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Report of Working Group V (Insolvency Law) on the work of its fifty-third session (New York, 7–11 May 2018)

Contents

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I. Introduction

A. Facilitating the cross-border insolvency of 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 (1997)[2] (MLCBI) and part three of the UNCITRAL Legislative Guide on Insolvency Law (2010)[3] and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).[4] 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), fiftieth (December 2016) (A/CN.9/898), fifty-first (May 2017) (A/CN.9/903) and fifty-second (December 2017) (A/CN.9/931) sessions and continued its deliberations at the fifty-third 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.[5] 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), fiftieth (December 2016) (A/CN.9/898), fifty-first (May 2017) (A/CN.9/903) and fifty-second (December 2017) (A/CN.9/931) sessions and continued its deliberations at the fifty-third session.

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

3. At its forty-sixth session (2013), the Commission requested Working Group V to conduct a preliminary examination of issues relevant to the insolvency of MSMEs.[6] 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.[7] At its forty-ninth session (2016), the Commission clarified the mandate of Working Group V with respect to the insolvency of MSMEs as follows: “Working Group V is mandated 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

[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] General Assembly resolution 52/158, annex.

[3] Available from http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

[4] United Nations publication, Sales No. E.10.V.6.

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

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.

take should be decided at a later time based on the nature of the various solutions that were being developed."[8] The Working Group held a preliminary discussion of the topic at its forty-fifth (April 2014) (A/CN.9/803), forty-ninth (May 2016) (A/CN.9/870) and fifty-first (May 2017) (A/CN.9/903) sessions and continued its deliberations at the fifty-third session.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fifty-third session in New York from 7 to 11 May 2018. The session was attended by representatives of the following States Members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Canada, Chile, China, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, India, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Libya, Mexico, Nigeria, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Bahrain, Cyprus, Dominican Republic, Iraq, Malta, Nepal, Netherlands, Paraguay, Qatar, Senegal, Saudi Arabia, Sudan and Uzbekistan.

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

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

(a) *Organizations of the United Nations system*: International Monetary Fund and the World Bank Group (WB);

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), Commercial Finance Association (CFA), European Law Students' Association (ELSA), Fondation pour le Droit Continental, Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Inter-Pacific Bar Association (IPBA), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT) and New York City Bar (NYCBAR).

8. The Working Group elected the following officers:

Chairman: Wisit WISITSORA-AT (Thailand)

Rapporteur: María Amparo LÓPEZ SENOVILLA (Spain)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.155);

(b) A note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft model law (A/CN.9/WG.V/WP.156);

(c) A note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law (A/CN.9/WG.V/WP.157);

(d) A note by the Secretariat on facilitating the cross-border insolvency of enterprise groups: draft legislative provisions (A/CN.9/WG.V/WP.158);

[8] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

(e) Note by the Secretariat on insolvency of micro, small and medium-sized enterprises (A/CN.9/WG.V/WP.159); and

(f) Proposal by the Government of the United States of America for the development of model legislative provisions on civil asset tracing and recovery (A/CN.9/WG.V/WP.154).

10. 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) recognition and enforcement of insolvency-related judgments; (b) facilitating the cross-border insolvency of enterprise groups; (c) insolvency of micro, small and medium-sized enterprises; and (d) proposal for the development of model legislative provisions on civil asset tracing and recovery.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its work with the discussion of the recognition and enforcement of insolvency-related judgments on the basis of documents A/CN.9/931 (annex), A/CN.9/WG.V/WP.156 and A/CN.9/WG.V/WP.157. The Working Group approved the text of the draft model law on recognition and enforcement of insolvency-related judgments annexed to this report and transmitted it for finalization and adoption by the Commission at its fifty-first session, in 2018. The Working Group requested the Secretariat to transmit to the Commission for consideration and adoption the draft guide to enactment contained in document A/CN.9/WG.V/WP.157, together with the revisions agreed to be made to that draft at the current session (see section IV.B of this report).

12. The Working Group also discussed cross-border insolvency of enterprise groups on the basis of document A/CN.9/WG.V/WP.158, insolvency of micro, small and medium-sized enterprises on the basis of document A/CN.9/WG.V/WP.159, and the proposal by the Government of the United States of America for the development of model legislative provisions on civil asset tracing and recovery (A/CN.9/WG.V/WP.154). The deliberations and decisions of the Working Group related to those topics are reflected in chapters V, VI and VII of this report.

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

A. Consideration of the draft model law

13. The Working Group commenced its discussions on the topic by reviewing the text of the draft model law contained in the annex to the report of its fifty-second session (A/CN.9/931) and drafting suggestions by the Secretariat to that draft contained in document A/CN.9/WG.V/WP.156.

Title

14. The Working Group agreed to delete the words “cross-border” from the title of the draft model law so that the title would read “Draft model law on recognition and enforcement of insolvency-related judgments” (MLIJ).

Preamble

15. The Working Group agreed to remove the words “for parties” and “their” in paragraph 1 (a) and to add the word “insolvency” before the word “proceedings” in paragraph 1 (b).

16. With those amendments, the Working Group approved the substance of the preamble.

Article 1. Scope of application

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

Article 2. Definitions

18. With reference to the drafting suggestions in paragraphs 1 and 2 of document A/CN.9/WG.V/WP.156, the Working Group considered whether a definition of the term “court” should be included in article 2 to clarify that the term encompassed a competent administrative authority. A question arose whether that definition would refer to courts and administrative authorities of the originating State or also of the receiving State. The concern was expressed that, if the definition was meant to cover both, it could interfere with draft article 4 that already sufficiently clarified that the model law intended to cover both courts and competent administrative authorities of the receiving State.

19. The Working Group agreed not to add a definition of “court” or “foreign court” in article 2 and to add the phrase “or other competent authority” in subparagraph (a) after the word “court” and in all other cases where such addition would be necessary to clarify that references to courts of the originating State encompassed also reference to other competent authorities of that State. The understanding was that the guide to enactment of the MLIJ would include an explanation of the references to courts, of both the originating and receiving State. The Working Group agreed to delete the words “by the court” in the end of the second sentence of subparagraph (c).

20. With those amendments, the Working Group approved the substance of the draft article.

Article 3. International obligations of this State

21. The Working Group approved the substance of the draft article.

Article 4. Competent court or authority

22. The Working Group approved the substance of the draft article with the deletion of the phrase “in the course of proceedings” at the end of the draft article.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State; Article 6. Additional assistance under other laws; and Article 7. Public policy exception

23. The Working Group approved the substance of the draft articles.

Article 8. Interpretation

24. A suggestion to replace the word “uniformity” with the word “consistency” did not receive support. The Working Group approved the substance of the draft article.

Article 9. Effect and enforceability of an insolvency-related judgment; and Article 9 bis. Effect of review in the originating State on recognition and enforcement

25. The Working Group approved the substance of the draft articles.

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

26. The suggestion to redraft paragraph 1 of the draft article to make it broader by according the right of standing also to various affected stakeholders did not gain support. The Working Group approved the substance of the draft article with the deletion of the words "in the course of proceedings" in paragraph 1 and with paragraph 5 redrafted as follows: "Any party against whom recognition and enforcement is sought has the right to be heard."

Article 11. Provisional relief

27. The Working Group approved the substance of the draft article.

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

28. With reference to the drafting suggestion in paragraph 3 of document A/CN.9/WG.V/WP.156, the Working Group agreed to delete the words "paragraph 1" in subparagraph (a).

29. With that amendment, the Working Group approved the substance of the draft article.

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

30. A proposal was made to add in draft article 13 the following wording: "where the effect of recognition would be (i) to restrict, suspend or interfere with or prejudice in any way insolvency proceedings in the State in which recognition is sought; or (ii) to prejudice the right of creditors in the State in which the judgment is sought to be enforced." That proposal did not receive support. It was explained that subparagraphs (a), (e) and (f) of the draft article already addressed some situations intended to be covered by the proposal. Concern was expressed that such terms as "interfere with" and "prejudice" used in the proposal were prone to a broad interpretation.

31. Doubts were expressed about the need for subparagraph (h) in the light of the broad scope of the draft model law and the difficulty of finding examples that would be covered by that subparagraph. The alternative view was that the provision should be retained as drafted. The Working Group recalled its deliberations on the same issue at past sessions.

32. The Working Group approved the substance of the draft article.

Article 14. Equivalent effect

33. The need for paragraph 1 was questioned. The prevailing view was that it should be retained.

34. Different views were expressed as to whether the first or second alternative texts in square brackets, or both, should be kept. Recalling that the Working Group had already considered the matter, the view that the draft article should be approved as drafted with the two alternative texts separated by the conjunction "or" and accompanied by a footnote as suggested in paragraph 4 of document A/CN.9/WG.V/WP.156 prevailed.

35. Suggestions to replace in paragraph 2 the word "relief" with the word "remedy" and the word "equivalent" with the words "available in this State" did not receive support.

Article 15. Severability

36. The Working Group approved the substance of draft article 15 with the replacement of the phrase "only part" with the words "only that part".

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*]

37. With reference to the drafting suggestion in paragraph 5 of document A/CN.9/WG.V/WP.156, the Working Group agreed to replace the words "the Model Law" at the end of the first sentence in the text in italics preceding article X with the words "that Model Law" to clarify that the reference was to the MLCBI.

38. With that amendment, the Working Group approved the substance of the draft article.

B. Consideration of the draft guide to enactment (A/CN.9/WG.V/WP.157)

39. The Working Group requested the Secretariat to reflect in the draft guide the revisions agreed to be made in the draft model law at the current session, in particular by adding in chapter III.B of the draft guide a section explaining that references to courts in the text of the model law encompassed competent administrative authorities (see para. 19 above).

40. A question was raised whether the title of the draft guide to enactment should be the Guide to Enactment and Interpretation similar to the title of the revised guide to enactment of the MLCBI. The Working Group recalled that the title of the guide to the MLCBI was amended after its content was expanded to reflect the case law on the MLCBI. The Working Group agreed to keep the title as contained in document A/CN.9/WG.V/WP.157. It was noted that consequential changes would need to be made to paragraph 13 of the draft guide by deleting the words "and its interpretation and application".

41. A suggestion was made to redraft paragraph 18 by softening the advice given to enacting States by using words such as "enacting States may wish to", by explaining benefits of enacting the MLIJ and by deleting the last sentence. It was pointed out that such benefits might include: fostering insolvency cooperation; consistent treatment of insolvency judgments; fairness; and reduction of costs of insolvency proceedings. The Working Group requested the Secretariat to revise paragraph 18 on the basis of those suggestions.

42. Queries were raised regarding the clarity of the drafting of paragraph 37, in particular whether the paragraph should address judgments arising from non-insolvency proceedings or only judgments originating from insolvency proceedings that would not be recognized under the MLCBI. The Secretariat was requested to consider redrafting that paragraph to provide more clarity on that aspect.

43. A question was also raised as to whether draft article 13, subparagraph (h) addressed the situation where the underlying insolvency proceeding was manifestly contrary to public policy. In response, it was suggested that public policy exemptions were sufficiently addressed in draft article 7.

44. The Working Group further agreed to amend the draft guide as follows:

(a) To add a cross-reference to paragraph 57 in paragraph 30;

(b) To replace in the third sentence of paragraph 37 the words "is an exception" with the words "also provides an exception";

(c) To delete paragraph 41;

(d) To delete the phrase starting with the words "as that judgment" from the last sentence of paragraph 44;

(e) To include in paragraph 46 reference to additional possible exemptions from the scope of the MLIJ that the State might consider under paragraph 2 of

article 1, such as judgments relating to entities excluded from the MLIJ, e.g. banks and insurance companies;

(f) To reflect, in conjunction with paragraph 49, that the "insolvency representative," although defined in the MLIJ, might be referred to by different names in various jurisdictions (e.g. along the lines of the Legislative Guide on Insolvency Law, part two, chapter III, para. 35);

(g) To redraft paragraph 55 by replacing the phrase "without more" with the phrase "without additional court orders";

(h) To redraft paragraph 57 by removing the reference to first day orders;

(i) To redraft paragraph 59(d) in more neutral terms to reflect that some States might consider that a judgment would fall into the category described in that paragraph when the cause of action arose after the commencement of insolvency proceedings, while other States might include judgments relating to a cause of action arising before the commencement of insolvency proceedings. It was suggested that the paragraph could be redrafted along the following lines: "Judgments determining whether the debtor owes or is owed a sum or any other performance not covered by subparagraph (a) or (b). The enacting State will need to determine whether this category should extend to all such judgments regardless of when the cause of action arose. While it might be considered that a cause of action that arose prior to the commencement of the insolvency proceedings was sufficiently linked to the insolvency proceeding, as it was being pursued in the context of, and could have an impact on, that proceeding, it might also be considered that a judgment on such a cause of action could have been obtained by or against the debtor prior to the commencement of the insolvency proceeding and, thus, lacked a sufficiently material association with the insolvency proceedings.";

(j) To add in the last sentence of paragraph 63 the word "could" before the word "apply";

(k) To delete paragraph 73 in the light of the clear explanation already contained in paragraph 72 in preference to the alternative suggestion to replace it with the following wording: "Judicial cooperation among insolvency courts, including through the recognition and enforcement of foreign judgments, should not be unduly hampered by an expansive interpretation of public policy";

(l) To delete the part of paragraph 78 starting with the word "Thus" until the words "a decision";

(m) To redraft the last part of the first sentence of paragraph 80 by replacing the phrase "review by an appellate court" with the phrase "review by way of an appeal to an appellate court";

(n) To replace in paragraph 83 the phrase "entitlement to apply" with "the conditions for applying" and the word "defines" with the word "sets";

(o) To add the word "solely" before the words "on a ground" in the first sentence of paragraph 110;

(p) To add at the end of paragraph 111 the following sentences: "The originating court does not need to have explicitly relied on or made findings regarding the relevant basis for jurisdiction, so long as that basis for jurisdiction existed at the relevant time. The originating court's reliance on additional or different jurisdictional grounds does not prevent one of the 'safe harbours' from applying.";

(q) In paragraph 113, to delete the fourth sentence and the first part of the last sentence until the words "it does not prevent";

(r) To delete the phrase "and relating only to assets" in the heading of the section on article 13, subparagraph (h);

(s) To move paragraph 118 before paragraph 117;

(t) To delete the last sentence in paragraph 121;

(u) To replace references to “relief” with references to “a form of relief” in paragraph 121 and the second sentence of paragraph 122;

(v) To add at the end of paragraph 126 the following sentence: “The enactment of this provision is not necessary in jurisdictions where the Model Law on Cross-Border Insolvency is interpreted as covering the recognition and enforcement of insolvency-related judgments”. Queries were raised whether reference to “judgment” instead of “insolvency-related judgment” might be more appropriate in the context of article X and whether the enactment of article X should be encouraged regardless of interpretation of the MLCBI, which might change over time.

45. The suggestion to replace the phrase “‘extraordinary’ reviews” with the phrase “‘extraordinary’ judicial reviews” in the last sentence of paragraph 80 did not gain support.

46. The suggestion was made that the last sentence of paragraph 83 should be deleted or replaced with the following phrase: “This basic structure would be complemented by existing procedural requirements of the enacting State and accordingly the enacting State should ensure that article 10 interacts appropriately with the domestic procedural law.” That suggestion did not gain support. Concern was expressed that by adding the suggested wording, a message could inadvertently be conveyed to enacting States that the MLIJ was more permissive than intended as regards grounds for refusing the recognition and enforcement of insolvency-related judgments. Noting that the last sentence of paragraph 83 as drafted was taken from the Guide to Enactment and Interpretation of the MLCBI, the Working Group agreed to retain that sentence with a cross-reference to article 10, paragraph 2.

47. With those amendments, the Working Group approved the substance of the draft guide.

V. Facilitating the cross-border insolvency of enterprise groups

A. Form of the document

48. The prevailing view was that the text should be prepared as a stand-alone model law, in the light of its distinct scope. That approach, it was noted, would accord more prominence to the text and facilitate its promotion, as well as highlight its importance for cross-border inter-State cooperation and coordination in insolvency-related matters.

49. A suggestion was made that the title of that model law should avoid terms that might create confusion with other UNCITRAL insolvency-related model laws. For that reason, it was suggested, such terms as “cross-border” should not be included in its title. A provisional title of “model law on enterprise group insolvency” (the MLEGI) was suggested.

50. Concern was expressed that enacting States might face difficulties with enacting the MLEGI, in particular because of its interaction with two other insolvency-related model laws of UNCITRAL (the MLCBI and the MLIJ). To address that concern, it was agreed that issues of enactment and implementation of the MLEGI, including its interaction with other two model laws, should be discussed in a guide to enactment of the MLEGI. The understanding was that it would be for enacting States to decide how to integrate the MLEGI into their legal framework, either as part of insolvency law or otherwise.

B. Consideration of the draft legislative provisions (A/CN.9/WG.V/WP.158)

[Part A]

Chapter 1. General provisions

Preamble

51. A suggestion to add the phrase “Initiation of the planning proceedings” in the beginning of subparagraph (c) did not receive support.

52. With reference to the drafting suggestion in paragraph 1 of document A/CN.9/WG.V/WP.158, different views were expressed as regards the need for ensuring consistency throughout the text in references to the overall combined value of the group members and of the enterprise group as a whole. The need for reference to the enterprise group as a whole in subparagraph (e) was questioned. The prevailing view was that the preamble should be kept unchanged to provide a general statement of the goals of the MLEGI.

Article 1. Scope

53. With reference to the drafting suggestion in paragraph 2 of document A/CN.9/WG.V/WP.158, the Working Group agreed to replace the word “including” with the words “and addresses”, to delete the words “for those enterprise group members” and add a new paragraph that would envisage exclusions from the scope of the MLEGI, along the lines of article 1, paragraph 2 of the MLCBI.

Article 2. Definitions

54. In response to a suggestion to replace the word “involved” in subparagraph (f) with a reference to “those” group members whose assets and operations were the subject of the proposals contained in the group solution, the question was raised as to whether the definition should be broader and include reference to: (a) those group members participating in a planning proceeding; and (b) those group members that, while not directly covered by the proposals in the group solution, might nevertheless be affected by those proposals. Related questions concerned the relevance or feasibility of determining the value of both of those sets of group members or the value of the group as whole, if that concept were to be added to the definition. After discussion, the Working Group agreed to retain the subparagraph with deletion of the word “involved” and replacement of the word “the group members” with “those group members”.

55. The Working Group agreed to consider including additional definitions in the MLEGI at a later stage. In a later discussion, the Working Group heard suggestions for inclusion of such additional definitions as main and non-main proceedings, foreign proceeding, insolvency proceeding and concurrent proceedings. The understanding was that the Secretariat should have discretion to consider the need for those and additional definitions when revising the draft text.

Article 2 bis. Jurisdiction of the enacting State

56. With reference to the drafting suggestion in paragraph 7 of document A/CN.9/WG.V/WP.158, the Working Group agreed to add the words “in respect of that enterprise group member” after the words “insolvency proceedings” in subparagraph (d).

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

57. The Working Group approved the substance of the draft articles.

Additional articles in chapter 1

58. The Secretariat was requested to add articles similar to articles 3 and 8 of the MLIJ addressing international obligations and uniform interpretation, respectively.

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; Article 4. Cooperation to the maximum extent possible under article 3; Article 6. Coordination of hearings

59. In response to a query on practical aspects of holding joint hearings as envisaged in article 6, paragraph 1, attention was drawn to part three of the Legislative Guide on Insolvency Law (chapter III, paras. 38–40) and other UNCITRAL texts discussing that point, as well as to relevant judicial practice.

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

60. A suggestion was made to delete paragraph 1 since it represented a fundamental principle relating to independence of courts applicable more broadly and not only to article 3 and that for that reason, it could be discussed in the guide to enactment as applicable to the MLEGI as a whole. Another suggestion was that paragraph 1 could be moved to draft article 3. An additional point made was that paragraph 1 might overlap with paragraph 2(a). An alternative view was that paragraph 1 should remain in the draft article.

61. After discussion, the Working Group agreed to retain paragraph 1 in draft article 5.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts; 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; and Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis**

62. The Working Group approved the substance of the draft articles.

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

63. In response to the question raised in paragraph 9(b) of document A/CN.9/WG.V/WP.158, there was agreement that a group representative, if appointed, should be authorized to enter into the agreements envisaged in draft article 9. Although there were different views as to whether a clarification needed to be included in article 9 or discussed in the guide to enactment of the MLEGI, the prevailing view was to include relevant drafting in the article.

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

64. A query was raised about the use of the phrase “a single or the same” in paragraph 1 and in the title of the draft article. The Working Group was referred to part three of the Legislative Guide on Insolvency Law (chapter II, paras. 142–144), where reasons for using that phrase were explained. The Secretariat was requested to include that explanation in the guide to enactment of the MLEGI. Suggestions to replace that phrase did not receive sufficient support.

65. A point was made that nothing in the draft model law could be understood as limiting obligations or duties, whether legislative or not, that existed in relation to insolvency representatives under domestic law. The Working Group agreed to delete paragraph 2 and reflect its content in the guide to enactment of the MLEGI.

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

66. The Working Group agreed: (a) to delete the words "chapter 2 of" in paragraph 1; (b) to replace the words "any other enterprise group" with the words "an enterprise group" in paragraph 4 and to move that paragraph before paragraph 3; and (c) to merge paragraphs 3 and 3 bis as follows: "An enterprise group member participating in a proceeding referred to in paragraph 1 has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. The sole fact that an enterprise group member participates in such a proceeding does not subject it to the jurisdiction of the courts of this State for any purpose other than that participation."

67. Proposals to delete paragraph 4 as being redundant in the light of paragraphs 1 and 2 of the draft article and to add provisions addressing possible exclusion from participation in the planning proceeding did not receive support.

Chapter 3. Conduct of a planning proceeding in this State

Article 12. Appointment of a group representative

68. With reference to the drafting suggestions in paragraph 12 of document A/CN.9/WG.V/WP.158, the Working Group agreed to delete the word "otherwise" in paragraph 1 of the draft article and to retain the words "a foreign proceeding" in subparagraphs 3(b) and (c) with an explanation in the guide that a foreign proceeding might cover proceedings other than insolvency proceedings. The Working Group agreed to add the phrase "pursuant to article 13" after the phrase "to seek relief" in paragraph 2 and to include an explanation in the guide to enactment of the MLEGI.

69. Support was expressed for a suggestion in paragraph 47 of document A/CN.9/WG.V/WP.158 to move paragraph 5 of draft article 20 to draft article 12. However, the Working Group deferred the consideration of article 20 to a later stage (see paras. 85–91 below).

Article 13. Relief available to a planning proceeding

70. The Working Group agreed to revise the draft article to reflect the drafting suggestions in paragraphs 14, 15 and 17 of document A/CN.9/WG.V/WP.158 (concerning the placement of paras. 1(c) and (g), the drafting of para. 1(g) in the singular form and the wording of para. 3). It also agreed to delete the phrase "where the funding entity is located in this State" in paragraph 1(g) (and in the corresponding provisions of arts. 15 and 17).

71. No support was expressed for closer aligning of the drafting of paragraph 3 with the wording contained in draft articles 15 and 17.

72. Various proposals were made with respect to paragraph 2 and the language in square brackets, including retaining the words in square brackets as drafted, deleting that text and deleting the whole paragraph. One difficulty highlighted with respect to the existing language in square brackets was that it referred to article 22, which is a supplemental article, and including a reference to that article in article 13, paragraph 2 would only be applicable to States that had decided to enact the supplemental provisions. Further, for States that chose to enact the supplemental provisions, the text could be extended to also refer to article 23. Where those supplemental provisions were not enacted, it was noted, the only relevant reference was to article 21.

73. A proposal, using less specific language, was to replace the bracketed text with the words "unless a decision to stay or decline to commence an insolvency proceeding was made by a court where the enterprise group member has its centre of main interest (COMI)". While that proposal received some support on the basis that it was the

COMI court that could most appropriately make the decision not to commence an insolvency proceeding, it was pointed out that that language did not address the situation in articles 21 and 21 bis, where the decision would not be made by the COMI court.

74. Further suggestions were to add the words "or as a consequence of a decision under article 21 bis, subparagraph (b)" after the word "COMI" in the proposal above or to refer to a decision of a court "of an appropriate jurisdiction". In support of deleting the text in square brackets, it was suggested that the guide to enactment could explain (for arts. 13, 15 and 17) the situations that might be covered by the reference to "not subject to insolvency proceedings" and that since the relief being discussed was not automatic, the court would have the discretion to take account of relevant considerations. Moreover, it was emphasized that the provisions on relief could not possibly concern group members that were not subject to insolvency proceedings. In support of the approach of dealing with the issue in the guide to enactment and avoiding complicated drafting to reconcile the core and supplemental provisions, it was recalled that the goal of the provision was to address very limited circumstances that would rarely occur i.e. those in which, notwithstanding that an insolvency proceeding had not commenced for a particular group member, there may nevertheless be a need to enable relief to be granted with respect to its assets and operations.

75. A different concern expressed was that the text should not impose on States that did not enact the supplemental articles 22 or 23 any obligation to recognize requests from States that had enacted those articles, although they may have the discretion to do so.

76. After further discussion, a proposal was made to replace the existing text in square brackets with the words "unless insolvency proceedings were not commenced for the purpose of minimizing the commencement of proceedings in accordance with this Law". Support was expressed for that proposal as a workable solution. A suggestion was made that the purpose of minimizing the commencement of proceedings should also be reflected in draft articles 21 and 22 or in the guide to enactment.

77. A suggestion was made to add another phrase to the proposed wording to read: "unless insolvency proceedings were not commenced for the purpose of minimizing the commencement of proceedings or facilitating the treatment of claims in an enterprise group insolvency in accordance with this Law." No support was expressed for the revised wording.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

78. The Working Group agreed to revise the draft article to: (a) amend the part of paragraph 2(c) after the comma to read "any other evidence concerning the appointment of the group representative that is acceptable to the court"; (b) add the word "insolvency" before the first reference to "proceedings" in paragraph 3(b); (c) delete the phrase "that are known to the group representative" at the end of paragraph 3(b); and (d) add the phrase "that are known to the group representative that have been" before the word "commenced" in paragraph 3(b).

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

79. The Working Group agreed to revise the draft article to reflect the drafting suggestions in paragraphs 28 and 31 of document A/CN.9/WG.V/WP.158 (concerning the addition of wording to para. 1 and deletion of the proviso in para. 1(g)). It was agreed that the issue raised in paragraph 29 of document A/CN.9/WG.V/WP.158 (concerning para. 1(e)) should be discussed in the guide.

Article 16. Decision to recognize a foreign planning proceeding

80. It was agreed that there was no need to add to paragraph 1 the language suggested in paragraph 32 of document A/CN.9/WG.V/WP.158. Different views were expressed on the need for the phrase "Subject to article 2 ter," at the beginning of paragraph 1. It was noted that the MLCBI used a similar opening phrase in article 17 and for that reason it should be retained in the MLEGI. A different view was that a deviation from the MLCBI in that respect could be justified in the light of the drafting history of the MLCBI and the automatic consequences of recognition in that text. The Working Group agreed to delete the phrase and explain in the guide to enactment the overarching nature of public policy provisions contained in article 2 ter of the MLEGI.

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

81. A question was raised as to whether the language of paragraphs 1(d) and 1(e) should be consistent — referring to "commencement and continuation" of proceedings. There was no support for revising the existing drafting.

82. The Working Group agreed to replace the word "recognizing" with the word "approving" in paragraph 1(h) and in other provisions where that phrase was used (arts. 13 and 15); and to delete the word "entrusting" and add the words "may be entrusted" before the phrase "to an insolvency representative appointed", in paragraph 2.

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

83. Concern was expressed that, by addressing the proceedings involving participating members only, draft article 18 was narrower than other provisions of the draft model law (e.g. draft article 12). It was agreed that a provision addressing authorization by the court for participation by a group representative in proceedings relating to non-participating members would be added at the end of article 18.

Article 19. Protection of creditors and other interested persons

84. With reference to the drafting suggestions in paragraphs 38 to 40 of document A/CN.9/WG.V/WP.158, the Working Group agreed to add the phrase "of each participating enterprise group member" after the word "creditors" in paragraph 1.

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

85. With reference to the drafting suggestion in paragraph 42 of document A/CN.9/WG.V/WP.158, the Working Group agreed to revise the title of the article to read "Approval of a group insolvency solution".

86. Preference was expressed for variant 2 of both paragraphs 1 and 4. It was suggested that the phrase "in accordance with the law of this State" could be added at the end of variant 2 of paragraph 1. It was further suggested that the word "refer" in paragraph 2 could be replaced with the words "[approve or] direct that" with the consequential change of the words "for approval" in the same paragraph with the words "be approved". An alternative suggestion was to redraft paragraph 2 as follows: "The portion of the group solution affecting the enterprise group member referred to in paragraph 1 shall be approved by the court in accordance with the local law."

87. Views differed as regards suggestions to delete paragraph 3, to move article 23, paragraph 2, to article 20, and to merge paragraphs 4 and 4 bis.

88. Several drafting suggestions were made in an attempt to address different requirements found in various jurisdictions as regards the approval or confirmation of the group solution by a court. A general understanding was that some type of approval or confirmation would be needed under the local law for the group solution to have effect in the enacting State but those requirements would vary from

jurisdiction to jurisdiction and would not necessarily involve a court. It was therefore suggested that the MLEGI should leave it to enacting States to specify their approval or confirmation requirements in their enactments of the MLEGI.

89. A query was raised about the need for paragraph 4. Concern was expressed in particular as regards the words "if unnecessary" found in that paragraph which would be inappropriate to suggest for enacting by States.

90. After detailed discussion, the Working Group agreed to replace paragraphs 1 to 4 bis with the following sentence: "Where a group insolvency solution affects an enterprise group member participating in a planning proceeding that has its COMI or establishment in this State, the portion of the group solution affecting that enterprise group member shall have effect in this State if it has received all approvals and confirmations required in accordance with the laws of this State." It was suggested that reference to approvals and confirmation in that proposed wording should be placed in square brackets to enable enacting States to specify applicable local requirements. The understanding was that the issues raised by that provision would be discussed in the guide to enactment of the MLEGI.

91. In response to concerns about the wording of draft article 4 ter, the Working Group agreed to revise it along the lines of article 7 of the MLCBI.

Chapter 5. Treatment of foreign claims

Article 21. Undertaking on the treatment of foreign claims: non-main proceedings

92. As regards the chapeau provisions of paragraph 1, a suggestion to move the opening two phrases to the guide did not receive support.

93. As regards paragraph 1(a), different views were expressed on whether the words "should be given" in the second sentence of that paragraph should be changed to "can be given" and whether that sentence should be moved to the guide.

94. It was suggested that the words "accorded" and "accord" where appearing in article 21 be replaced with the word "granted" or "grant" as appropriate.

95. As regards the article as a whole, views differed on whether it should be limited to synthetic proceedings related to the same debtor. Preference was expressed for keeping the scope of the article broader. The view was expressed that an article on international obligations agreed to be included in the draft model law (see para. 58 above) would sufficiently accommodate an approach to synthetic procedures taken in one region. In response, it was argued that provisions on international obligations alone would not be sufficient and the article itself should be limited to proceedings related to the same debtor, while other situations should be covered in supplemental provisions. For that reason, it was proposed to add the phrase "of that enterprise group member" in the chapeau provisions of paragraph 1 and in paragraph 1(a), in both cases after the words "main proceeding". That proposal did not receive support.

96. After discussion, except for replacing the conjunction "and" with "or" in opening phrases of the chapeau, the prevailing view was to retain the draft article unchanged and include in the guide the following explanation: "Article 21 was conceived to apply to a single debtor. The wording of the article, however, does not exclude the possibility for the enacting State to permit claims that could be made in a non-main proceeding for one group member to be addressed in the main proceeding of another group member."

Article 21 bis. Powers of the court of this State with respect to an undertaking under article 21

97. The Working Group approved the substance of the draft article.

[Part B]

Supplemental provisions

Article 22. Undertaking on the treatment of foreign claims: main proceedings

98. The Working Group agreed to include the text in square brackets without square brackets. Views differed as regards other drafting suggestions in paragraphs 51 and 52 of document A/CN.9/WG.V/WP.158. The Working Group agreed not to incorporate them.

Article 22 bis. Powers of a court of this State with respect to an undertaking under article 22

99. With reference to the drafting suggestion in paragraph 53 document A/CN.9/WG.V/WP.158, the Working Group agreed to retain the text in square brackets in the chapeau without the brackets.

Article 23. Additional relief

100. With reference to the drafting suggestions in paragraph 54 of document A/CN.9/WG.V/WP.158, the Working Group agreed to delete the text in the first set of square brackets in paragraph 1 and retain the word "that" without the brackets. No support was expressed for a suggestion to delete the word "particularly".

101. The Working Group agreed to retain the text in both sets of square brackets in paragraph 2 without the brackets. No support was expressed for moving paragraph 2 to article 20.

102. No support was expressed for a suggestion to add a new paragraph after paragraph 2 that would read as follows: "The portion of the group insolvency solution approved by the court pursuant to paragraph 1 of this article shall be given the same effect as it would have had if it had been prepared pursuant to insolvency law of this State."

103. A suggestion to add a reference to implementation of the plan in draft article 20 did not receive support.

C. Decision of the Working Group

104. The Working Group requested the Secretariat to revise document A/CN.9/WG.V/WP.158 to reflect the deliberations at the session. The understanding was that at the next session the Working Group might have for its consideration a draft of the guide to enactment of the MLEGI.

VI. Insolvency of micro, small and medium-sized enterprises

A. General statements

105. Appreciation was expressed to the Secretariat for preparing document A/CN.9/WG.V/WP.159, which would serve an excellent basis for further work of the Working Group on the topic.

106. General support was expressed for the work by UNCITRAL on the topic as being both timely and important, considering that MSMEs were the backbone of economies of all countries, not only developing ones, and recognizing the role of MSMEs for achieving sustainable development goals (SDGs). Difficulties currently faced by some developing countries in building local capacity to deal with MSME's insolvency were mentioned.

107. Some delegates pointed out that, in the light of the debtors intended to be covered, the work on the topic might raise some issues that were not previously

considered by the Working Group in detail, such as out-of-court proceedings and other non-legislative measures to support MSMEs, such as counselling and advisory services.

108. National and regional experience with providing special treatment for insolvency of MSMEs and individual entrepreneurs was shared. The work of other international institutions on the same topic was also recalled. While acknowledging the importance of the work of those other institutions, the Working Group was of the view that the work by UNCITRAL would not duplicate but rather complement their work. In addition, it was noted, that in the light of its coordination mandate, UNCITRAL would be expected to coordinate the work of other international organizations on issues of MSMEs insolvency.

B. Form of the document

109. Different views were expressed on the form of document to be prepared, in particular whether it would be a supplement to the Legislative Guide on Insolvency Law or a stand-alone set of recommendations. The understanding was that the answer to that question would emerge as the work progressed. Support was expressed for preparing a toolbox of solutions to common problems faced by MSMEs in insolvency.

C. Consideration of core provisions relating to MSME insolvency

1. Scope of work

110. Views differed on whether the formulation of a definition of enterprises to be covered by an intended simplified regime would be needed. Difficulties with defining MSMEs were acknowledged in the light of varying and evolving concepts, thresholds and standards used in jurisdictions for such purpose. The alternative view was that the accounting standards or a global survey of national approaches to defining MSMEs might assist in formulating a generally acceptable definition of MSMEs.

111. Although various suggestions were made as to what should be the focus of the work i.e. micro enterprises, micro and small enterprises or micro, small and medium enterprises, differentiating between categories of MSMEs was thought to be too difficult; instead the focus should be on criteria that an enterprise would need to meet in order to be eligible for access to simplified insolvency procedures (e.g. a simple debt structure).

112. The general understanding was that the policy decision as to the persons that would be able to benefit from a simplified regime as envisaged would need to be left to each State.

2. Policy objectives

113. The following objectives of the work by the Working Group on the topic were mentioned: (a) formulating provisions for speedy, simple and low cost procedures; (b) emphasizing in that context the importance of out-of-court and hybrid procedures, conciliation and enforcement of concluded settlement agreements; (c) facilitating and incentivizing early access to insolvency proceedings; (d) achieving the right balance between the competing needs and interests of creditors and MSME debtors; (e) ensuring equity and fairness; and (f) building safeguards against abuse of a simplified insolvency regime.

D. Comments on document A/CN.9/WG.V/WP.159

1. Liquidation

Access by MSME debtors

114. The following points were made about access by MSME debtors:

(a) As to the relevance of good faith to commencement of liquidation proceedings, it should not be a condition of access to a proceeding, but was relevant to the progress of the proceeding and, in particular, to the availability of discharge and the conditions upon which it might be provided. Otherwise, administrative efficiency would not be achieved. There should be no presumption of bad faith based only upon the fact of financial difficulty or bad record keeping;

(b) On the test that might be available for commencement of a liquidation, cessation of payments was regarded as being easier to prove for small debtors. At the same time, balance sheet records were considered important for distribution of assets or, in no-asset cases, for discharge;

(c) With respect to the costs of liquidation, mechanisms should be found to ensure that debtors that did not have sufficient assets to fund a liquidation could nevertheless enter a proceeding or process to address their financial difficulties and obtain a discharge; the level of assets available might be relevant to determining the type of process available, and States might give consideration to the use of other sources of funding, such as public monies;

(d) A debtor seeking to access liquidation should be required, as a minimum, to provide a statement of what assets they owned, without having to provide details such as the value of those assets, as well as information relating to any transfers they might have made to related persons such as relatives. Such a requirement would assist in determining the appropriate process for the debtor and be relevant to considerations of good faith;

(e) Notification of creditors and the existence of a debtor's restructuring plan might also be considered as relevant factors in determining good faith;

(f) Ways of providing relevant information to MSME debtors to create incentives for early access to insolvency proceedings and to avoid any delay in commencement of proceedings (in particular through electronic communications and standard documentation) might be considered; at the same time it was recognized that those issues could be outside the scope of the insolvency law;

(g) Parallel proceedings for personal bankruptcy and linked insolvency of MSMEs should be discussed, as well as the possibility of nominating a joint liquidator or insolvency representative.

Assets constituting the insolvency estate

115. Although provisions for exemption of assets would be needed, safeguards against abuse would have to be also considered, in particular by specifying assets subject to exemption in legislation.

No-asset cases

116. Concerns were expressed that the advantages of mechanisms described in paragraphs 23 to 25 for no-asset MSMEs may be abused and therefore safeguards, for example verification procedures, should be put in place.

2. Reorganization

117. With respect to reorganization, a number of points were made, including the following:

(a) The issue of viability, as reflected in paragraph 32, was an important one and viability needed to be assessed, although it may be difficult in practice to do so. Any test adopted should not be costly or detrimental to the assets of the debtor. One means suggested might be to focus on various ratios e.g. debt to capital;

(b) Simplified procedures needed to ensure an appropriate balance was achieved between the rights of the debtor and creditors. Unlike the general approach of the Legislative Guide, for MSMEs there should not be a focus on reorganization, and to the extent that it was discussed it should avoid reference to complex issues such as different categories of creditors. Consideration might be given to exploring reorganization of only some categories of debt. In addition, the question of hold outs where there was, for example, a single creditor in a position of influence (such as creditor secured by the residential property of the debtor) and the problems arising from intermingling of business and personal assets needed to be considered;

(c) As in the case of liquidation, incentives to encourage early access to reorganization processes should be considered, particularly with respect to equity holders and debtors providing personal guarantees for MSME debt; and

(d) Creditor passivity was not a problem peculiar to MSME insolvency, so that simplification might be justified not by reference to that issue, but rather to the number of creditors.

3. Discharge

118. As regards that section, the following suggestions were made: (a) to place that section after the section on liquidation; (b) to stipulate a short discharge period, which would be important for a fresh start as explained in paragraph 68; (c) not to condition the discharge on the availability of funds, which would however be an important factor in determining the length of the discharge period and categories of debts that could be discharged; (d) to note that in some jurisdictions provisions on discharge could be found not in insolvency but in consumer protection law; and (e) to prefer the second option for disqualification described in paragraph 75.

4. Related persons and third party guarantors

119. The importance of elaborating on the notions of related persons and third party guarantees referred to in paragraph 79 was emphasized. A suggestion was made to redraft paragraphs 80 and 81 to balance interests of debtors and creditors considering that if the enforcement was stayed, the interests of creditors might be jeopardized.

E. Decision of the Working Group

120. The Working Group requested the Secretariat to revise document A/CN.9/WG.V/WP.159 to reflect the deliberations at the session.

VII. Proposal by the Government of the United States of America for the development of model legislative provisions on civil asset tracing and recovery

121. The Working Group heard further information with respect to the proposal that had been submitted to the Working Group at the previous session (A/CN.9/931, para. 95). The intention, it was emphasized, was not to embark upon any consideration of criminal law or cross-border issues. It was pointed out that close coordination with international organizations that might be affected by any work on the topic that might be taken up by UNCITRAL, including the Hague Conference on Private International Law and the United Nations Office on Drugs and Crime (UNODC), was to be ensured. It was further explained that, while the proposal raised issues not necessarily

limited to insolvency law, a toolbox of options might be developed that could be of particular utility in the context of insolvency.

122. There was support in the Working Group for suggesting to the Commission that it might wish to consider that topic for possible future work. The understanding was that, if the Commission were to find the proposal interesting, it might wish to request the Secretariat to research the topic and prepare a study for future consideration.

Annex

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

Preamble

1. The purpose of this Law is:

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

(b) To avoid the duplication of insolvency 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 insolvency estates; and

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

2. This Law is not intended:

(a) To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment;

(b) To replace legislation enacting the UNCITRAL 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 proceeding.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which 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 or other competent authority 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. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related judgment":

(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) 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, 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 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.

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 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 judgment

An insolvency-related 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.

Article 9 bis. Effect of review in the originating State on recognition and enforcement

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

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition or enforcement of the judgment.

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

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

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

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

(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. Any party against whom recognition and enforcement is sought has the right to be heard.

Article 11. Provisional relief

1. From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related 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 judgment has been issued; or

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

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, 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 judgment is made.

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

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

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

(b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative 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 a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

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

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related 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 involving the same parties on the same subject matter, provided 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, including by conflicting with a stay or other order that could be recognized or enforced in this State;

(f) The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

(ii) 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 objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to 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 incompatible with the law of this State;

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

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

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

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

Article 14. Equivalent effect

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

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

Article 15. Severability

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is sought, or where only that 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 that may have cast doubt on whether judgments can be recognized and enforced under article 21 of that 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 UNCITRAL 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 UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

* The enacting State may wish to note that it should choose between the two alternatives provided in square brackets. An explanation of this provision is provided in the Guide to Enactment in the notes to article 14.