
A/CN.9/WG.V/WP.150

[21] Legislative Guide, Introd., para. 12 (b): "'Assets of the debtor': property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets."

Article 14. Equivalent effect

115. Article 14, paragraph 1 provides that an insolvency-related foreign judgment recognized and enforceable under the Model Law should be given the same effect in the receiving State [as it had in the originating State i.e. the effect in the originating State is exported to the receiving State] [as it would have had if it been issued in the receiving State i.e. the effect would be equivalent to the effect such a judgment would have if issued in the receiving State].

116. Paragraph 2 provides that where the insolvency-related foreign judgment provides for relief that is not available or not known in the receiving State, the court should provide relief that has equivalent effects (as opposed to relief that is merely "formally" equivalent), and give effect to the judgment to the extent permissible under its national law. The receiving court is not required to provide relief that is not available under its national law, but is authorized, as far as is possible, to adapt the relief granted by the originating court to a measure known in the receiving court, but not exceeding the effects the relief granted in the judgment would have under the law of the originating State. This provision enhances the practical effectiveness of judgments and aims at ensuring that the successful party receives meaningful relief.

117. Two types of situations can trigger this provision. First, where the receiving State does not know the relief granted in the originating court. For example, [*provide an insolvency-related example*].

118. Secondly, where the receiving State knows a type of relief that is "formally", but not "substantively" equivalent. Although provisional measures are not to be considered as insolvency-related foreign judgments for the purposes of the Model Law, a stay preventing a defendant from disposing of his or her assets may provide an illustration of how this article operates, as such a stay can have *in personam* or *in rem* effects, depending on the jurisdiction. Where recognition of a stay issued by a State that characterizes stays as having *in rem* effects is sought in a State that only grants such orders *in personam* effects, article 14 would be satisfied by the receiving court enforcing the stay, but only with *in personam* effects. On the other hand, when the originating court issued a stay with only *in personam* effects and recognition of this order was sought in a State whose national law granted such a stay *in rem* effects, the receiving court would not comply with article 14 if it enforced the stay with *in rem* effects in accordance with national law, as that would go beyond the effects granted under the law of the originating State.[22]

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.138
A/CN.9/870, para. 78
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [38]
A/CN.9/898, para. 43
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 49, 83
A/CN.9/WG.V/WP.150

Article 15. Severability

119. Article 15 aims to increase the predictability of the Model Law and encourages reliance on the judgment in cases where recognition or enforcement of the judgment as a whole might not be possible.[23] In those circumstances, the receiving court should not be able to refuse recognition and enforcement of one part of the judgment on the

[22] See para. 207, Explanatory note providing background on the proposed draft text and identifying outstanding issues, Prel. Doc. No. 2, April 2016, prepared by the Permanent Bureau of the Hague Conference on private international law for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments.

[23] See art. 15, 2005 Choice of Court Convention; Hartley/Dogauchi report, para. 217.

basis that another part is not recognizable and enforceable; the severable part of the judgment should be treated in the same manner as a judgment that is wholly recognizable and enforceable.

120. Recognition and enforcement of the judgment as a whole might not be possible where some of the orders included in the judgment fall outside the scope of the Model Law, are contrary to the public policy of the receiving State or, because they are interim orders, are not yet enforceable in the originating State. It may also be the case that only some parts of the judgment are relevant to the receiving State. In such cases, the severable part of a judgment could be recognized and enforced, if that part is capable of standing alone. This would normally depend on whether recognizing and enforcing only that part of the judgment would significantly change the obligations of the parties. Where this question raises issues of law, they would be determined by the law of the receiving State.

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 80-81
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [39]
A/CN.9/898, para. 44
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 50-51
A/CN.9/WG.V/WP.150

Article X. Recognition of an insolvency-related judgment under [*insert a cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

121. As noted above (para. …), it has been suggested, under some interpretations of the MLCBI, that since the provisions on relief (principally art. 21) make no specific reference to the recognition and enforcement of an insolvency-related judgment, recognition and enforcement of such a judgment is not available as a form of relief. The purpose of article X is to clarify the interpretation of article 21 as meaning that the relief available under article 21 of the MLCBI includes recognition and enforcement of an insolvency-related judgment. If article 21 is interpreted in that manner, any relief granted would be subject to the applicable provisions of the MLCBI (e.g. art. 22).

Discussion in UNCITRAL and the Working Group

A/CN.9/898, paras. 40-41
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 54-57, 84-85
A/CN.9/WG.V/WP.150

VI. Assistance from the UNCITRAL Secretariat

A. Assistance in drafting legislation

122. The UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from the UNCITRAL secretariat (mailing address: Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060-4060; fax: (+43-1) 26060-5813; email: uncitral@uncitral.org; Internet home page: http://www.uncitral.org).

B. Information on the interpretation of legislation based on the Model Law

123. The Model Law is included in the Case Law on UNCITRAL Texts (CLOUT) information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application. The Secretariat publishes abstracts of decisions in the six official languages of the United Nations and the full, original decisions are available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.