United Nations A/CN.9/903

General Assembly

Distr.: General
26 May 2017

Original: English

United Nations Commission on International Trade Law
Fifty-first session
New York, 10-19 May 2017

Report of Working Group V (Insolvency Law) on the work of its fifty-first session (New York, 10-19 May 2017)

I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency and part three of the UNCITRAL Legislative Guide on Insolvency Law and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870) and fiftieth (December 2016) (A/CN.9/898) sessions and continued its deliberations at the fifty-first session.

B. Recognition and enforcement of insolvency-related judgments

2. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[2] The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870) and fiftieth (December 2016) (A/CN.9/898) sessions and continued its deliberations at the fifty-first session.

[1] A/CN.9/763, paras. 13-14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, para. 259(a)).

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

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C. Insolvency of micro, small and medium-sized enterprises (MSMEs)

3. At its forty-seventh session (2014), the Commission gave Working Group V a mandate to undertake work on the insolvency of MSMEs as a next priority, following completion of the work on facilitating the cross-border insolvency of multinational enterprise groups and recognition and enforcement of insolvency-related judgments.[3]

4. At its forty-ninth session (2016), the Commission clarified that the mandate of Working Group V with respect to the insolvency of MSMEs was to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed.[4]

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its fifty-first session in New York from 10-19 May 2017. The session was attended by representatives of the following States Members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Burundi, Canada, Chile, China, Colombia, Czechia, Denmark, El Salvador, France, Germany, Greece, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Libya, Mexico, Namibia, Nigeria, Panama, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Sri Lanka, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

6. The session was attended by observers from the following States: Congo, Democratic Republic of Congo, Estonia, Iraq, Malta, Netherlands, Saudi Arabia, Syrian (Arab Republic) and Viet Nam.

7. The session was also attended by observers from the Holy See and the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF); World Bank; World Intellectual Property Organization (WIPO);

(b) *Invited inter-governmental organizations*: International Association of Insolvency Regulators;

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), European Investment Bank (EIB), Fondation pour le Droit Continental (FDC), Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI), INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC),

[3] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.

[4] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

National Law Center for Inter-American Free Trade (NLCIFT), The European Law Students Association (ELSA), The Law Association for Asia and the Pacific (LAWASIA) and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Wisit Wisitsora-At (Thailand)

Rapporteur: Sanjay Rajaratnam (Sri Lanka)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.144);

(b) A note by the Secretariat on recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.145);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.146);

(d) A note by the Secretariat on the insolvency of micro, small and medium-sized enterprises (A/CN.9/WG.V/WP.147); and

(e) Comments by Canada on the draft model law on the recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.148).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) the insolvency of micro, small and medium-sized enterprises; (b) the cross-border recognition and enforcement of insolvency-related judgments; and (c) facilitating the cross-border insolvency of multinational enterprise groups.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group commenced its deliberations on the insolvency of micro, small and medium-sized enterprises on the basis of documents A/CN.9/WG.V/WP.147 and A/CN.9/WG.V/WP.121 and a number of presentations by States and other delegations. It then took up the cross-border recognition and enforcement of insolvency-related judgments on the basis of documents A/CN.9/WG.V/WP/145 and A/CN.9/WG.V/WP.148, followed by the cross-border insolvency of multinational enterprise groups on the basis of document A/CN.9/WG.V/WP.146. The Working Group completed its work by considering a revised text of the draft model law on the cross-border recognition and enforcement of insolvency-related judgments, as indicated in the deliberations and decisions of the Working Group reflected below.

IV. Insolvency of micro, small and medium-sized enterprises (A/CN.9/WG.V/WP.147 and A/CN.9/WG.V/WP.121)

13. The Working Group commenced its deliberations on the insolvency of micro, small and medium-sized enterprises (MSME) on the basis of documents A/CN.9/WG.V/WP.147 and A/CN.9/WG.V/WP.121 and a number of presentations by the delegations of the International Monetary Fund and the World Bank on the work they had undertaken in respect of MSME insolvency; by Japan and the

Republic of Korea on their legislation specifically addressing MSME insolvency; and by a group of interested experts on a modular approach to the design of MSME insolvency regimes. Those presentations were made available on the dedicated Working Group V webpage on the UNCITRAL website: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html. Additional information on the approach to MSME insolvency in other States was provided by various delegations. The Working Group acknowledged the usefulness of the presentations to the manner in which its work might be taken forward and the issues to be covered.

14. Following discussion, the Working Group agreed that the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) provided an appropriate framework for structuring future work on this topic. That work could proceed by examining each of the topics addressed in the Legislative Guide and considering whether the treatment provided was appropriate and necessary for an MSME insolvency regime, building upon the brief outline provided in A/CN.9/WG.V/WP.121. If such treatment was not appropriate, consideration should be given to how it might need to be adjusted for MSME insolvency. Additionally, consideration should be given to issues not covered by the Legislative Guide that should nevertheless be addressed in an MSME insolvency regime. The Working Group also expressed interest in considering how the modular approach might contribute to the arrangement of the elements required for an effective and efficient insolvency regime for MSMEs.

V. Cross-border recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.145 and A/CN.9/WG.V/WP.148)

15. The Working Group next addressed the text on cross-border recognition and enforcement of insolvency-related judgments.

Preamble

Article 1. Scope of application; Article 2. Definitions

16. The Working Group agreed to defer its consideration of a possible preamble, the scope of application in article 1 and the definitions in draft article 2 until it had reviewed the remaining text of the draft model law.

Article 3 and 3 bis. International obligations of this State

17. The Working Group approved the substance of draft article 3.

18. It was suggested that a note along the lines of paragraph 93 in the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency (the Model Law), which explained that a provision along the lines of draft article 3 in the current text might not be required in all States, should be included in the guide to enactment for the current text. It was also suggested that that guide to enactment might clarify that binding legal obligations issued by regional economic integration organizations (REIOs) that were applicable in the member States of a REIO could be treated as obligations arising from an international treaty.

19. In respect of draft article 3 bis there was support for both retaining and deleting the article in its entirety and for retaining and deleting certain elements of it.

20. After discussion, it was agreed that paragraphs 1 bis and 2 of article 3 bis should be deleted. The relationship between article 3 and article 3 bis (consisting only of paragraph 1) was questioned and the Working Group agreed that paragraph 1 of article 3 bis should remain in square brackets pending further consideration and clarification of that relationship.

Article 4. Competent court or authority

21. The Working Group considered draft article 4 (WP.145) and the proposal for new article 4.1 (WP.148). With respect to the latter, concerns were raised that it did not include the reference in article 4 (WP.145) to "any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings", and that the use of the word "application" might be too narrow. After discussion, the drafting of article 4 (WP.145) was approved.

Article 5. Authorization to [seek recognition and enforcement of an insolvency-related judgment in a foreign State] [act in another States in respect of an insolvency-related judgment issues in this State]

22. As between the two phrases in square brackets, preference was expressed in favour of the second. Proposals to add the phrase "recognition of" after "with respect to" and to delete the final phrase "as permitted by the applicable foreign law" did not receive support. The Working Group approved the substance of draft article 5 with the second alternative text and without square brackets, and agreed to conform the title to those changes.

Article 6. Additional assistance under other laws

23. The Working Group approved the substance of draft article 6.

Article 7. Public policy exception

24. A proposal to add the words "including situations involving the infringement of the security or sovereignty of this State" to article 7 did not receive sufficient support, but it was agreed that the guide to enactment could clarify that those situations would be covered by the public policy exception. It was noted that, in any event, the interpretation of what was covered by public policy was a matter for the enacting State. The Working Group approved the substance of draft article 7.

Article 8. Interpretation

25. Although a proposal to delete the phrase "and the observance of good faith" was made, it did not receive sufficient support. It was observed that since the phrase was used in the Model Law and there was a close relationship between that text and the present text, its deletion might raise questions of interpretation and it would be preferable to maintain conformity between the two texts. The Working Group agreed to retain article 8 as drafted.

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

26. Proposals were made to change "recognition and enforcement" at the beginning of paragraph 2 to "recognition or enforcement" and to add the words "recognition or" before the word "enforcement" at the end of that paragraph. Those proposals were accepted by the Working Group.

27. A question was raised as to whether the "review" in paragraph 2 referred to appellate review or review by the originating court. It was explained that in some jurisdictions, an originating court had a short period before an appeal to a higher court was made in which it could review its own judgment; once the appeal was launched, the lower court no longer had the ability to review its decision. After discussion, article 9 was approved with the revisions noted above and it was agreed that the guide to enactment would include some explanation of the notion of "review."

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

28. Various proposals were made with respect to paragraph 1: (a) to replace the first sentence with New Article [4] (Interest to bring an application) in A/CN.9/WG.V/WP.148 and to make clear the persons who might be entitled to apply for recognition and enforcement of an insolvency-related judgment; (b) to limit the persons able to seek recognition and enforcement to the insolvency representative and avoid reference to any "person entitled under the law of the originating State."; and (c) to retain the second sentence without square brackets and amend it to read: "The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings."

29. With respect to the proposals in (a) and (b) above, the reference to a "foreign representative or group representative" was not supported and it was agreed that the term "insolvency representative" should be retained. Although there was some support for including a reference to "a creditor whose interests are affected by the judgment", it was the view of the Working Group that they would be covered as a "person entitled under the law of the originating State" to seek recognition and enforcement. It was observed that the persons entitled to seek recognition and enforcement in the receiving State should mirror those entitled to do so in the originating State. After discussion, the proposals in (a) and (b) above did not receive sufficient support and the first sentence of paragraph 1 was retained as drafted. The proposals in (c) above were also agreed.

30. With respect to subparagraph 2(a), it was suggested that the guide to enactment should explain that the meaning of what constituted a "certified copy" should be determined by reference to the law of the State in which the judgment was issued.

31. With respect to subparagraph 2(c), various observations were made: firstly, that since the subparagraph addressed notification of the application, that notification could only be provided after the application had been made and therefore evidence of that notification could not be submitted with the application; secondly, in some legal systems, the notification of the making of the application was given by the court and the applicant would therefore not be in a position to provide the evidence required by subparagraph 2(c); and thirdly, it was not clear whether the standard for notification was that of the law of the originating State or the receiving State. Reference was made to draft article 15(1) of the most recent draft of the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments (the draft Hague Conference text) as a possible approach that might be followed. A question was raised as to the purpose of subparagraph 2(c), and the Working Group agreed that the aim of the provision was to ensure the rights of parties to be heard and to present arguments against recognition and enforcement of the judgment. It was suggested that drafting along the lines of "the court shall ensure that the party against whom relief is sought should be given the right to be heard on the application" could be included as a new paragraph to article 10 and that subparagraph 2(c) could be deleted. That approach was agreed and the Secretariat was requested to propose appropriate drafting.

32. Proposals to change the word "may" in paragraph 3 to "shall" and to delete "whether or not they have been legalized" in paragraph 4 were not taken up by the Working Group. With respect to the latter, the Working Group was of the view that since that phrase was in the existing Model Law and since it provided flexibility to enable the courts of the enacting State to rely upon the presumption or to refer to local rules in the event of any doubt as to the authenticity of documents, that phrase should be retained.

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

33. The Working Group approved the substance of draft article 11 with the deletion of the text in square brackets in subparagraph (d). There was no support to add a provision along the lines of paragraph 2 of New Article [4.2] (Notification of application and summary recognition where not contested) in A/CN.9/WG.V/WP.148. A question was raised as to whether the drafting of subparagraph (e), and in particular, the use of the words "do not apply", was appropriate or sufficiently clear.

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

34. Proposals were made to add new grounds for refusal of recognition based upon public policy and satisfaction of the judgment as set forth in subparagraphs (a.1) and (e.1) of Article [12] (Grounds to refuse recognition and enforcement of an insolvency-related judgment) in A/CN.9/WG.V/WP.148.

35. With respect to the proposal to add a new subparagraph (a.1), a number of suggestions were made: (a) to delete "manifestly"; (b) to adopt a different drafting solution making article 12 subject to article 7 along the lines of the approach of article 17 of the Model Law; and (c) to consider the relationship between subparagraph (a.1), article 9(1) and article 11(e), and whether the public policy question was sufficiently addressed by those other provisions.

36. There was no agreement to delete the word "manifestly". After further discussion, it was agreed that even though the references in articles 9 and 11 might be sufficient to address refusal on the basis of public policy, a further reference should be added at the beginning of the chapeau of article 12 along the lines of "Subject to article 7,".

37. The proposal to add a new subparagraph (e.1) did not receive sufficient support.

Subparagraph (a)

38. The Working Group approved the substance of subparagraph (a) as drafted.

Subparagraph (b)

39. To maintain consistency with the Hague Convention of 30 June 2005 on Choice of Court Agreements, it was suggested that the entire text of subparagraph (b) should be retained without square brackets. A different view was that the subparagraph should be retained without the text in the second set of square brackets to maintain consistency with the most recent draft Hague Conference text. After discussion, the Working Group agreed to remove the square brackets from around the entire subparagraph, and to delete "[in connection with a matter of procedure]".

Subparagraphs (c) and (d)

40. The Working Group approved the substance of subparagraphs (c) and (d) as drafted.

Subparagraph (e)

41. Several concerns were expressed including whether the reference to "the debtor's insolvency proceedings" included proceedings in both the enacting State and foreign proceedings, and how the subparagraph could be applied in a situation where there were competing insolvency proceedings. After discussion, there was strong support in the Working Group to retain the substance of subparagraph (e) as drafted.

Subparagraph (f)

42. It was noted that with the proposed revision of the definition of "insolvency-related judgment" in article 2, the cross-reference to subparagraph (e)(v) was no longer appropriate. Various proposals were made for revision of subparagraph (f), including: (a) to reproduce the content of subparagraph 2(e)(v) in subparagraph 12(f); (b) to delete the limitation and apply the requirement for adequate protection to all judgments to be covered by the draft instrument; and (c) to refer to the types of judgment to which the requirement for adequate protection might apply. It was recalled that there had been extensive discussion as to the judgments that would fall within the scope of subparagraph 12(f), and agreement had been reached on those referred to in subparagraph 2(e)(v). After discussion, it was agreed that the substance of subparagraph 2(e)(v) should be repeated in subparagraph 12(f), subject to conforming it to any revisions that might be agreed by the Working Group when it considered the definition of that term.

Subparagraph (g)

43. After extensive discussion and in order to maintain consistency with the approach in the most recent draft Hague Conference text, noting that if further changes were made to that text the issues might have to be reconsidered, the Working Group agreed that subparagraph (g)(i) should be redrafted as follows:

> "(g) The originating court did not satisfy one of the following conditions:
>
> > "(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;
> >
> > "(i bis) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it was evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;"

44. The Working Group approved the substance of subparagraphs (g)(ii) and (iii) as drafted.

Subparagraph (h)

45. Text to replace subparagraph (h) was proposed along the following lines:

> "(h) The judgment originates from a proceeding that is not recognizable under the [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*], unless:
>
> > "(i) The insolvency representative of a proceeding that could have been recognized under the [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*] participated in the originating proceeding to the extent of engaging in the substantive merits of the claim to which those proceedings related; and
> >
> > "(ii) The *judgment* relates solely to assets that were located in the originating state at the time that proceeding commenced."

46. A concern was raised regarding the temporal application of "not recognizable", and in particular, how it would be interpreted where the relevant proceeding had concluded prior to the time recognition of the judgment was being considered. In response, it was suggested that that matter might be addressed in the guide to enactment, which would clarify that the drafting was intended to cover a proceeding that had not been, could not be, or could not have been recognized.

47. Another concern was whether the phrase "originates from a proceeding" was narrower than the phrase used in the previous version of subparagraph (h)

(A/CN.9/WG.V/WP.145) "is related to an insolvency proceeding". In particular, it was questioned whether a judgment on an avoidance action issued by a court other than the court supervising the insolvency proceeding could be considered to "originate from" an insolvency proceeding; it would clearly have been covered by the phrase "related to an insolvency proceeding". In response, it was observed that there may be circumstances, particularly where there were a number of competing proceedings, in which it would not be clear which of those proceedings the judgment related to, but it would be clear from which proceeding it originated. On that basis, it was felt that the use of the term "originated from" was clearer and would save the court from having to consider the question of relationship.

48. A further issue concerned which proceeding was referred to in the first line of the chapeau. In response, it was noted that while it might be the insolvency proceeding or another proceeding, that distinction was not material for the purposes of the subparagraph. However, it was acknowledged that explanatory material could be included in the guide to enactment. After discussion, it was agreed that the issues raised should be noted, that there was support for the text as drafted, and that the paragraph could be reconsidered if a proposal for revision was made.

Article 13. Equivalent effect

49. The Working Group approved the substance of draft article 13.

Article 14. Severability

50. A proposal was made to replace "shall" with "may" in the draft article in order to provide better protection for creditors and more discretion and flexibility to the court. Although that proposal received some support, it was observed that the change proposed might not accomplish the protection sought; what might be required was language that conferred upon the court the power to enforce the severable part of a judgment on a conditional basis. It was noted that a court should not be able to refuse recognition or enforcement of one part of a judgment only on the basis that another part was not enforceable; the severable part should be treated no differently than a judgment that was not severable. It was also noted that articles 11 and 14 should contain the same mandatory language and it was further noted that the corresponding article of the most recent draft Hague Conference text also used the word "shall". It was suggested that an approach along the lines of conditional enforcement under article 9 of the present text or the approach of article 22 of the Model Law providing for adequate protection of the interests of creditors and other interested parties might be relevant to this article.

51. After discussion, the Working Group approved the substance of draft article 14. Delegations were encouraged to make proposals relating to any additional language concerning the protection of creditors.

Article 15. Provisional relief

52. Reference was made to the proposal for New Article 4.3 (Interim Protective Relief) in A/CN.9/WG.V/WP.148 that would add express provision for ex parte relief and additional safeguards to article 15. Although there was some support for that proposal, it was observed that the combination of the chapeau of article 15 and paragraph 2 would already enable provisional relief to be sought on an ex parte basis, unless such relief was not permitted in the enacting State. In addition, it was felt that matters of notice were best left to the enacting State as provided in the present article 15 and article 19(2) of the Model Law.

53. A proposal was made to add the phrase "including whether notice would be required under this article" at the end of paragraph 2. After discussion, it was agreed that the question of notice should be addressed in accordance with domestic law, that paragraph 15(1) could encompass ex parte relief and that the proposed text should be added at the end of paragraph 2. Further, it was observed that the guide to enactment could also address the issue.

Article 16. Recognition of an insolvency-related [foreign] judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*]

54. Preference was expressed in favour of Variant 1 with the deletion of the phrases "For greater certainty" and "insolvency-related [foreign]". In response to concerns about the relationship of article 16 to the Model Law, it was confirmed that its sole purpose was to affect the interpretation of article 21 of the Model Law and not to have any effect on the present text. If article 21 was interpreted by an enacting State to cover recognition and enforcement of a judgment as a form of discretionary relief, that relief would be subject to the applicable provisions of the Model Law.

55. As to placement of the provision, it was suggested that it might appear at the end of this text as an unnumbered optional provision with a heading along the lines of "States that have enacted legislation based upon the Model Law may wish to consider the following".

56. After discussion, a proposal was made that the draft article should be revised as follows:

> "*States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of decisions which may have cast doubt on whether judgments can be recognized and enforced under article 21. States may therefore wish to consider enacting the following provision*:
>
> "*Article X. Recognition of an insolvency-related [foreign] judgment under [insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*]
>
> "Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment."

57. Although some concern was expressed about the appropriateness of including such an article in this draft text, after discussion, there was support in the Working Group for the proposed text.

Preamble

58. The Working Group agreed that a preamble should be included in the draft text, and a proposal along the following lines was widely supported:

> "The purpose of this Law is:
>
> "(a) To create greater certainty for parties in regard to their rights and remedies for *enforcement* of insolvency-related judgments;
>
> "(b) To avoid the duplication of proceedings;
>
> "(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;
>
> "(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;
>
> "(e) To protect and maximize the value of the insolvency estate; and
>
> "(f) Where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation."

Article 1. Scope of application

59. A proposal to add words to the following effect in paragraph 2 of article 1 was not supported:

> "This Law is not intended to apply to the recognition and enforcement of judgments falling under the scope of the 1997 UNCITRAL Model Law on Cross-Border Insolvency."

60. It was indicated that paragraph 2 of article 1 was not intended to contain such material, based as it was upon the same paragraph of article 1 of the Model Law, which was designed to enable States to specify the types of proceeding to which the Model Law would not apply (with examples of such proceedings being provided in that text). It was also observed that to add such words might essentially eviscerate this model law, leaving little that could be subject to recognition under it. Another concern raised was how that proposed language would interact with the text of draft article 16 that had been agreed by the Working Group.

61. Such a limitation, it was suggested, would only have relevance for States that had enacted the Model Law, not States that had only enacted this model law. In the latter case, it was observed, there should be no such limitation to application of this model law. It was observed that this model law was not intended to be a supplement to the Model Law and recalled that the mandate of the Working Group was to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments, without any reference being made to the relationship of the text to be developed to the Model Law. It was also recalled that the Working Group had itself decided, at its forty-sixth session (2014), that the text should be developed as a stand-alone instrument, rather than forming part of the Model Law.

62. After discussion, a suggestion to add the text proposed in footnote 3 of A/CN.9/WG.V/WP.145 as a second paragraph to the preamble along the following lines received strong support:

> "The purpose of this Law is not:
>
> "(a) To displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment;
>
> "(b) To replace legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation if it is interpreted as applying to the recognition and enforcement of an insolvency-related [foreign] judgment;
>
> "(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or
>
> "(d) To apply to the judgment commencing the insolvency proceedings to which the judgment is related."

63. The text of draft article 1 set forth in A/CN.9/WG.V/WP.145 was approved without change.

Article 2. Definitions

(a) "Insolvency proceeding"

64. The substance of the definition of "insolvency proceeding" was approved as drafted.

(b) "Insolvency representative"

65. The substance of the definition of "insolvency representative" was approved as drafted.

(c) "**Judgment**"

66. The Working Group agreed to delete the square brackets surrounding the definition; to delete the words "on the merits"; and to retain without the square brackets the text "or administrative authority, provided an administrative decision had the same effect as a court decision".

67. With respect to the final sentence of the definition concerning interim measures, there was support both for its retention and for its deletion. In support of its retention, it was observed that it was quite possible to have final judgments relating to interim measures issued in insolvency proceedings, as well as pre-trial judgments that were properly insolvency-related. Moreover, the nature of insolvency proceedings often required provisional measures to be issued to protect the insolvency estate and the collective interests of creditors and speed was often a necessity; providing for cross-border recognition of such measures would be of assistance to the insolvency proceedings. In support of deletion, it was observed that such judgments were often issued ex parte and many, such as orders preserving the status quo, could not be considered to be final judgments and thus were not intended to be the subject of foreign recognition. After discussion, the prevailing view was that the sentence should be retained, but revised to read "An interim measure of protection should not be considered to be a judgment for the purposes of this Law."

(d) "Insolvency-related [foreign] judgment"

68. The Working Group agreed that the defined term should be "insolvency-related foreign judgment". The Working Group considered that definition on the basis of the various elements contained in the draft text set forth in A/CN.9/WG.V/WP.145 and the proposed text in A/CN.9/WG.V/WP.148. There was insufficient support in the Working Group to replace subparagraphs (i), (ii) and (iii) of the definition in A/CN.9/WG.V/WP.145 with the chapeau proposed in A/CN.9/WG.V/WP.148. With respect to subparagraph (i) (WP.145), a proposal was made that the words "Is related to" were too broad and should be replaced with the phrase "derives directly from or is closely connected to" an insolvency proceeding. It was noted that because that formulation was used in the European Union and was the subject of substantial interpretative jurisprudence by the European Court of Justice, it established an appropriate standard for the current instrument. Support was expressed, however, in favour of retaining the phrase "Is related to" on the basis that the proposed language was too narrow and that following that jurisprudence might not be appropriate for other jurisdictions not subject to that jurisprudence. After discussion, there was support to retain both formulations in the text in square brackets as optional alternatives for States to choose between and for including an explanation of both alternatives in the guide to enactment.

69. In relation to the definition proposed in A/CN.9/WG.V/WP.148, it was mentioned that it was aimed at ensuring a predictable and simple determination of whether a judgment was covered or not, which was consistent with an expedited recognition and enforcement regime. It was further mentioned that such a definition would facilitate implementation of the text in developing countries.

70. With respect to subparagraph (ii) (WP.145), there was general agreement that the words "[on or]" should be retained and the square brackets removed. With respect to subparagraph (iii) (WP.145), it was generally agreed that the words "[interests of the]" could be deleted without affecting the substance of the subparagraph.

71. A concern was expressed that the cumulative effect of subparagraphs (i), (ii) and (iii) might be to exclude judgments relating to an insolvency proceeding issued after the proceeding had concluded. For example, in some jurisdictions avoidance actions may be pursued after the confirmation of a reorganization plan, which was to be considered conclusion of the proceedings; judgments relating to those avoidance actions should be covered by the present instrument. In order to address that concern, text along the following lines was proposed: "Subparagraphs (i), (ii)

and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has been concluded." That proposal was agreed and the Secretariat was requested to consider the appropriate placement for its inclusion.

72. The Working Group considered the exclusions provided in subparagraphs (a) to (e) of the text proposed in A/CN.9/WG.V/WP.148. After discussion, there was insufficient support for including the text proposed in those subparagraphs. The Working Group agreed to place the examples set out in footnote 9 of A/CN.9/WG.V/WP.145 in the guide to enactment.

73. A question was raised as to whether paragraph 2 of the definition might need to be extended to exclude other judgments, such as the judgment appointing an insolvency representative. In response, it was observed that recognition of the order appointing the insolvency representative was often a critical factor in demonstrating that the insolvency representative had standing to apply for recognition and enforcement of the judgment and should thus be covered by the definition. After discussion, paragraph 2 was retained as drafted.

Title

74. The Working Group agreed that the title of the draft text should be "Model Law on Cross-Border Recognition and Enforcement of Insolvency-Related Judgments".

Further consideration of the draft model law

75. The Working Group considered a revision of the draft model law reflecting the decisions taken earlier in the session. Amendments were only proposed in respect of the following articles; other provisions were adopted without comment.

Preamble

76. The Working Group agreed to number the two purpose paragraphs and to delete in the second paragraph (b) the phrase "if it is interpreted as applying to the recognition and enforcement of an insolvency-related [foreign] judgment".

Article 2. Definitions

77. In respect of paragraph (d)(i), a proposal was made to replace the two alternative texts with the following: "stems intrinsically from or is materially associated with". After discussion, it was agreed that that proposal should be added to the text as a third alternative in square brackets.

Article 3. International obligations of this State

78. The Working Group agreed to remove the square brackets around paragraph 2 and retain the text.

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

79. The Working Group agreed to delete the phrase "be inconsistent" in paragraph (e) and replace it with "conflict".

80. With respect to paragraph (f), a proposal was made to adjust the existing text as follows:

> "The judgment determines whether:
>
> > "(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;
> >
> > "(ii) A transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate; or

> "(iii) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary or out-of-court restructuring agreement should be approved;
>
> "and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued."

81. Concerns were expressed that such an approach would be problematic in that it would allow re-litigation of many bilateral disputes. The Working Group agreed to place proposed subparagraphs (i) and (ii) in square brackets in paragraph (f).

82. The Working Group preferred Variant 1 of the chapeau of paragraph (h), and supported adding the words "State whose" between "a" and "proceeding", and deleting the word "that" after "proceeding"; deleting Variant 2; and deleting the square brackets around the words "is or" in paragraph (h)(i).

Article 14. Equivalent effect

83. A proposal was made to replace the phrase "has in the originating State" in paragraph 1 with the phrase "would have had if it had been issued by a court of this State". Since some jurisdictions adopted the approach of exporting the effect given to a judgment in the originating State, as reflected in the existing text, while others adopted the approach in the proposed text, the Working Group agreed to include both texts in square brackets for further consideration.

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

84. The Working Group agreed to replace the word "decisions" in the introductory text before the article with the word "judgments". A proposal to delete the phrase "Notwithstanding any prior interpretation to the contrary" did not receive sufficient support.

85. The Working Group agreed that the draft text would be revised to reflect the changes noted above and attached as an annex to this report.

VI. Facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.146)

[Part A]

Chapter 1. General provisions

Preamble

86. The Working Group approved the substance of the preamble as drafted.

Article 1. Scope

87. The Working Group agreed to remove the square brackets and to add the phrase "and the conduct and administration of insolvency proceedings" from footnote 3 after the word "cooperation" in article 1. With that change, the Working Group approved the substance of article 1.

Article 2. Definitions

(a) "Enterprise"; (b) "Enterprise group"; (c) "Control"; (d) "Enterprise group member"; (e) "Group Representative"

88. The Working Group approved the substance of the definitions as drafted.

(f) "Group insolvency solution"

89. In subparagraph (ii), the Working Group expressed a preference for the second text in square brackets, replacing "and" with "or", and agreed to delete the other text in square brackets. Further, there was agreement to delete subparagraph (iii) in line with the suggestion in footnote 6. With those adjustments, the Working Group approved the substance of the definition.

(g) "Planning proceeding"

90. The Working Group approved the substance of the definition as drafted.

Additional definitions

91. The Working Group agreed that no additional definitions were needed at this time, but that they might become necessary at a later stage, for example, in respect of the terms "insolvency representative" and "foreign court".

Article 2 bis. Jurisdiction of the enacting State

92. The Working Group agreed to remove the square brackets around article 2 bis, to delete "[to any extent]" in subparagraph (b), and to move the last sentence of subparagraph (c) to become a separate subparagraph (d) along the following lines: "(d) Create an obligation to commence insolvency proceedings in this State when there is no obligation to commence such proceedings." With those amendments, the Working Group approved the substance of article 2 bis.

Article 2 ter. Public policy exception; Article 2 quater. Competent court or authority

93. The Working Group approved the substance of the articles as drafted.

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

94. The Working Group approved the substance of the article as drafted.

Article 4. Cooperation to the maximum extent possible under article 3

95. The Working Group agreed to move the phrase "for the purposes of article 3" to the beginning of the chapeau and to delete subparagraph (f) with a view to including its content in chapter 5. With those changes, the Working Group approved the substance of article 4.

Article 5. Limitation of the effect of communication under article 3

96. The Working Group agreed to refer to "the court" rather than "each court" and to insert the phrase "With respect to communication under article 3" at the beginning of article 5(1). With those amendments, the Working Group approved the substance of article 5.

Article 6. Coordination of hearings

97. The Working Group agreed to change "each court" in article 6(2) and (3) to "the court", and in order to clarify who was to reach agreement, to insert "the parties" before "reaching" and the phrase "and the court approving that agreement" at the end of subparagraph 2. With those changes, the Working Group approved the substance of the article.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

98. The Working Group agreed to delete the phrase in square brackets at the beginning of article 7(1), and to include in a guide to enactment a reference to coordination and cooperation between the group representative and an insolvency representative appointed in other proceedings in the State of the planning proceeding. With that amendment, the Working Group approved the substance of article 7.

Article 7 bis. Cooperation and direct communication between a [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*]**, foreign courts, foreign representatives and a group representative**

99. The Working Group agreed to delete the phrase in square brackets at the beginning of article 7 bis(1), and with that change, the Working Group approved the substance of the article.

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis

100. The Working Group approved the substance of article 8 as drafted.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

101. The Working Group agreed that the article should be drafted to identify the party authorized to enter into agreements concerning coordination proceedings along the following lines: "A [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*] may enter into an agreement concerning the coordination of proceedings involving two or more enterprise group members located in different States, including where a group insolvency solution is being developed."

Article 10. Appointment of a single or the same insolvency representative

102. Since it was not an uncommon practice for the appointment referred to in the draft article to be of more than one individual, it was suggested that that point could be addressed in the guide to enactment. If a definition of insolvency representative were to be added to the text, along the lines specified in paragraph 12(v) of the Legislative Guide, the use in that definition of the phrase "person or body" might be sufficient to address that point. Alternatively, it might be clarified as appropriate that references to the singular in the text also referred to the plural. The Working Group approved the substance of article 10.

Chapter 3. Conduct of a planning proceeding in this State

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

103. The Working Group agreed to retain the term "prohibits" in paragraph 2 without square brackets and to delete "[precludes]".

104. Concern was expressed as to the relationship between articles 11 and 12 and the point at which the elements of the definition of "planning proceeding" in article 2 would become applicable. It was explained that article 11 was intended to refer only to the commencement of a main proceeding with respect to at least one group member in the enacting State in which other group members might participate with a view to, inter alia, developing a group insolvency solution. Such a proceeding did not necessarily become a planning proceeding under article 12 unless required and then only provided that the elements of article 2(g) were fulfilled. As such, it was suggested that article 11 might be better located in chapter 2 as an additional tool for cooperation, with the addition of the word "including" in the closing phrase of

paragraph 1 to indicate that the development of a group insolvency solution was only one possible result of the participation referred to.

105. After extensive discussion and a number of different proposals, the Working Group agreed to move article 11 into chapter 2 and add the word “including” in paragraph 1 as indicated above.

106. A question was raised as to whether article 11 addressed the participation of a group member that had its centre of main interests (COMI) in the enacting State. It was explained that paragraph 1 was the general provision with respect to participation by any other group member wherever located; the qualification “subject to paragraph 2” meant that the limitations in paragraphs 2 and 3 applied only in the case of group members with their COMI located in another State.

Article 12. Appointment of a group representative

107. To further clarify the relationship between articles 11 and 12 and to reflect the definition of “planning proceeding” in article 2(g), it was proposed that paragraph 1 be revised along the following lines: to substitute for the phrase after the words “in article 11” the phrase “and the requirements of article 2(g) are otherwise met, the court may appoint a group representative, by which the proceeding becomes a planning proceeding.” There was support in the Working Group for that proposal.

108. A question was raised as to the procedure for appointment of a group representative and whether that representative could be the same person as the insolvency representative of the COMI proceeding. It was observed that in practice they were very often the same person, but that there were circumstances in which the tasks of the insolvency representative and of the group representative might be different. In terms of the text, it was noted that with respect to substantive articles such as those dealing with relief, it would be important to ensure that the correct officeholder was referenced. As to article 12(2), it was intended that the procedure for appointment of the group representative was left to the law of the enacting State, as different laws adopted different approaches to that issue.

109. Another question concerned the powers of the group representative. It was noted that the group representative was authorized under article 12 to take various actions with respect to the planning proceeding, but since the COMI proceeding could become the planning proceeding, it was unclear whether the group representative was also authorized to act with respect to the COMI proceeding. In response, it was explained that the group representative’s focus was to act as a representative of the planning proceeding, in keeping with articles 2(e) and 12, in order to develop and implement a group insolvency solution.

Article 13. Relief available to a planning proceeding

110. The Working Group agreed: (a) in respect of the chapeau of paragraph 1, to replace “and” with “or” and to retain the text but remove all of the square brackets; (b) in paragraph (c), to delete “temporarily” and to retain “insolvency” without square brackets; and (c) to delete the square brackets and retain the text in paragraph (g).

111. The Working Group agreed to delete the first alternative text and to retain the second alternative text in paragraph 2 without square brackets.

112. In response to a query as to the meaning of the phrase “subject to insolvency proceedings”, it was clarified that it referred to the group member in respect of which the proceeding referred to in article 11(1) had commenced. The Working Group agreed that the distinction between group members that were “subject to” or “participating in” insolvency proceedings should be carefully considered in the articles in which those phrases were used and that the distinction should be explained in the guide to enactment.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

113. With respect to paragraph 2, after extensive discussion, the prevailing view was that the requirements should be as simple as possible and that an application for recognition should be accompanied by evidence of the appointment of the group representative: in subparagraph (a), a certified copy of the decision appointing; in subparagraph (b), a certificate affirming the appointment; or in subparagraph (c), any other evidence of that appointment. The Secretariat was requested to redraft paragraph 2 to reflect that view, ensuring that subparagraphs (a), (b) and (c) were drafted in the alternative.

114. In respect of paragraph 3(a), it was agreed that the second sentence should be deleted. It was also agreed that paragraph 3(b) should be retained without square brackets.

Article 15. Interim relief that may be granted upon application for recognition of a foreign planning proceeding

115. The Working Group agreed that the text of the chapeau of paragraph 1 and the text of paragraph 1(c) should be conformed to the corresponding parts of article 13.

116. With respect to paragraph 1(e), concern was expressed that it might not be appropriate for the group representative to be entrusted with the task set out in that paragraph. It was suggested that, in the first instance, it should be entrusted to the insolvency representative appointed to proceedings in the receiving State, provided that person had the capacity or ability to perform the task; only where that was not the case could it be entrusted to the group representative. Various drafting proposals were made to address that concern. After discussion, a proposal to address the drafting along the following lines received support: “In order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the enterprise group member’s assets located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the enterprise group member’s assets located in this State, the group representative or another person designated by the court may be entrusted with that task.”

117. Although there was a proposal to delete paragraph 1(g), the prevailing view was that it should be retained.

118. The Working Group agreed to replace the two alternative texts in square brackets in paragraph 4 with text along the following lines: “Relief under this article may not be granted with respect to the assets and operations located in this State of any group member participating in a planning proceeding if that group member would not be eligible for commencement of insolvency proceedings in the State in which its COMI is located.” There was some support for that proposal, and also for retaining the first alternative bracketed text. Some support was also expressed for an additional suggestion to add to that first alternative text along the following lines: “unless not commencing insolvency proceedings was a part of the proposals being developed in the planning proceeding”. After discussion, the Working Group agreed to retain the first alternative text without the brackets (and to delete the second alternative) as a basis for further consideration at a future time, and to retain the phrase in square brackets “[in any jurisdiction]”.

119. The Working Group agreed to retain in paragraph 5 the second alternative text without square brackets, and to delete the first alternative text.

Article 16. Decision to recognize a foreign planning proceeding

120. A question was raised as to whether changes in the status of the planning proceeding referred to in paragraph 4 would include changes relating to the status of

the participating group members and changes that might bear upon the relief granted on the basis of recognition (as noted in paragraph 168 of the Guide to Enactment and Interpretation of the Model Law with respect to article 18). It was also queried why the draft article did not mirror the content of article 18 of the Model Law. Various proposals were made to revise paragraph 4 as follows: (a) to add the word "substantial" or "material" before the word "changes"; (b) to add to the end of the paragraph "and changes that might bear upon the relief granted on the basis of recognition"; and (c) to place paragraph 4 in a separate article. After discussion, the Working Group agreed to place the changes suggested in (a) and (b) in square brackets for discussion at a future time.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

121. The Working Group agreed that the text of the chapeau of paragraph 1 and the text of paragraph 1(d) should be conformed to the corresponding parts of articles 13 and 15. The Working Group also agreed that the references "[or at any time thereafter]" and "or […]" in the chapeau of paragraph 1 could be deleted. Further, the reference in footnote 42 to the interpretation of the words "upon recognition" in article 21 of the Model Law should be included in the guide to enactment.

122. It was further agreed that paragraphs 1(f) and 2 should be conformed with the Working Group's decision on article 15(1)(e), that paragraph 3 should be conformed with article 15(4), and that article 15(4) should also be added to article 13. A proposal to insert in article 17 a paragraph along the lines of the text agreed in respect of article 15(5) was supported.

123. With respect to paragraph 1(i), there was support for a proposal that the cross-reference to article 19 was unnecessary. A further proposal was to add the cross-reference "pursuant to article 21(1)" at the end of the paragraph or to add the words "pursuant to a commitment made under article 21" before the word "approving".

124. After discussion, a proposal to delete paragraph 1(i) and to deal with that issue in article 21 (and possibly article 22) was supported.

Article 18. Participation of a group representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]

125. Although there were suggestions to retain the text in square brackets at the end of the article, the prevailing view was that it should be deleted. It was observed that deletion of that text would not prevent an enacting State from allowing such participation in accordance with its law.

Article 19. Protection of creditors and other interested persons

126. To resolve a concern about the need to identify the specific articles in the cross-reference, a drafting proposal along the following lines was made to replace the opening phrase before "the court must" with: "In granting, denying, modifying or terminating relief under this Law". That proposal received support and it was agreed that in paragraphs 2 and 3, the references to articles 15 and 17 should be replaced with "under this Law". It was noted that, since article 21(2) was not designated as a form of relief, its reference to article 19 should be retained.

Article 20. Approval of local elements of a group insolvency solution

127. A proposal was made to clarify the application of paragraphs 4 and 5 as follows:

(a) To replace paragraph 4 with text along the following lines: "Nothing in this article requires the commencement of a proceeding if unnecessary to implement the portion of a group insolvency solution affecting a group member."; and

(b) To add text along the following lines to the end of paragraph 5: "and to request additional assistance under other laws of this State for implementing the group solution."

128. Although some support was expressed for that proposal, support was also expressed in favour of retaining the text as drafted. It was agreed that for future consideration, the proposed text should be added in square brackets to the draft, and square brackets should be placed around the current text of paragraph 4.

129. Following further discussion, the Working Group agreed to insert for future discussion additional text along the following lines:

> "[4. Where a group solution affects a group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [*identify the laws of the enacting state relating to insolvency*] has commenced in this State or article 21 applies, no such proceeding needs to be commenced if unnecessary to implement the portion of the group insolvency solution affecting the group member.]
>
> "[4 bis. Where a group solution affects a group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [*identify the laws of the enacting state relating to insolvency*] has commenced in this State or article 21 applies, the group representative may request additional assistance under other laws of this State to implement the portion of the group insolvency solution affecting the group member.]"

Chapter 5. Treatment of foreign claims

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

130. Concerns were expressed that because the group representative did not necessarily represent an insolvency estate (unless the group representative and the insolvency representative of the underlying COMI proceeding were the same person), permitting the group representative to make the commitment referred to in paragraph 1 might not be appropriate. Preference was expressed in favour of deleting any reference to the group representative in paragraph 1. Although some support was expressed in favour of that proposal, it was also noted that since the goal of the text was to create a new framework in which the group representative would have some authority, removing that reference in paragraph 1 would effectively reduce the value of the text. There was support for a proposal to require the commitment to be given jointly by the insolvency representative appointed in the main proceeding and the group representative, where such a representative was appointed and was a person different to the insolvency representative. It was felt that such a requirement would address concerns that the group representative did not represent any particular insolvency estate that could provide the assets necessary to support the undertaking.

131. In response to concerns that the drafting was confusing, it was clarified that the main proceeding and the non-main proceeding referred to in paragraph 1 were proceedings relating to the same debtor.

132. A question was raised as to the meaning of "treatment" and it was suggested that article 36 of the European Insolvency Regulation might provide some text to clarify that issue.

133. A number of proposals were made to revise paragraph 1 to address the concerns raised and to provide greater clarity. After extensive discussion, support was expressed by the Working Group in favour of a text for article 21 that included elements along the following lines:

> "To facilitate the treatment of claims that could otherwise be brought by a creditor in a non-main proceeding for an enterprise group member in another

State, an insolvency representative of an enterprise group member appointed in the main proceeding taking place in this State may jointly with a group representative (if any) where another person has been appointed to that role, commit to, and the court in this State may approve, providing that creditor with the treatment in this State that they would have received in a non-main proceeding in that other State. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate."

134. There was some support for retaining the cross reference to article 19 in paragraph 2, although there was concern that the redrafting of article 19 made the cross reference too general. In response, it was observed that the court referred to in paragraph 2 could only be concerned about the creditors located within its jurisdiction, which should be sufficiently specific. Recalling the agreement to address the issue raised in article 17(1)(i) in the context of article 21 (and possibly article 22), it was agreed that appropriate text should be added to paragraph 2. It was also agreed that further consideration needed to be given to the linkage with article 21, and in particular the words "a commitment made under paragraph 1". The Working Group agreed that paragraph 2 should be a separate article, as it addressed a different court to the court referred to in paragraph 1, and that the heading of article 21 needed to be revisited in light of the agreed changes.

135. The Secretariat was requested to provide a revised text of article 21 for future consideration by the Working Group.

[Part B]

Supplemental provisions

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

136. It was recalled that while article 21 dealt with the same debtor, article 22 might potentially address the treatment of creditors of different debtors in a group context. Although it was suggested that the changes made to article 21(1) should be reflected in article 22(1), the Working Group was reminded that as a supplemental provision, article 22 was intended to expand upon article 21 and provide solutions for those States wanting greater flexibility than provided in article 21. Accordingly, the changes made to article 21 did not need to be reflected in article 22. After discussion, the Working Group agreed to retain the text of paragraph 1 and delete the square brackets around the second sentence, to reconsider the heading, and to make paragraph 2 a separate article. As noted above, appropriate text should be added to paragraph 2 to address the issue raised in article 17(1)(i).

137. A question was raised as to which insolvency estate was being referred to in the second sentence, and the matter was left for future consideration by the Working Group.

Article 23. Additional relief

138. There was support to change the words "where a group representative has made a commitment under article 21 or 22" in paragraph 1 to "where a commitment under article 21 or 22 has been made" and to delete the text in both sets of square brackets in paragraph 2.

Annex

Draft model law on cross-border recognition and enforcement of insolvency-related judgments: revised text

Preamble

1. The purpose of this Law is:

(a) To create greater certainty for parties in regard to their rights and remedies for enforcement of insolvency-related judgments;

(b) To avoid the duplication of proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of the insolvency estate; and

(f) Where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. The purpose of this Law is not:

(a) To displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment;

(b) To replace legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceedings to which the judgment is related.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a proceeding taking place in a State that is different from the State where recognition and enforcement are sought.

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

Article 2. Definitions

For the purposes of this Law:

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

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

(c) “Judgment” means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related foreign judgment" means a judgment that:

(i) [Is related to] [Derives directly from or is closely connected to] [Stems intrinsically from or is materially associated with] an insolvency proceeding;

(ii) Was issued on or after the commencement of the insolvency proceeding to which it is related; and

(iii) Affects the insolvency estate;

and subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has been concluded.

For the purposes of this definition:

1. An "insolvency-related foreign judgment" includes a judgment issued in a proceeding in which the cause of action was pursued by:

(a) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

(b) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

and the judgment on that cause of action would otherwise be enforceable under this Law; and

2. An "insolvency-related foreign judgment" does not include a judgment commencing an insolvency proceeding.

Article 3. International obligations of this State

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

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after this Law comes into force), and that treaty applies to the judgment.

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related foreign judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.

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

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

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

Article 7. Public policy exception

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

Article 8. Interpretation

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

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

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

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

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

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings.

2. When recognition and enforcement of an insolvency-related foreign judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related foreign judgment;

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

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

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. The court shall ensure that the party against whom relief is sought should be given the right to be heard on the application.

Article 11. Provisional relief

1. From the time recognition and enforcement of an insolvency-related foreign judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related foreign judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 10, paragraph 1, grant relief of a provisional nature, including:

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

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

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article.*]

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

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

Subject to articles 7 and 13, an insolvency-related foreign judgment shall be recognized and enforced provided:

(a) The requirements of article 9, paragraph 1 with respect to effectiveness and enforceability are met;

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

(c) The application meets the requirements of article 10, paragraph 2; and

(d) Recognition and enforcement is sought from or arises by way of defence or as an incidental question before a court referred to in article 4.

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

Subject to article 7, recognition and enforcement of an insolvency-related foreign judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

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

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

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

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

(f) The judgment determines whether:

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

[(ii) A transaction involving the debtor or assets of the insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate; or]

(iii) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary or out-of-court restructuring agreement should be approved;

and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without contesting jurisdiction within the time frame provided in the law of the originating State unless it was evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not inconsistent with the law of this State;

States that have enacted legislation based on the Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment originates from a State whose proceeding is not recognizable under the [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under the [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*] participated in the originating proceeding to the extent of engaging in the substantive merits of the claim to which those proceedings related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time that proceeding commenced.

Article 14. Equivalent effect

1. An insolvency-related foreign judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] [would have had if it had been issued by a court of this State].

2. If the insolvency-related foreign judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 15. Severability

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

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments which may have cast doubt on

whether judgments can be recognized and enforced under article 21 of the Model Law. States may therefore wish to consider enacting the following provision:

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

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.