UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment

UNITED NATIONS

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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UNCITRAL 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 is 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 10. 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 11. 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 12. 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 11, 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 13. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 14, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9 with respect to effect 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 11, paragraph 1;

(c) The application meets the requirements of article 11, 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 14. 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 in this State of the institution of that proceeding in a manner that is incompatible with the rules 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 that party 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 15. 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].[1]

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 16. 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.

[1] 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 15.

Part two

Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

I. Purpose and origin of the Model Law

A. Purpose of the Model Law

1. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, adopted in 2018, is designed to assist States to equip their laws with a framework of provisions for recognizing and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings and complement the UNCITRAL Model Law on Cross-Border Insolvency (the MLCBI).

B. Origin of the Model Law

2. The work on this topic had its origin, in part, in certain judicial decisions[1] that led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under the MLCBI, to recognize and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceedings, on the basis that neither article 7 nor 21 of the MLCBI explicitly provided the necessary authority. Moreover, there was a concern that decisions by foreign courts determining the lack of such explicit authority in the MLCBI for recognition and enforcement of insolvency-related judgments might

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

have been regarded as persuasive authority in those States with legislation based upon article 8, MLCBI, which relates to international effect.

3. Those concerns about the application and interpretation of the MLCBI together with the general absence of an applicable international convention or other regime to address the recognition and enforcement of insolvency-related judgments[2] and the exclusion of judgments relating to insolvency matters from the instruments that do exist,[3] led to the proposal to UNCITRAL in 2014 to develop a model law or model legislative provisions on the recognition and enforcement of insolvency-related judgments.

4. The law of recognition and enforcement of judgments is arguably becoming more and more important in a world in which movement across borders, of both persons and assets, is increasingly easy. Although there is a general tendency towards more liberal recognition of foreign judgments, it is reflected in treaties requiring such recognition in specific subject areas (e.g., conventions relating to family matters, transportation and nuclear accidents) and in a narrower interpretation of the exceptions to recognition in treaties and domestic laws. Under applicable national regimes, some States will only enforce foreign judgments pursuant to a treaty regime, while others will enforce foreign judgments more or less to the same extent as local judgments. Between those two positions there are many different national approaches.

5. With respect to an international regime dealing more generally with recognition and enforcement of judgments, in 1992, the Hague Conference on Private International Law (the Hague Conference) commenced work on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of judgments abroad (the Judgments Project). The focus of that work was to replace the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. It led to the Convention of 30 June 2005 on Choice of Court Agreements (2005 Choice of Court Convention), which entered into force on 1 October 2015. Further work to develop a global judgments convention commenced in 2015.[4]

6. Insolvency decisions are typically excluded from the Hague Conference instruments, on the grounds, for example, that those matters may be seen as very

[2] Existing regimes are largely regional in focus, e.g., Latin America, the European Union and the Middle East. See UNCITRAL document A/CN.9/WG.V/WP.126, para. 6.

[3] The 1971 Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters and the Convention of 30 June 2005 on Choice of Court Agreements, both of which were developed by the Hague Conference on Private International Law.

[4] Information on the work of the Hague Conference can be found at: https://www.hcch.net.

specialized and best dealt with by specific international arrangements, or as closely intertwined with issues of public law. Article 1, subparagraph 5, of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, for example, provides that the convention does not apply to "questions of bankruptcy, compositions or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor." Article 2, subparagraph 2 *(e)*, of the 2005 Choice of Court Convention provides that it does not apply to "insolvency, composition and analogous matters". That approach is followed in the work to develop a global judgments convention, with the additional exclusion of "resolution of financial institutions".[5]

7. In the context of the Hague Conference texts,[6] the term "insolvency" is intended to cover both the bankruptcy of individual persons and the winding up or liquidation of corporate entities which are insolvent. It does not cover the winding up or liquidation of corporations for reasons other than insolvency, which is addressed in other provisions. It does not matter whether the process is initiated or carried out by creditors or by the insolvent person or entity itself with or without the involvement of a court. The term "composition" refers to procedures in which the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term "analogous proceedings" covers a broad range of other methods in which insolvent persons or entities can be assisted to regain solvency while continuing to trade.[7]

8. Very few States have recognition and enforcement regimes that specifically address insolvency-related judgments. Even in States that do have such regimes, they may not cover all orders that might broadly be considered to relate to insolvency proceedings.[8] In one State, for example, judgments against a creditor or third party determining rights to property claimed by the insolvency estate, awarding damages against a third party, or avoiding a transfer of property can be considered insolvency-related judgments as they are the result of an adversarial process and have required service of the documents originating the action. In that same State, orders confirming a plan of reorganization, granting a bankruptcy discharge or allowing or rejecting a claim against the insolvency estate are not considered insolvency-related judgments, even if those orders may have some of the attributes of a judgment.

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[5] See art. 2, subpara. 1*(e)* of the draft convention of May 2018. This additional exclusion refers to the new legal framework enacted in various jurisdictions under the auspices of the Financial Stability Board to prevent the failure of financial institutions.

[6] Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report by Trevor Hartley and Masato Dogauchi, para. 56.

[7] For example, chapter 11 of the United States Federal Bankruptcy Code and Part II of the United Kingdom Insolvency Act 1986.

[8] See UNCITRAL document A/CN.9/WG.V/WP.126, para. 16.

9. One regional regime provides for the recognition and enforcement of judgments that "derive directly from and are closely linked to the insolvency proceedings". Judgments held to fall into that category have included those concerning:[9] avoidance actions, insolvency law-related lawsuits on the personal liability of directors and officers; lawsuits concerning the priority of a claim; disputes between an insolvency representative and debtor on inclusion of an asset in the insolvency estate; approval of a reorganization plan; discharge of residual debt; actions on the insolvency representative's liability for damages, if exclusively based on the carrying out of the insolvency proceedings; action by a creditor aiming at the nullification of an insolvency representative's decision to recognize another creditor's claim; and claims by an insolvency representative based on specific insolvency law privilege. Judgments held not to fall into that category have included:[10] actions by and against an insolvency representative which would also have been possible without the insolvency proceedings; criminal proceedings in connection with insolvency; an action to recover property in the possession of the debtor; an action to determine the legal validity or amount of a claim pursuant to general laws; claims by creditors with a right for segregation of assets; claims by creditors with a right for separate satisfaction (secured creditors); and an avoidance action filed not by an insolvency representative but by a legal successor or assignee.

10. Examples of judgments to be covered by the Model Law are discussed further below in the notes on article 2 (para. 60).

C. Preparatory work and adoption

11. In 2014, the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments.[11] The Model Law was negotiated between December 2014 and May 2018, the Working Group having devoted a part of each of the eight sessions (forty-sixth to fifty-third) to work on the project.

12. The final negotiations on the draft text took place during the fifty-first session of UNCITRAL, held in Vienna from 25 June to 13 July 2018. UNCITRAL adopted the Model Law by consensus on 2 July 2018 (see annex II).[12] In addition to the 60 States members of UNCITRAL, representatives of 31 observer States and 34 inter-governmental and non-governmental organizations participated in the

[9] These judgments relate to decisions under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings. See UNCITRAL document A/CN.9/WG.V/WP.126, para. 21 for case citations.

[10] Ibid., para. 22.

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

[12] Ibid., *Seventy-third session, Supplement No. 17* (A/73/17), para. 131.

deliberations of the Commission and the Working Group. Subsequently, the General Assembly adopted resolution 73/200 of 20 December 2018 (see annex I), in which it expressed its appreciation for UNCITRAL finalizing and adopting the Model Law.

II. Purpose of the Guide to Enactment

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

14. The present Guide was considered by Working Group V at its fifty-second (December 2017) and fifty-third (May 2018) sessions. It is based on the Working Group's deliberations and decisions on the Model Law at those sessions and of the Commission in finalizing and adopting the Model Law at its fifty-first session.

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

15. A model law is a legislative text recommended to States for incorporation into their national law. Unlike an international convention, a model law does not require the State enacting it to notify the United Nations or other States that may have also enacted it. However, the General Assembly resolution endorsing the Model Law invites States that have used the Model Law to advise the Commission accordingly (see annex I).

A. Fitting the Model Law into existing national law

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

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

18. The flexibility that enables the Model Law to be adapted to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see notes on article 8 below) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency-related matters. Modification means that the degree of, and certainty about, harmonization achieved through a model law may be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, States may wish to make as few changes as possible when incorporating the Model Law into their legal systems. That approach will not only assist in making national law as transparent and predictable as possible for foreign users. It will also

contribute to fostering cooperation between insolvency proceedings, as the laws of different States will be the same or very similar; reducing the costs of proceedings because of greater efficiency in the recognition of judgments; and improving consistency and fairness of treatment of insolvency judgments in the cross-border context.

19. While the Model Law indicates specific grounds upon which a judgment may be refused recognition and enforcement, it also preserves the possibility of excluding or limiting any action that may be taken under the Model Law on the basis of overriding public policy considerations (article 7), although it is expected that the public policy exception would be rarely used.

B. Use of terminology

20. Rather than using terminology familiar to only some jurisdictions and legal traditions and thus to avoid confusion, the Model Law follows the approach of other UNCITRAL texts of developing new terms with defined meanings. Accordingly, the Model Law introduces the term "insolvency-related judgment" and relies upon other terms, such as "insolvency representative" and "insolvency proceeding" that were developed in other UNCITRAL insolvency texts. Where the expression used is likely to vary from country to country, the Model Law, instead of using a particular term, indicates the meaning of the term in italics within square brackets and calls upon the drafters of the national law to use the appropriate term.

21. The use of the term "insolvency-related judgment" is intended to avoid confusion as to the application to the Model Law of jurisprudence that may relate to particular terms or phrases used in specific States or regions. The phrase "arises as a consequence of or is materially associated with" is used to describe the connection between the judgment and an insolvency proceeding, rather than the phrase referred to in paragraph 9 above, which is key terminology in a particular regional law and has been given a specific interpretation by relevant courts.

"Insolvency"

22. Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, "insolvency proceeding" refers to various types of collective proceedings commenced with respect to a debtor that is in severe financial distress or insolvent, with the goal of liquidating or reorganizing that debtor as a commercial entity. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2, subparagraph *(a)* are not

insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph *(a)* of the Model Law only if the debtor is insolvent or in severe financial distress. The use of the term "insolvency" in the Model Law is consistent with its use in other UNCITRAL insolvency texts, specifically the MLCBI and the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide).[13]

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

"State"/"originating State"

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

"Recognition and enforcement"[14]

25. The Model Law generally refers to "recognition and enforcement" of an insolvency-related judgment as a single concept, although there are some articles where a distinction is made between recognition on the one hand and enforcement on the other. Use of the phrase "recognition and enforcement" should not be regarded as requiring enforcement of all recognized judgments where it is not required.

26. Under some national laws, recognition and enforcement are two separate processes and may be covered by different laws. In some federal jurisdictions, for example, recognition may be subject to national law, while enforcement is subject to the law of

[13] MLCBI, Guide to Enactment and Interpretation, paras. 48–49; Legislative Guide, Introd., glossary, para. 12*(s)*: "'Insolvency': when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets."

[14] See paras. 78-79 below for further explanation of the meaning of the term "recognition and enforcement".

a territorial or sub-federal unit. Recognition may have the effect of making the foreign judgment a local judgment that can then be enforced under local law. Thus while enforcement may presuppose recognition of a foreign judgment, it goes beyond recognition. Confusion may be caused in some States as to whether both can be achieved through a single application or whether two separate applications are required. The Model Law does not specifically address that procedural requirement, but provisions that might be of specific relevance to the issue of enforcement should be noted, for example, article 10 which refers to conditional recognition or enforcement.

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

"Competent court or authority"

28. As indicated in article 2, subparagraph *(c)*, the Model Law envisages that a judgment can be issued by a court or an administrative authority in the originating State, provided that a decision issued by an administrative authority has the same effect as a court decision. This usage is consistent with the first part of the definition of "court" in the MLCBI (art. 2, subpara. *(e)* referring to "a judicial or other authority"),[15] and the Legislative Guide (glossary, para. 8).

29. Moreover, article 4 contemplates that the body competent to perform the functions of the Model Law with respect to recognition and enforcement in the receiving State may be either a court or administrative authority, as designated by that State. For ease of reference, the Model Law uses the word "court" to refer to that authority. In the event that the body designated under article 4 is an administrative authority, the enacting State may wish to consider replacing the word "court", where it refers to the receiving State, with the word "authority".

[15] It might be noted that the use of the term "court" in the Model Law is not limited by the second part of the definition in the MLCBI i.e., the words "competent to control or supervise a foreign proceeding", for the reasons given in para. 52 below.

Documents referred to in this Guide

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

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

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

(d) "Legislative Guide": UNCITRAL Legislative Guide on Insolvency Law (2004), including part three: treatment of enterprise groups in insolvency (2010) and part four: obligations of directors in the period approaching insolvency (2013);

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

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

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

IV. Main features of the Model Law

A. Scope of application

31. The Model Law applies to an insolvency-related judgment that was issued in a proceeding taking place in a State other than the enacting State in which recognition and enforcement is sought. That scope would include the situation where both the proceeding giving rise to the judgment and the insolvency proceeding to which it relates are taking place in another State. It would also include the situation in which the judgment was issued in another State, but the insolvency proceeding to which the judgment relates is taking place in the enacting State in which recognition and enforcement is sought. In other words, while the judgment must be issued in a State other than the enacting State, the location of the insolvency proceeding to which the judgment relates is not material, and it can be either a foreign proceeding or a local proceeding taking place in the enacting State.

B. Types of judgment covered

32. To fall within the scope of the Model Law, a foreign judgment needs to possess certain attributes. These are, firstly, that it arises as a consequence of or is materially associated with an insolvency proceeding (as defined in art. 2, subpara. *(a)*) and, second, that it was issued on or after the commencement of that insolvency proceeding (art. 2, subpara. *(d)*). The definition does not include the judgment commencing an insolvency proceeding, as noted in the preamble, subparagraph 2*(d)* (see para. 45 below) and in article 2, subparagraph *(d)*(ii) (see para. 62 below). An interim measure of protection is not to be considered a judgment for the purposes of the Model Law (see paras. 54-55 below).

33. The cause of action giving rise to an "insolvency-related judgment" may have been pursued by various parties, including a creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action or, if the cause of action was assigned by the insolvency representative in accordance with the applicable law, by the party to whom it was assigned. In both instances, the judgment must be otherwise enforceable under the Model Law.

34. For the information of enacting States, a number of examples of the types of judgment that might fall within the definition of "insolvency-related judgment" are provided below; the list is not intended to be exhaustive (see para. 60 below).

C. Relationship between the Model Law and the MLCBI

35. The subject matter of the Model Law is related to that of the MLCBI. Both texts use similar terminology and definitions (e.g., the definition of "insolvency proceeding" draws upon the definition of "foreign proceeding" in the MLCBI); a number of the general articles of the MLCBI are repeated in the Model Law;[16] and the Preamble[17] refers specifically to the relationship between the Model Law and the MLCBI. The Preamble, as noted below (para. 45), clarifies that the Model Law is not intended to replace legislation enacting the MLCBI. States that have enacted or are considering enacting the MLCBI may wish to note the following guidance on the complementary nature of the two texts.

36. The MLCBI applies to the recognition of specified foreign insolvency proceedings (that is, those that are a type of proceeding covered by the definition of "foreign proceeding" and can be considered to be either a foreign main or a foreign non-main proceeding under article 2). Other types of insolvency proceeding, such as those commenced on the basis of presence of assets or those that are not a collective proceeding (as explained in paras. 69–72 of the Guide to Enactment and Interpretation) do not fall within the types of proceeding eligible for recognition under the MLCBI.

37. The Model Law, in comparison, has a narrower scope, addressing the recognition and enforcement of insolvency-related judgments, that is, judgments that bear the necessary relationship (as defined in art. 2, subpara. *(d)*), to an insolvency proceeding (as defined in art. 2, subpara. *(a)*). If the insolvency proceeding to which the specific judgment relates does not satisfy that definition, the judgment would not be an insolvency-related judgment capable of recognition and enforcement under the Model Law. The decision commencing the insolvency proceeding, which is the subject of the MLCBI's recognition regime, is specifically excluded from the definition of "insolvency-related judgment" for the purposes of the Model Law.[18] However, it should be noted that, in view of the severability provision in article 16, there

[16] MLCBI, arts. 3 (para. 1) to 8.

[17] Preamble, subpara. 2*(b)*), as well as article 14, subparagraph *(h)* and article X (discussed below, see paras. 126-127).

[18] Preamble, subpara. 2*(d)* and art. 2, para. *(d)*(ii) (see paras. 45 and 62 below).

may be other orders included in a judgment commencing an insolvency proceeding that could be subject to recognition and enforcement under the Model Law (see para. 58 below).

38. Like the MLCBI, the Model Law establishes a framework for seeking cross-border recognition, but in this case of an insolvency-related judgment. That framework seeks to establish a clear, simple procedure that avoids unnecessary complexity, such as requirements for legalization.[19] Like the analogous article in the MLCBI (art. 19), the Model Law also permits orders for provisional relief to preserve the possibility of recognizing and enforcing an insolvency-related judgment between the time recognition and enforcement are sought and the time the court issues its decision. Like the MLCBI, the Model Law also seeks to establish certainty with respect to the outcome of the recognition and enforcement procedure, so that if the relevant documents are provided, the judgment satisfies the definitional requirements and those for effectiveness and enforceability in the originating State, the person seeking recognition and enforcement is the appropriate person and there are insufficient or no grounds for refusing recognition and enforcement, the judgment should be recognized and enforced.

39. As discussed in more detail in the article-by-article remarks below, the Model Law includes an optional provision that permits recognition of an insolvency-related judgment to be refused when the judgment originates from a State whose insolvency proceeding (being an insolvency proceeding that met the definition of that term as used in the Model Law) is not or would not be susceptible of recognition under the MLCBI. Under the terms of the MLCBI, the insolvency proceeding may not be recognizable because that State is neither the location of the insolvency debtor's centre of main interests (COMI) nor of an establishment of the debtor (i.e., it is neither a main nor a non-main proceeding). That principle of non-recognition of insolvency proceedings under the MLCBI is acknowledged in article 14, subparagraph *(h)* of the Model Law, which is an optional provision for consideration by States that have enacted (or are considering enacting) the MLCBI. The substance of subparagraph *(h)* also provides an exception to that general principle. The exception permits recognition of a judgment, notwithstanding its origin in a State whose insolvency proceeding is not or would not be recognizable under the MLCBI, provided: (i) the judgment relates only to assets that were located in the originating State; and (ii) certain conditions are met. The exception could facilitate the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. Such an exception with respect to the recognition of insolvency proceedings is not available under the MLCBI (discussed further below, paras. 117-120).

[19] See the discussion on legalization in paras. 88-91 below.

40. A requirement for protection of the interests of creditors and other interested persons, including the debtor, is included in both the Model Law and the MLCBI, but in different situations. The MLCBI requires the recognizing court to ensure that those interests are considered when granting, modifying or terminating provisional or discretionary relief under the MLCBI (art. 22). As the Guide to Enactment and Interpretation explains, the idea underlying that requirement is that there should be a balance between relief that might be granted to the foreign representative and the interests of the persons that may be affected by that relief.[20] The Model Law is more narrowly focused; the issue of such protection is relevant only in so far as article 14, subparagraph *(f)* gives rise to a ground for refusing recognition and enforcement where those interests were not adequately protected in the proceeding giving rise to certain types of judgment. Those include, for example, a judgment confirming a plan of reorganization. As discussed further below (see paras. 108–109), the rationale is that the types of judgment specified in article 14, subparagraph *(f)* directly affect the rights of creditors and other stakeholders collectively. Although other types of insolvency-related judgment resolving bilateral disputes between parties may also affect creditors and other stakeholders, those effects are typically indirect (e.g., via the judgment's effect on the size of the insolvency estate). In those circumstances, a separate analysis of the adequate protection of third-party interests is not considered to be necessary and could lead to unnecessary litigation and delay.

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

[20] See Guide to Enactment and Interpretation, paras. 196–199.

V. Article-by-article remarks

Title

"Model Law"

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

Discussion in UNCITRAL and the Working Group

A/CN.9/WG.V/WP.151, paras. 35–36
A/CN.9/WG.V/WP.157, paras. 40–41
A/CN.9/956

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.

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

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

45. Paragraph 2 of the Preamble is intended to clarify certain issues concerning the relationship of the Model Law to other national legislation dealing with the recognition of insolvency proceedings that might also address the recognition of insolvency-related judgments, including, for example, the MLCBI where it has been enacted (see also art. 14, subpara. *(h)* and article X). Subparagraph 1*(f)* of the Preamble emphasizes that the Model Law is intended to complement the MLCBI, while subparagraph 2*(a)* builds upon that complementarity, confirming that nothing in the Model Law is intended to restrict the application of those other laws and subparagraph 2*(b)* clarifies that the Model Law is not intended to replace legislation enacting the MLCBI or to limit the application of that legislation. Subparagraph 2*(c)* relates to article 1 of the Model Law and clarifies that the text does not cover recognition and enforcement of an insolvency-related judgment issued in the enacting State. Subparagraph 2*(d)* of the Preamble confirms that the Model Law is not intended to apply to a judgment commencing an insolvency proceeding.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 48

A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 58, 76
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 37–39
A/CN.9/931, paras. 14–15
A/CN.9/WG.V/WP.157, paras. 42–44
A/CN.9/937, paras. 15–16
A/CN.9/955, para. 10
A/CN.9/956 and A/CN.9/956/Add.2

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 is sought.

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

Paragraph 1

46. Article 1, paragraph 1, confirms that the Model Law is intended to address the recognition and enforcement in one State (i.e., the State enacting the Model Law) of an insolvency-related judgment issued in a different State i.e., in a cross-border context. While the judgment to which the Model Law applies must be issued in a State other than the State in which recognition and enforcement is sought, it should be noted that the insolvency proceeding to which that judgment is related could be taking place in the State in which recognition and enforcement are sought; there is no requirement that that proceeding be taking place in another State. The judgment could also be related to a number of insolvency proceedings concerning the same debtor that are taking place in more than one State concurrently.

Paragraph 2

47. Article 1, paragraph 2, indicates that the enacting State might decide to exclude certain types of judgment, such as those raising public policy considerations or where other specifically designated legal regimes are applicable. Those might include, for example, judgments concerning foreign revenue claims, extradition for insolvency-related matters, family law matters or judgments relating to entities excluded from the Model Law, such as banks and insurance companies. With a view to making

the national law based on this Model Law more transparent for the benefit of foreign users, exclusions from the scope of the law might usefully be mentioned in paragraph 2.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 49–53
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 55–60
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 32
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [1]
A/CN.9/898, para. 11
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 16, 59–63
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 40–41
A/CN.9/931, para. 16
A/CN.9/WG.V/WP.157, paras. 45–46
A/CN.9/937, para. 17
A/CN.9/955, para. 11
A/CN.9/956 and A/CN.9/956/Add.2

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.

Subparagraph *(a)* "Insolvency proceeding"

48. This definition draws upon the definition of "foreign proceeding" in the MLCBI.[21] A judgment will fall within the scope of the Model Law if it is related to an insolvency proceeding that meets the definition in article 2, subparagraph *(a)*. The attributes required for that proceeding to fall within the definition include the following: judicial or administrative proceeding of a collective nature; basis in insolvency-related law of the originating State; opportunity for involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. For a proceeding to be considered an "insolvency proceeding" it must possess all of these elements. The definition refers to assets that "are or were subject to control" to address situations such as where the insolvency proceeding has closed at the time recognition of the insolvency-related judgment is sought or where all assets were transferred at the start of a proceeding pursuant to a pre-packaged reorganization plan and while the assets are no longer subject to control, the proceeding remains open (see also notes with respect to the definition of "insolvency-related judgment" below).

[21] MLCBI, art. 2*(a)*: *(a)* "'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

49. A detailed explanation of the elements required for a proceeding to be considered an "insolvency proceeding" is provided in the Guide to Enactment and Interpretation.[22]

Subparagraph *(b)* "Insolvency representative"

50. This definition draws upon the definition of "foreign representative" in MLCBI[23] and "insolvency representative" in the Legislative Guide.[24] As noted in the Legislative Guide,[25] insolvency laws refer to the person responsible for administering insolvency proceedings by a number of different titles, including "administrators", "trustees", "liquidators", "supervisors", "receivers", "curators", "official" or "judicial managers" or "commissioners". The term "insolvency representative" is used in the Model Law to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing between those different functions in different types of proceeding. The insolvency representative may be an individual or, in some jurisdictions, a corporation or other separate legal entity. Article 2, subparagraph *(b)* recognizes that the insolvency representative may be a person authorized in insolvency proceedings to administer those proceedings and, in the case of proceedings taking place in a State other than the enacting State, the "insolvency representative" may also include a person authorized specifically for the purposes of representing those proceedings.

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

[22] Guide to Enactment and Interpretation, paras. 69–80.

[23] MLCBI, art. 2*(d)*: "'Foreign representative' means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

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

[25] Ibid., part two, chap. III, para. 35.

non-interim basis. The definition in subparagraph *(b)* is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph *(c)* "Judgment"

52. The Model Law adopts a broad definition of what constitutes a judgment, explaining what the term might include in the second sentence of article 2, subparagraph *(c)*. The focus is upon judgments issued by a court, which might generally be described as an authority exercising judicial functions or by an administrative authority, provided a decision of the latter has the same effect as a court decision. Administrative authorities are included in the Model Law, as they are in the MLCBI, on the basis that some insolvency regimes are administered by specialized authorities and decisions issued by those authorities in the course of insolvency proceedings merit recognition on the same basis as judicial decisions. The Model Law does not require an insolvency-related judgment to have been issued by a specialized court with insolvency jurisdiction, since not all States have such specialized courts and there are many instances in which a judgment covered by the Model Law could be issued by a court that did not have such competence. This is also supported by the focus upon "insolvency-related" judgments. For those reasons, the use of the word "court" is intentionally broader than the use of that word in both the MLCBI and the Legislative Guide.[26]

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

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

55. Interim measures may serve two principal purposes: to maintain the status quo pending determination of the issues at trial and to provide a preliminary means of securing assets out of which an ultimate judgment may be satisfied. In addition,

[26] Ibid., Introd., para. 8: For purposes of simplicity, the Legislative Guide uses the word "court" in the same way as art. 2, subpara. *(e)*, of MLCBI to refer to "a judicial or other authority competent to control or supervise" insolvency proceedings. An authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term "court" as that term is used in the Guide. MLCBI, art. 2 subpara. *(e)*, provides: "*(e)* 'Foreign court' means a judicial or other authority competent to control or supervise a foreign proceeding."

they may share certain characteristics; for example, they are temporary in nature, they may be sought on an urgent basis, or they may be issued on an ex parte basis. However, if an order for such measures is confirmed after the respondent has been served with the order and had the opportunity to appear and seek the discharge of the order, it may cease to be regarded as a provisional or interim measure.

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

Subparagraph *(d)* "Insolvency-related judgment"

57. The types of judgment to be covered by the Model Law are those that can be considered to arise as a consequence of or that are materially associated with an insolvency proceeding (as defined in art. 2, subpara. *(a)*) and that are issued by a court or relevant administrative authority on or after the commencement of that insolvency proceeding. An insolvency-related judgment would include any equitable relief, including the establishment of a constructive trust, provided in that judgment or required for its enforcement, but would not include any element of a judgment imposing a criminal penalty (although article 16 may enable the criminal penalty to be severed from other elements of the judgment).

58. The decision commencing an insolvency proceeding is specifically the subject of recognition under the MLCBI and is not covered by the Model Law, as confirmed by subparagraph *(d)*(ii) of the definition. It might be noted that should recognition of the commencement decision be required, it is most likely to be in circumstances where the relief available under the MLCBI is also required. The Model Law does, however, cover judgments issued at the time of commencement of insolvency proceedings, such as appointment of an insolvency representative, judgments or orders addressing payment of employee claims and continuation of employee entitlements, retention and payment of professionals, acceptance or rejection of executory contracts, and use of cash collateral and post-commencement finance. They would be considered insolvency-related judgments on the basis that they arise as a consequence of the commencement of the insolvency proceedings and are judgments that fall within the definition of that term.

59. The words at the end of the definition of "insolvency-related judgment" in article 2, subparagraph *(d)*(i) a, "whether or not that insolvency proceeding has closed", clarify that an insolvency-related judgment issued after the proceeding to which it relates has closed, can still be considered an insolvency-related judgment for the purposes of the Model Law. In some jurisdictions, for example, actions for

avoidance may be pursued after a reorganization plan has been approved and confirmed by the court, where that confirmation is considered to be the conclusion of the proceedings. Insolvency laws take different approaches to conclusion of insolvency proceedings, as discussed in the Legislative Guide, part two, chapter VI, paragraphs 16–19.

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

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

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

(c) A judgment determining that a representative or director of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate under the law relating to insolvency, in line with part four of the Legislative Guide;

(d) A judgment determining whether the debtor owes or is owed a sum or any other performance not covered by subparagraph *(a)* or *(b)*. Enacting States 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. Enacting States may also wish to have regard to the treatment of such judgments under other international instruments;

(e) A judgment (i) confirming or varying a plan of reorganization or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement. The types of agreement referred to in subparagraph (iii) are typically not regulated by the insolvency law and may be reached through informal negotiation to address a consensual modification of the claims of all participating creditors. In the Model Law, the reference is to such agreements that

are ultimately referred to the court for approval in formal proceedings, such as an expedited proceeding of the type addressed in the Legislative Guide;[27] and

(f) A judgment for the examination of a director of the debtor, where that director is located in a third jurisdiction.

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

62. Subparagraph *(d)*(ii), as noted above, confirms that the definition does not include the decision commencing an insolvency proceeding on the basis that it is the subject of a recognition regime under the MLCBI. However, other decisions made at the time of commencement of an insolvency proceeding, as noted above, such as the decision appointing the insolvency representative, are not excluded from the Model Law. Recognition of that appointment, for example, is often a critical factor in demonstrating that the insolvency representative has standing to apply for recognition and enforcement of the judgment (art. 11) or for relief associated with such recognition and enforcement (art. 12).

Discussion in UNCITRAL and the Working Group

A/73/17, paras. 116 and 125–126
A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 54–60
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 61–70
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 3–5
A/CN.9/870, paras. 53–60
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [2]–[13]
A/CN.9/898, paras. 48–60
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 16, 64–73, 77 (para. 68 is relevant to the history and evolution of the definition of the term "insolvency-related judgment")

[27] Legislative Guide, part two, chap. IV, section B.

A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 42–56
A/CN.9/931, paras. 17–18
A/CN.9/WG.V/WP.157, paras. 47–61
A/CN.9/937, paras. 18–20
A/CN.9/955, paras. 12–15
A/CN.9/956, Add.1 and A/CN.9/956/Add.2

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.

63. Article 3, paragraph 1, expressing the principle of supremacy of international obligations of the enacting State over domestic law, has been modelled on similar provisions in other model laws prepared by UNCITRAL, including the MLCBI.[28]

64. Article 3, paragraph 2, provides that where there is a treaty in force for the enacting State and that treaty applies to the recognition and enforcement of civil and commercial judgments, if the judgment in question falls within the terms of the treaty, then the treaty should cover its recognition and enforcement, rather than the Model Law. The article confirms that the treaty will prevail only when it has entered into force for the enacting State and applies to the judgment in question. Binding legal obligations issued by regional economic integration organizations that are applicable to members of that organization might be treated as obligations arising from an international treaty. This provision can also be adapted in national law to refer to binding international instruments with non-State entities, where such instruments could apply to the recognition and enforcement of insolvency-related judgments.

65. In some States binding international treaties are self-executing. In other States, however, those treaties, with certain exceptions, are not self-executing as they require domestic legislation in order to become enforceable law. In view of the

[28] See for example, Guide to Enactment and Interpretation, paras. 91–93.

normal practice of the latter group of States with respect to international treaties and agreements, it might be inappropriate or unnecessary to enact article 3 or it might be appropriate to enact it in a modified form.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 61–63
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [14]–[15]
A/CN.9/898, paras. 13–17
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 17–20, 78
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 57–59
A/CN.9/931, para. 19
A/CN.9/WG.V/WP.157, paras. 62–64
A/CN.9/937, para. 21
A/CN.9/955, para. 16
A/CN.9/956 and A/CN.9/956/Add.2

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.

66. The competence for the judicial functions dealt with in the Model Law may lie with different courts and authorities in the enacting State and the enacting State would tailor the text of the article to its own system of such competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the legislation for the benefit of, in particular, foreign insolvency representatives and others authorized under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment. If, in the enacting

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

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

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 64
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [16]–[17]
A/CN.9/898, paras. 18–20
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, para. 21
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 60–61
A/CN.9/931, para. 20
A/CN.9/WG.V/WP.156
A/CN.9/WG.V/WP.157, paras. 65–66
A/CN.9/937, para. 22
A/CN.9/956

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.

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

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

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 65
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 22
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 62–63

A/CN.9/931, para. 20
A/CN.9/WG.V/WP.157, paras. 67–68
A/CN.9/937, para. 23
A/CN.9/956 and A/CN.9/956/Add.2

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.

70. The purpose of the Model Law is to increase and harmonize the cross-border assistance available in the enacting State with respect to the recognition and enforcement of an insolvency-related judgment. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a foreign insolvency representative could obtain that assistance and since it is not the purpose of the Law to replace or displace those provisions to the extent they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether article 6 is needed to make that point clear. Article X is also relevant in this regard in so far as it provides clarification as to the scope of MLCBI, article 21 and the relief that should be available under that article. As article 6 does not specify to whom the relief is available, it follows from article 11 that any person entitled to apply for recognition and enforcement of an insolvency-related judgment could also seek additional assistance under article 6.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 66
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 23
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, para. 64

A/CN.9/931, para. 21
A/CN.9/WG.V/WP.157, para. 69
A/CN.9/937, para. 23
A/CN.9/956

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.

71. The notion of public policy is grounded in national law and may differ from State to State. No uniform definition of that notion is attempted in article 7.

72. In some States, the expression "public policy" may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when to do so would contravene those fundamental principles.[29]

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

74. The second part of the provision referring to procedural fairness is intended to focus attention on serious procedural failings. It was drafted to accommodate those States with a relatively narrow concept of public policy (and which treat procedural fairness and natural justice as being distinct from public policy) that may wish to include language about procedural fairness in legislation enacting the Model Law. The addition of this language is not intended to suggest that the approach to public policy in the Model Law differs in any way from that of the MLCBI or that the idea of procedural fairness would not be included under the public policy exception in MLCBI, article 6.

[29] For relevant cases under the MLCBI see, for example, the Judicial Perspective, section III.B.5 "The 'public policy' exception".

Discussion in UNCITRAL and the Working Group

A/73/17, paras. 116 and 127–128
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 67
A/CN.9/WG.V/WP.143
A/CN.9/898, para. 21
A/CN.9/WG.V/WP.143/Add.1, notes [18]–[19]
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, para. 24
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 65–69
A/CN.9/931, para. 22
A/CN.9/WG.V/WP.157, paras. 70–74
A/CN.9/937, para. 23
A/CN.9/955, para. 17
A/CN.9/956 and A/CN.9/956/Add.2

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.

75. A provision similar to the one contained in article 8 appears in a number of private law treaties (e.g., art. 7, para. 1, of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)).[30] It has been recognized that such a provision would also be useful in a non-treaty text, such as a model law, on the basis that a State enacting a model law would have an interest in its harmonized interpretation. Article 8 is modelled on the corresponding article of the MLCBI.

76. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from UNCITRAL (for further information about the system, see para. 129 below).

[30] United Nations, *Treaty Series*, vol. 1498, No. 25567.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.135
A/CN.9/864, para. 71
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 68
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [16]
A/CN.9/898, para. 22
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, para. 25
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 70–71
A/CN.9/931, para. 23
A/CN.9/WG.V/WP.157, paras. 75–76
A/CN.9/937, para. 24
A/CN.9/956/Add.2

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.

77. Article 9 provides that a judgment will only be recognized if it has effect in the originating State, and will only be enforced if it is enforceable in the originating State. Having effect generally means that the judgment is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. It is possible that a judgment is effective in the originating State without being enforceable because, for example, it has been suspended pending the outcome of an appeal (this is addressed in article 10). If a judgment does not have effect or is not enforceable in the originating State or if it ceases to have effect or be enforceable in the originating State, it should not be recognized or enforced (or continue to be recognized or enforced) in another State under the Model Law. The question of effect and enforceability must thus be determined by reference to the law of the originating State, recognizing that different States have different rules on finality and conclusiveness of judgments.

78. This discussion raises the distinction between recognition of a judgment and its enforcement. As noted above (see paras. 25–27), recognition means that the receiving court will give effect to the originating court's determination of legal rights and obligations reflected in the judgment. For example, if the originating court held that the plaintiff had, or did not have, a certain right, the receiving court would accept and recognize that determination. Enforcement, on the other hand, means the application of the legal procedures of the receiving court to ensure compliance with the judgment issued by the originating court. A decision to enforce the judgment must, for the purposes of the Model Law, be preceded or accompanied by recognition of the judgment.

79. In contrast, recognition need not be accompanied or followed by enforcement. For example, if the originating court held that one party had an obligation to pay money to another party or that one party had a certain right, the receiving court may simply recognize that finding of fact, without any issue of enforcement arising. If the cause of action giving rise to that judgment was pursued again in the receiving State, recognition of the foreign judgment would be sufficient to dispose of the application.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 69, 72
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [20]–[21]
A/CN.9/898, paras. 23–24
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 26–27
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 72–75
A/CN.9/931, paras. 24–26
A/CN.9/WG.V/WP.157, paras. 77-79
A/CN.9/937, para. 25
A/CN.9/955, para. 18
A/CN.9/956 and A/CN.9/956/Add.2

Article 10. 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.

80. The use of the word "review" in article 10 might have different meanings depending on national law; in some jurisdictions, it might initially include both the possibility of a review by the issuing court, as well as review by way of an appeal to an appellate court. For example, an originating court may have a short period before an appeal is made to a higher court in which to review its own judgment; once the appeal is made, the originating court no longer has that ability. Both situations would be covered by the use of the word "review". "Ordinary review" describes, in some legal systems, a review that is subject to a time limit and conceived as an appeal with a full review (of facts and law). It differentiates those cases from "extraordinary" reviews, such as an appeal to a court of human rights or internal appeals for violation of fundamental rights.

81. Article 10, paragraph 1, provides that if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review has not expired, the receiving court has the discretion to adopt various approaches to the judgment. For example, it can refuse to recognize the judgment; postpone recognition and enforcement until it is clear whether the judgment is to be affirmed, set aside or amended in the originating State; proceed to recognize the judgment, but postpone enforcement; or recognize and enforce the judgment. This flexibility allows the court to deal with a variety of different situations, including, for example, where the judgment debtor pursues an appeal in order to delay enforcement, where the appeal may otherwise be considered frivolous or the judgment may be provisionally enforced in the originating State. If the court decides to recognize and enforce the judgment notwithstanding the review or to recognize the judgment but postpone enforcement, the court can require the provision of some form of security to ensure that the relevant party is not prejudiced pending the outcome of the review. If the judgment is subsequently set aside or amended or ceases to become effective or enforceable in the originating State, the receiving State should rescind or amend any recognition or enforcement granted in accordance with relevant procedures established under domestic law.

82. If the court decided to refuse recognition and enforcement because of the pending review, that decision should not prevent a new request for recognition and enforcement once that review had been determined. Refusal in that situation would mean dismissal without prejudice. This is addressed by article 10, paragraph 2.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 69, 72
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [20]–[21]
A/CN.9/898, paras. 23–24
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 26-27
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 76–77
A/CN.9/931, paras. 24–26
A/CN.9/WG.V/WP.157, paras. 80–82
A/CN.9/937, para. 25
A/CN.9/955, para. 19
A/CN.9/956

Article 11. 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.

83. Article 11 establishes the conditions for applying for recognition and enforcement of an insolvency-related judgment in the enacting State, as set out in paragraph 2, and the core procedural requirements. Article 11 provides a simple, expeditious structure to be used for obtaining recognition and enforcement. Accordingly, in incorporating the provision into national law, it is desirable that the process not be encumbered with requirements additional to those already included.

Paragraph 1

84. Recognition and enforcement of an insolvency-related judgment can be sought by either an insolvency representative or a person authorized to act on behalf of an insolvency proceeding within the meaning of article 2, subparagraph *(b)*. It may also be sought by any person entitled under the law of the originating State to seek such recognition and enforcement. Such a person might include a creditor whose interests are affected by the judgment. The second sentence of paragraph 1 repeats article 4, noting that the question of recognition may also be raised by way of defence or as an incidental question in the course of a proceeding. In such cases, enforcement may not be required. Where the issue arises in those circumstances, the requirements of article 11 should be met in order to obtain recognition of the judgment. Moreover, the person raising the question in that manner should be a person referred to in the first sentence of article 11, paragraph 1.

Paragraph 2

85. Article 11, paragraph 2, lists the documents or evidence that must be produced by the party seeking recognition and enforcement of an insolvency-related judgment. Subparagraph 2*(a)* requires the production of a certified copy of the judgment. What constitutes a "certified copy" should be determined by reference to the law of the State in which the judgment was issued. Subparagraph 2*(b)* requires the

provision of any documents necessary to satisfy the condition that the judgment is effective and enforceable in the originating State, including information as to any pending review of the judgment (see para. 81), which could include information concerning the time limits for review. While the Model Law does not provide for recognition of the decision commencing the insolvency proceeding to which the judgment is related, it is desirable that a copy of that judgment be provided to the recognizing court as evidence of the existence of the insolvency proceeding to which the judgment is related. It is not intended, however, that where a copy of that judgment is provided in support of the application for recognition and enforcement, a receiving court should evaluate the merits of the foreign court's decision commencing that proceeding.

86. In order to avoid refusal of recognition because of non-compliance with a mere technicality (e.g., where the applicant is unable to submit documents that in all details meet the requirements of art. 11, subparas. 2*(a)* and *(b)*), subparagraph *(c)* allows evidence other than that specified in subparagraphs 2*(a)* and *(b)* to be taken into account. That provision, however, does not compromise the court's power to insist on the presentation of evidence acceptable to it. It is advisable to maintain that flexibility in enacting the Model Law.

Paragraph 3

87. Paragraph 3 entitles, but does not compel, the court to require a translation of some or all of the documents submitted under paragraph 2. If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time if the court is in a position to consider the request without the need for translation of the documents.

Paragraph 4

88. The Model Law presumes that documents submitted in support of recognition and enforcement need not be authenticated in any special way, in particular by legalization: according to article 11, paragraph 4, the court is entitled to presume that those documents are authentic whether or not they have been legalized. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

89. It follows from article 11, paragraph 4, (according to which the court "is entitled to presume" the authenticity of documents submitted pursuant to paragraph 2)

that the court retains discretion to decline to rely on the presumption of authenticity in the event of any doubt arising as to that authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, in particular when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g., because in some States they involve various authorities at different levels). Nevertheless, a State requiring legalization of documents such as those provided under article 11 is not prevented by the terms of the article from extending that requirement to the Model Law.

90. In respect of the provision relaxing any requirement of legalization, the question may arise whether it is in conflict with the international obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 1961[31] adopted under the auspices of the Hague Conference on Private International Law and providing specific, simplified procedures for the legalization of documents originating from signatory States. In many instances, however, the treaties on legalization of documents, like letters rogatory and similar formalities, leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore, a conflict is unlikely to arise. For example, as stated in article 3, paragraph 2, of the abovementioned convention:

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

91. According to article 3, paragraph 1, of the Model Law, if there is still a conflict between domestic law enacting the Model Law and a treaty or other formal, binding agreement, the treaty or other agreement will prevail.

Paragraph 5

92. Article 11, paragraph 5, establishes the right of the party against whom the relief provided in the judgment is sought to be heard on the application for recognition and enforcement. To ensure that the right is meaningful and can be enforced,

[31] United Nations, *Treaty Series*, vol. 527, No. 7625.

the party against whom that relief is sought will require notice of the application for recognition and enforcement and of the details of the hearing. The Model Law leaves it up to the law of the enacting State to determine how that notice should be provided.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 62–63
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 72–75
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 70–71
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [22]–[25]
A/CN.9/898, paras. 25–26
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 28–32
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 78–86
A/CN.9/931, paras. 27–29
A/CN.9/WG.V/WP.157, paras. 83–92
A/CN.9/937, para. 26
A/CN.9/955, para. 20
A/CN.9/956 and A/CN.9/956/Add.2

Article 12. 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 11, 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.

93. Article 12 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available from the moment recognition is sought, until a decision on recognition and, if appropriate, enforcement is made. The rationale for making such relief available is to preserve the possibility that if the judgment is recognized and enforced, assets will be available to satisfy it, whether they are assets of the debtor in the insolvency proceeding to which the judgment relates or of the judgment debtor. The urgency of the measures is alluded to in the opening words of paragraph 1. Subparagraph 1*(a)* restricts the stay to the disposition of assets of any party against whom the judgment was issued. Subparagraph 1*(b)* provides for other relief, both legal and equitable, to be granted provided it is within the scope of the judgment for which recognition is sought. As drafted, paragraph 1 should be flexible enough to encompass an ex parte application for relief, where the law of the enacting State permits a request to be made on that basis. This deferral to the law of the enacting State is also reflected in the notice provisions contained in paragraph 2.

Paragraph 2

94. The laws of many States contain requirements for notice to be given (either by the insolvency representative upon the order of the court or by the court itself) when relief of the type mentioned in article 12 is granted, except where it is sought on an ex parte basis (if that is permitted in the enacting State). Paragraph 2 is the appropriate place for the enacting State to make provision for such notice where it is required.

Paragraph 3

95. Relief available under article 12 is provisional in that, as provided in paragraph 3, it terminates when the issue of recognition and, where appropriate enforcement, is decided, unless extended by the court. The court might wish to do so, for example, to avoid a hiatus between any provisional measure issued before recognition and any measure that might be issued on or after recognition.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 82–83
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [40]
A/CN.9/898, para. 45
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 52–53
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 87–89
A/CN.9/931, para. 30
A/CN.9/WG.V/WP.157, paras. 93–95
A/CN.9/937, para. 27
A/CN.9/956 and A/CN.9/956/Add.2

Article 13. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 14, 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 11, paragraph 1;

(c) The application meets the requirements of article 11, 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.

96. The purpose of article 13 is to establish clear and predictable criteria for recognition and enforcement of an insolvency-related judgment. If *(a)* the judgment is an

"insolvency-related judgment" (as defined in art. 2, subpara. *(d)*); *(b)* the requirements for recognition and enforcement have been met (i.e., the judgment is effective and enforceable in the originating State under art. 9); *(c)* recognition is sought by a person referred to in article 11, paragraph 1, from a court or authority referred to in article 4 or the question of recognition arises by way of defence or as an incidental question before such a court or authority; *(d)* the documents or evidence required under article 11, paragraph 2, have been provided; *(e)* recognition is not contrary to public policy (art. 7); and *(f)* the judgment is not subject to any of the grounds for refusal (art. 14), recognition should be granted.

97. In deciding whether an insolvency-related judgment should be recognized and enforced, the receiving court is limited to the preconditions set out in the Model Law. No provision is made for the receiving court to embark on a consideration of the merits of the foreign court's decision to issue the insolvency-related judgment or issues related to the commencement of the insolvency proceeding to which the judgment is related. Nevertheless, in reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any information that may have been presented to the originating court. Those orders or decisions are not binding on the receiving court in the enacting State, which is only required to satisfy itself independently that the insolvency-related judgment meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumption in article 11, paragraph 4, on the information in the certificates and documents provided in support of the request for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 64
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76–77
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 73
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [26]–[27]
A/CN.9/898, paras. 27–29
A/CN.9/WG.V/WP.145
A/CN.9/903, para. 33
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 90–91

A/CN.9/931, para. 31
A/CN.9/WG.V/WP.156
A/CN.9/WG.V/WP.157, paras. 96–97
A/CN.9/937, paras. 28–29
A/CN.9/956

Article 14. 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 in this State of the institution of that proceeding in a manner that is incompatible with the rules 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 that party 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.

98. Article 14 sets out the specific grounds, in addition to the public policy ground under article 7, on which recognition and enforcement of an insolvency-related judgment might be refused. The list of grounds is intended to be exhaustive, so that grounds not mentioned would not apply. As noted above, provided the judgment meets the conditions of article 13, recognition is not prohibited under article 7,

and the grounds set forth in article 14 do not apply, recognition of the judgment should follow. By indicating that recognition and enforcement "may" be refused, article 14 makes it clear that, even if one of the provisions of article 14 is applicable, the court is not obliged to refuse recognition and enforcement. However, it might be noted that in some legal traditions, once one of the grounds enumerated in article 14 is found to exist, the court would not have that discretion and would have to refuse recognition and enforcement of the judgment. In principle, the onus of establishing one or more of the grounds set out under article 14 rests upon the party opposing recognition or enforcement of the judgment.

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

99. Article 14, subparagraph *(a)* permits the court to refuse recognition and enforcement if the defendant in the proceeding giving rise to the insolvency-related judgment was not properly notified of that proceeding. Two rules are involved: the first, in subparagraph *(a)*(i), is concerned with the interests of the defendant; the second, in subparagraph *(a)*(ii), is concerned with the interests of the receiving State.

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

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

102. Subparagraph *(a)*(ii) addresses notification given in a manner that was incompatible with rules of the receiving State concerning service of documents, but only applies where the receiving State is the State in which that notification was given. Some States have no objection to the service of a foreign writ on their territory without any participation by their authorities, as it is seen as a matter of conveying information. A foreign person can serve a writ in those jurisdictions simply by going there and handing it to the relevant person. Other States, however, take a different view, considering that the service of a writ is a sovereign or official act and thus service on their territory without permission is an infringement of sovereignty. Permission would normally be given through an international agreement laying down the procedure to be followed. Such States would be unwilling to recognize a foreign judgment if the writ was served in a way that was regarded as an infringement of their sovereignty. Subparagraph *(a)*(ii) takes account of this point of view by providing that the court addressed may refuse to recognize and enforce the judgment if the writ was notified to the defendant in the receiving State in a manner that was incompatible with the rules of that State concerning service of documents. Procedural irregularities that are capable of being cured retrospectively by the court in the receiving State would not be sufficient to justify refusal under this ground.

Subparagraph *(b)* — fraud

103. Article 14, subparagraph *(b)*, sets out the ground of refusal that the judgment was obtained by fraud, which refers to a fraud committed in the course of the proceedings giving rise to the judgment. It can be a fraud, which is sometimes collusive, as to the jurisdiction of the court. More often, it is a fraud practised by one party to the proceedings on the court or on the other party by producing false evidence or deliberately suppressing material evidence. Fraud involves a deliberate act; mere negligence does not suffice. Examples might include where the plaintiff deliberately served the writ, or caused it to be served, on the wrong address; where the requesting party (typically the plaintiff) deliberately gave the party to be notified (typically the defendant) incorrect information as to the time and place of the hearing; or where either party sought to corrupt or mislead a judge, juror or witness,

or deliberately conceal key evidence. While in some legal systems fraud may be considered as falling within the scope of the public policy provision, this is not true for all legal systems. Accordingly, this provision is included as a form of clarification.

Subparagraphs *(c)–(d)* — inconsistency with another judgment

104. Article 14, subparagraphs *(c)* and *(d)*, concern the situation in which there is a conflict between the judgment for which recognition and enforcement is sought and another judgment given in a dispute between the same parties. Both subparagraphs are satisfied where the two judgments are inconsistent, but they operate in different ways.

105. Article 14, subparagraph *(c)*, is concerned with the case where the foreign judgment is inconsistent with a judgment issued by a court in the receiving State. In such a situation, the receiving court is permitted to give preference to a judgment issued in its own State, even if that judgment was issued after the issue of the inconsistent judgment in the originating court. For this provision to be satisfied, the parties must be the same, but it is not necessary for the cause of action or subject matter to be the same; the subparagraph is therefore broader than subparagraph *(d)*. The requirement that the parties must be the same will be satisfied if the parties bound by the judgments are the same, even if the parties to the proceedings giving rise to the judgment are different, for example, where one judgment is against a particular person and the other judgment is against the successor to that person. Under subparagraph *(c)*, inconsistencies between the judgments occur when findings of fact or conclusions of law, which are based on the same issues, are different.

106. Article 14, subparagraph *(d)*, concerns foreign judgments, where the judgment for which recognition and enforcement is sought is inconsistent with an earlier judgment issued in another State. In that situation, a judgment may be refused recognition and enforcement only if: *(a)* it was issued after the conflicting judgment, so that priority in time is a relevant consideration; *(b)* the parties to the dispute are the same; *(c)* the subject matter is the same, so that the inconsistency goes to the central issue of the cause of action; and *(d)* the earlier conflicting judgment fulfils the conditions necessary for recognition in the enacting State, whether under this Law, other national law or a convention regime.

Subparagraph *(e)* — interference with insolvency proceedings

107. Subparagraph *(e)* addresses the desirability of avoiding interference with the conduct and administration of the debtor's insolvency proceedings. Those proceedings could be the proceeding to which the judgment is related or other insolvency proceedings (i.e., concurrent proceedings) concerning the same insolvency debtor. While the concept of interference is somewhat broad, the provision gives examples of what might constitute such interference. Inconsistency with a stay, for example, would typically arise where the stay permitted the commencement or continuation of individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition and enforcement of any ensuing judgment. It could also arise where the stay did not permit the commencement or continuation of such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay (and was thus potentially in violation of the stay). Interference may also cover instances where recognition of the insolvency-related judgment could upset cooperation between multiple insolvency proceedings or result in giving effect to a judgment on a matter or cause of action that should have been pursued in the jurisdiction of the insolvency proceeding (e.g., because the insolvency proceeding is the main proceeding or is taking place in the State in which the assets that are the subject of the judgment are located). However, this ground of interference should not be used as a basis for selective recognition of foreign judgments. It would not be justified as the sole reason for denying recognition and enforcement on the basis that, for example, it would deplete the value of the insolvency estate.

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

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

109. Subparagraph *(f)* does not apply more generally to other types of insolvency-related judgment that resolve bilateral disputes between two parties. Even though such judgments may also affect creditors and other stakeholders, those effects are only indirect (e.g., via the judgment's effect on the size of the insolvency estate).

In those instances, permitting a judgment debtor to resist recognition and enforcement by citing third-party interests could unnecessarily generate opportunities for wasteful relitigation of the cause of action giving rise to the judgment. For example, if a court in State A determined that the debtor owned a particular asset and issued a judgment against a local creditor resolving that ownership dispute, and the insolvency representative then sought to enforce that judgment in State B, the creditor should not be able to resist enforcement in B by raising arguments about the interests of other creditors and stakeholders that are not relevant to that dispute.

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

110. Article 14, subparagraph *(g)*, permits refusal of recognition and enforcement if the originating court did not satisfy one of the conditions listed in subparagraphs (i) to (iv); in other words, if the originating court exercised jurisdiction solely on a ground ***other*** than the ones listed, recognition and enforcement may be refused. As such, subparagraph *(g)* works differently to the other subparagraphs of article 14, each of which create a freestanding discretionary ground on which the court may refuse recognition and enforcement of a judgment; under subparagraph *(g)*, one of the grounds ***must*** be met or recognition and enforcement of the judgment can be refused.

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

112. Subparagraph *(g)*(i) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor explicitly consented to that exercise of jurisdiction, whether orally or in writing. The consent could be addressed to the court (e.g., the judgment debtor informed the court that no objections to jurisdiction would be raised) or to the other party (e.g., the judgment debtor agreed with the other party that the proceeding should be brought in the originating court). The existence of explicit consent is a question of fact to be determined by the receiving court.

113. Subparagraph *(g)*(ii) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor submitted to the jurisdiction of the originating court by presenting their case without objecting to jurisdiction

or the exercise of jurisdiction within any time frame applicable to such an objection, unless it was evident that such an objection would not have succeeded under the law of the originating State. In the above circumstances, the judgment debtor cannot resist recognition and enforcement by claiming that the originating court did not have jurisdiction. The method of raising the objection to jurisdiction is a matter for the law of the originating State. A receiving court, in an appropriate case, may make inquiries where matters giving rise to concern become apparent.

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

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

Subparagraph *(h)* — judgments originating in certain States

116. This subparagraph is an optional provision. States that have or are considering enacting the MLCBI might wish to consider adopting this provision. Nothing in the provision would prevent a State that has not enacted (and does not plan to enact) the MLCBI from adopting the approach of that subparagraph.

117. The chapeau of article 14, subparagraph *(h)*, establishes the key principle that recognition of an insolvency-related judgment can be refused when the judgment originates from a State whose insolvency proceeding is not or would not be susceptible of recognition under the MLCBI (e.g., because that State is neither the location of the insolvency debtor's COMI nor of an establishment). The language of the chapeau does not require an insolvency proceeding to have actually commenced in the originating State, only that, were such a proceeding to commence

in that State, recognition and enforcement could be refused if the proceeding would not be susceptible of recognition. For example, an insolvency debtor has its COMI in State A and an establishment in State B, but only a main proceeding in A has commenced and no non-main insolvency proceeding has yet commenced in B. Some other litigation in B results in an insolvency-related judgment that is relevant to the insolvency estate. The insolvency representative from A wants to seek recognition or enforcement of the insolvency-related judgment from B in State C, which has enacted the Model Law and the MLCBI. The court in C would see that the judgment comes from a State whose insolvency proceeding would be recognizable under the MLCBI (i.e., the debtor has an establishment in B and a non-main proceeding could thus be commenced), even though no such recognizable proceeding has yet commenced in B. The receiving court thus cannot refuse recognition on the basis of article 14, subparagraph *(h)*.

118. Subparagraph *(h)* relies upon the MLCBI framework of recognition of specific types of foreign proceedings (i.e., main or non-main proceedings) and addresses the situation of a judgment issued in a State that is not the location of either the COMI or an establishment of the insolvency debtor, where the judgment relates only to assets that were located in that State at the time the proceeding giving rise to the judgment commenced. In those circumstances, it may be useful for that judgment to be recognized because, for example, it resolves issues of ownership that are relevant to the insolvency estate and that could only be resolved in that jurisdiction, rather than in the jurisdiction of the debtor's COMI or establishment. By facilitating the recognition and enforcement of such judgments, the Model Law could assist the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets. The provision is nevertheless designed to help ensure that the Model Law framework is not undermined by the recognition and enforcement of judgments resolving issues that should have been resolved in the State where the debtor has or had its COMI or an establishment.

119. Subparagraphs *(h)*(i) and (ii) outline two conditions that must be met in order to establish an exception to the general principle of non-recognition. Subparagraph *(h)*(i) requires the insolvency representative of an insolvency proceeding that is or could have been recognized under the law giving effect to the MLCBI in the enacting State (i.e., the insolvency representative of a main or non-main proceeding) to have participated in the proceeding giving rise to the judgment, where that participation involved engaging with the substantive merits of the cause of action being pursued. For the purposes of this subparagraph, participation would mean that the insolvency representative was a party to the proceedings as a representative of the debtor's insolvency estate or had standing to intervene in those proceedings by appearing in court and making representations on the substantive merits of the case. The proceedings might have been instituted by the insolvency debtor against a third party or have been instituted against the debtor. Many national procedural

laws contemplate cases where a party who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings.

120. Subparagraph *(h)*(ii), which adds to the requirement in subparagraph *(h)*(i), requires the judgment in question to have related solely to assets that were located in the originating State at the time of commencement of the proceeding giving rise to the judgment. With regard to the reference to "assets", the broad definition of "assets of the debtor" (meaning the insolvency debtor) in the Legislative Guide[32] might be noted, even though it may not be applicable to all circumstances arising under the current text. It may be sufficiently broad to cover, for example, intellectual property registered in the originating State where it is neither the debtor's COMI nor a State in which the debtor has an establishment.

Discussion in UNCITRAL and the Working Group

A/73/17, paras. 117–122 and 129
A/CN.9/WG.V/WP.130
A/CN.9/835, paras. 65–69
A/CN.9/WG.V/WP.135
A/CN.9/864, paras. 76–77
A/CN.9/WG.V/WP.138
A/CN.9/WG.V/WP.140, paras. 6–9
A/CN.9/870, paras. 73, 76, 79
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, notes [28]–[37]
A/CN.9/898, paras. 27–29
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 34–48, 79–82
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 92–114
A/CN.9/931, paras. 32–36
A/CN.9/WG.V/WP.157, paras. 98–120
A/CN.9/937, paras. 30–32
A/CN.9/955, paras. 21–25
A/CN.9/956, Add.2 and Add.3

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

Article 15. 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].[1]

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.

[1] 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 15.

121. Article 15, paragraph 1, provides that an insolvency-related judgment recognized and enforceable under the Model Law can be given one of two different effects in the enacting State. Since States adopt different approaches to this question, the Model Law provides that the enacting State can choose between giving the judgment the same effect in the receiving State as it had in the originating State (i.e., the effect in the originating State is exported to the receiving State) or the same effect as it would have had if it had been issued in the receiving State (i.e., the effect would be equivalent to that of such a judgment issued in the receiving State). The rationale of the first choice, that the effect in the originating State is extended to the receiving State, ensures that the judgment has, in principle, the same effects in all States; the effect does not differ depending on the receiving State. That effect is modified to some extent by paragraph 2, which does not oblige the receiving State to provide a form of relief that is not available under its own law. The rationale of the second choice is based upon maintaining equality, fairness and certainty as between domestic and foreign judgments, as well as the practical difficulties that a court in the enacting State may have in determining the precise "effects" (such as claim or issue preclusion) of a judgment under the law of the originating State.

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

123. Two types of situations can trigger this provision: first, where the receiving State does not know the relief granted in the originating State; and secondly, where the receiving State knows a form of relief that is "formally", but not "substantively" equivalent. Although provisional measures are not to be considered insolvency-related judgments for the purposes of the Model Law (art. 2*(c)*), a stay preventing a defendant from disposing of his or her assets may provide an illustration of how this article operates, as such a stay can have *in personam* or *in rem* effects, depending on the jurisdiction. Where recognition of a stay issued by a State that characterizes stays as having *in rem* effects is sought in a State that only grants such orders *in personam* effects, article 15 would be satisfied by the receiving court enforcing the stay with *in personam* effects. If the originating court issued a stay with only *in personam* effects and recognition was sought in a State whose national law granted such a stay *in rem* effects, the receiving court would not comply with article 15 if it enforced the stay with *in rem* effects in accordance with national law, since that would go beyond the effects granted under the law of the originating State.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/WG.V/WP.138
A/CN.9/870, para. 78
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [38]
A/CN.9/898, para. 43
A/CN.9/WG.V/WP.145
A/CN.9/903, paras. 49, 83
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 115–118
A/CN.9/931, paras. 37–38
A/CN.9/WG.V/WP.156
A/CN.9/WG.V/WP.157, paras. 121–123
A/CN.9/937, paras. 33–35
A/CN.9/955, paras. 26–27
A/CN.9/956

Article 16. 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.

124. Article 16 aims to increase the predictability of the Model Law and encourages reliance on the judgment in cases where recognition or enforcement of the judgment as a whole might not be possible. In those circumstances, the receiving court should not be able to refuse recognition and enforcement of one part of the judgment on the basis that another part is not recognizable and enforceable; the severable part of the judgment should be treated in the same manner as a judgment that is wholly recognizable and enforceable.

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

Discussion in UNCITRAL and the Working Group

A/73/17, para. 123
A/CN.9/WG.V/WP.130
A/CN.9/835, para. 61
A/CN.9/WG.V/WP.138
A/CN.9/870, paras. 80–81
A/CN.9/WG.V/WP.143
A/CN.9/WG.V/WP.143/Add.1, note [39]
A/CN.9/898, para. 44
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 50–51
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, paras. 119–120
A/CN.9/931, para. 39

A/CN.9/WG.V/WP.157, paras. 124–125
A/CN.9/937, para. 36
A/CN.9/956

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.

126. As noted above (para. 2), an issue has arisen as to whether the relief available under the MLCBI includes the recognition and enforcement of an insolvency-related judgment. The MLCBI provisions on relief (principally art. 21) make no specific reference to recognition and enforcement of such a judgment. The purpose of article X is to make it clear to States enacting (or considering enactment of) the MLCBI that the relief available under article 21 of the MLCBI includes recognition and enforcement of an insolvency-related judgment and that such relief may therefore be sought under article 21. States enacting (or considering enactment of) the MLCBI may thus rely upon article X to achieve that purpose, irrespective of any prior interpretations of article 21 to the contrary. The enactment of this provision is not necessary in jurisdictions where the MLCBI is interpreted as covering the recognition and enforcement of insolvency-related judgments.

127. Since article X relates to interpretation of the MLCBI, it is not intended that it be included in legislation enacting this Model Law. To do so might lead to it being overlooked by parties seeking to make use of the MLCBI or by courts interpreting the MLCBI as enacted. States wishing to enact this article should determine the appropriate location. It might, for example, be enacted as an amendment to the legislation giving effect to the MLCBI.

Discussion in UNCITRAL and the Working Group

A/73/17, para. 116
A/CN.9/898, paras. 40–41
A/CN.9/WG.V/WP.145
A/CN.9/WG.V/WP.148
A/CN.9/903, paras. 54–57, 84–85
A/CN.9/WG.V/WP.150
A/CN.9/WG.V/WP.151, para. 121
A/CN.9/931, paras. 40–41
A/CN.9/WG.V/WP.156
A/CN.9/WG.V/WP.157, paras. 126–127
A/CN.9/937, paras. 37–38
A/CN.9/955, para. 28

VI. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

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

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

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

Annex I

General Assembly Resolution 73/200 of 20 December 2018

Model Law on Recognition and Enforcement of Insolvency-Related Judgments of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and preserving employment,

Convinced that the law of recognition and enforcement of judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals to have assets in more than one State and to move assets across borders,

Considering that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude insolvency-related judgments from their scope,

Concerned that inadequate coordination and cooperation in cases of cross-border insolvency, which lead to uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that debtors' assets would be concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors,

Convinced that fair and internationally standardized legislation on cross-border insolvency that respects national procedural and judicial systems, as expressed by the provisions of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments,[1] that is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

1. *Expresses* its appreciation to the United Nations Commission on International Trade Law for finalizing and adopting the Model Law on Recognition and Enforcement of Insolvency-Related Judgments[1] and its guide to enactment;

2. *Requests* the Secretary-General to transmit the text of the Model Law, together with its guide to enactment, to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to insolvency, bearing in mind the need for internationally harmonized legislation governing and facilitating instances of cross-border insolvency, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider implementation of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law.[2]

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), annex III.
[2] Resolution 52/158, annex.

Annex II

Decision of the United Nations Commission on International Trade Law

At its 1080th meeting, on 2 July 2018, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, in which the Assembly established the United Nations Commission on International Trade Law with the purpose of promoting the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment and of fostering entrepreneurial activity and preserving employment,

Convinced that the law of recognition and enforcement of judgments is becoming more and more important in a world in which it is increasingly easy for enterprises and individuals to have assets in more than one State and to move assets across borders,

Considering that international instruments on the recognition and enforcement of judgments in civil and commercial matters exclude insolvency-related judgments from their scope,

Concerned that inadequate coordination and cooperation in cases of cross-border insolvency, including uncertainties associated with recognition and enforcement of insolvency-related judgments, can operate as an obstacle to the fair, efficient and effective administration of cross-border insolvencies, reducing the possibility of rescuing financially troubled but viable businesses, making it more likely that debtors' assets are concealed or dissipated and hindering reorganizations or liquidations that would be the most advantageous for all interested persons, including the debtors, the debtors' employees and the creditors,

Convinced that fair and internationally harmonized legislation on cross-border insolvency that respects national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

Appreciating the support for and the participation of intergovernmental and invited non-governmental organizations active in the field of insolvency law reform in the development of a draft model law on recognition and enforcement of insolvency-related judgments and its guide to enactment,

Expressing its appreciation to Working Group V (Insolvency Law) for its work in developing the draft Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment,

1. *Adopts* the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, as it appears in annex III to the report of the United Nations Commission on International Trade Law on its fifty-first session,[1] and its guide to enactment, consisting of the text contained in A/CN.9/WG.V/WP.157, with the amendments listed in document A/CN.9/955 and the amendments adopted by the Commission at its fifty-first session;[2]

2. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and its guide to enactment, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments when revising or adopting legislation relevant to insolvency, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency (1997).[3]

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17).
[2] Ibid., chapter V, subsection A.3.
[3] General Assembly resolution 52/158, annex.

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