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Insolvency Law

Recognition and enforcement of foreign insolvency-derived judgements

Note by the Secretariat

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Introduction

1. At its forty-seventh session (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-derived judgements.

2. The suggestion to take up work on this topic has its origin in recent judicial decisions,[1] which have led to some uncertainty concerning the ability of some courts, in the context of recognition proceedings under the UNCITRAL Model Law on Cross-Border Insolvency (the UNCITRAL Model Law), to recognize and enforce judgements given in the course of foreign insolvency proceedings, such as judgements in transaction avoidance proceedings, on the basis that neither article 7 nor 21 of the Model Law explicitly provides the necessary authority. Moreover, in those States that have enacted article 8 of the Model Law, decisions by foreign courts on the lack of such explicit authority in the Model Law for recognition and enforcement of insolvency-derived judgements might be regarded as persuasive authority. The absence of any applicable international convention or other regime to address the recognition and enforcement of insolvency-derived judgements, together with a concern that the uncertainty created by the judgements might have a chilling effect on further adoption of the Model Law, led to the proposal to develop a model law or model legislative provisions.

3. While it may not explicitly provide for recognition and enforcement of insolvency-derived judgements, the scope and content of the UNCITRAL Model Law may provide a useful reference for the scope and content of work to achieve this new mandate as it does provide a framework for the cross-border recognition of certain decisions of a foreign court, namely to commence insolvency proceedings and to appoint an insolvency representative.

I. Background — recognition and enforcement of judgements regimes

4. The law of recognition and enforcement of judgements is arguably becoming more and more important in a world in which persons and assets can easily be moved across borders. There is a general tendency towards more liberal recognition of foreign judgements, with more treaties requiring it in specific subject areas (e.g. conventions relating to family matters, transportation and nuclear accidents) and more narrow interpretation of the exceptions in treaties and domestic laws. Efforts to develop an international regime for recognition and enforcement of judgements more generally have not necessarily met with success.

5. Under applicable national regimes, some States will only enforce foreign judgements pursuant to a treaty regime (e.g. Netherlands and some Scandinavian countries); others enforce foreign judgements more or less to the same extent as local judgements (United States of America). Between those two positions there are many different national approaches.

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[1] *Rubin v Eurofinance SA*, [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971); CLOUT case No. 1270.

6. Regionally, Latin America,[2] the European Union[3] and the Middle East[4] have adopted various conventions and regulations. Drafting of conventions has been suggested in a number of regional organizations, but not taken up by, for example, the Asian-African Legal Consultative Committee, LAWASIA, Association of Southeast Asian Nations (ASEAN) and the Southern African Development Community (SADC).[5]

7. Internationally, the 1971 Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters developed by the Hague Conference on private international law (1971 Hague Convention) is in force only between Cyprus, the Netherlands, and Portugal — where it is largely displaced by the Brussels I Regulation — and Albania and Kuwait. In 1999, negotiations began at the Hague towards a global judgements convention, but a 2001 draft stalled (2001 draft Hague convention). Instead, those negotiations led to a narrower Convention of 30 June 2005 on Choice of Court Agreements (2005 Hague Convention), which regulates jurisdiction in civil and commercial matters based on the exclusive choice of parties and mandates the conditions and procedures for the recognition of ensuing judgements (articles 8-15). Mexico has acceded to the convention; the United States of America and the European Community signed it in 2009.

8. Insolvency decisions are typically excluded from a number of these instruments. Article 1, subparagraph 5, of the 1971 Hague Convention, for example, provides that the convention does not apply to "questions of bankruptcy, composition or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor." Article 2, subparagraph 2(e), of the 2005 Hague Convention provides that it does not apply to "insolvency, composition and analogous matters".

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[2] Latin America Art. 2 of the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards lays down conditions for enforcement; the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgements specifies requirements for the jurisdiction of the rendering court. Whereas the former Convention has been ratified by eight Latin American countries, the latter is in force only between Mexico and Uruguay.

[3] Brussels I Convention (Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters) and the Lugano Convention of 2007; with respect to insolvency, judgements opening insolvency proceedings are recognized under Art. 16 of the Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings, with the enforcing State's public policy as the only relevant defence (Art. 26); other judgements of the insolvency court are enforceable under the Brussels I Regulation (Art. 25).

[4] The most relevant Middle Eastern treaties include the 1952 Agreement as to the Execution of Judgements ("Arab League Judgements Convention"), the 1983 Arab Convention on Judicial Co-operation ("Riyadh Convention"), and the 1995 Protocol on the Enforcement of Judgements Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council ("GCC Protocol").

[5] Ralf Michaels, Recognition and Enforcement of Foreign Judgements, Max Planck Encyclopedia of International Law, 2009, para. 19.

II. Approaches to recognition and enforcement

9. 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 State law. Recognition may have the effect of making the foreign judgement a local judgement that can then be enforced under local law. Thus while enforcement may presuppose recognition of a foreign judgement, 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.

10. In the case of some judgements, recognition might be sufficient and enforcement will not be needed, for example, declarations of rights or non-monetary judgements, such as the discharge of a debtor or a judgement 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 be accompanied or followed by enforcement.

11. Section 481 of the 1986 American Law Institute (ALI) Restatement (Third) of Foreign Relations Law stipulates that a final judgement of a court of a foreign State is entitled to recognition in courts in the United States of America and such a judgement may be enforced in accordance with the procedure for enforcement of judgements applicable where enforcement is sought. The 2005 Hague Convention, article 8, provides that a judgement is to be recognized only if it has effect in the State of origin (i.e. it is legally valid and operative), and enforced only if it is enforceable in the State of origin, raising the distinction between recognition and enforcement. The official commentary to article 8[6] indicates that recognition means the receiving court gives effect to the determination of the legal rights and obligations made by the originating court and that enforcement means the application of the legal procedures of the receiving court to ensure that the defendant obeys the judgement given by the originating court. Where a judgement ceases to have effect in the originating State, it should not be recognized in another State. The power to review a decision to recognize under article 18 of the UNCITRAL Model Law where the status of the foreign proceedings has changed might also be relevant in the judgements context.

12. The Working Group might wish to consider what recognition and enforcement of an insolvency-derived judgement might mean, for example as described above with respect to the 2005 Hague Convention or that it would have the same force and effect as a judgement entered by a court of the recognizing jurisdiction. The Working Group may also wish to consider whether recognition and enforcement should be addressed in a draft instrument as a single concept.

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[6] Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report by Trevor Hartley and Masato Dogauchi, para. 170, available from www.hcch.net/upload/expl37final.pdf.

III. Judgements to be covered by a recognition and enforcement regime

A. General characteristics for recognition

13. Some regimes specify the characteristics that a judgement must possess in order for it to be recognized under that regime. Many of those regimes typically require a judgement to be final, conclusive and enforceable in the originating State before it can be recognized. Finality usually means that judgements are not recognizable until no ordinary appeals can be launched against them. Exceptions exist in some legal systems, especially where close legal relations between States enable a regime to account for the consequences of enforcing a judgement that is later reversed (e.g. art. 46, Brussels I Regulation for judgements, art. 31 for preliminary injunctions), where plaintiffs have a specific interest in speedy enforcement (e.g. art. 4(2) Hague Maintenance Convention) or where the jurisdiction allows enforcement to prevent inappropriate depletion of assets or transfer of assets out of the jurisdiction. Finally, judgements must usually be decided on the merits. This requirement excludes, in particular, mere procedural decisions, which are usually not recognized because each State's courts usually follow their own rules of procedure and will therefore not be bound by another court's decision based on its own procedural rules.

14. Article 4 of the 2005 Hague Convention provides that a judgement covered by the Convention means "any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including by an officer of the court), provided that the determination relates to a decision on the merits which may be recognized or enforced under this Convention. An interim measure of protection is not a judgment."

15. Other regimes envisage recognition of provisional judgements. The definition of a judgement covered by article 23 of the 2001 draft Hague convention uses wording similar to the wording subsequently adopted in the first sentence of the 2005 Hague Convention definition, but had also included the words "decisions ordering provisional or protective measures in accordance with article 13 paragraph 1" (which dealt with jurisdiction to order such measures). Principles developed by the European Max Planck Group for Conflict of Laws in Intellectual Property (CLIP Principles) cover, among other things, appealable judgements, provisionally enforceable orders or judgements rendered in default of appearance. The Principles also include orders for the payment of money, orders for the transfer and delivery of property, orders regulating the conduct of the parties, and orders declaring the rights and liabilities of the parties, including negative declarations such as declarations on non-infringement of intellectual property rights, and monetary and non-monetary judgements. The CLIP Principles grant discretion to a court to stay recognition and enforcement of foreign non-final judgements when they are subject to review in the rendering State, using the word "may" in the relevant provisions. The 2001 draft Hague convention uses the same discretionary terminology in article 25, subparagraph (4).

B. “Insolvency-[derived] [related]” judgements

16. Very few States have recognition and enforcement regimes that specifically address insolvency-derived judgements. Even in States that do have such regimes, they may not cover all orders that might broadly be considered to derive from insolvency proceedings. In the United States of America, for example, a judgement or decree 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-derived judgements. These are considered to be adversarial matters, requiring service of documents originating the action and resulting in a judgement. An order or decree confirming a plan of reorganization, granting a bankruptcy discharge or allowing or rejecting a claim against the insolvency estate are not considered insolvency-derived judgements, even if those orders may have some of the attributes of a judgement. However, Chapter 15 of the Bankruptcy Code (enacting the UNCITRAL Model Law in the United States of America) provides a procedure for the recognition and enforcement of orders and decrees entered in foreign proceedings that would include an order confirming a foreign plan of reorganization; applications under Chapter 15 routinely seek such relief.

17. Several approaches to defining what constitutes an “insolvency-derived judgement” might be envisaged. One approach might be to list certain categories of judgements that would be covered, some of which might be monetary judgements and others not. Monetary judgements might include fraudulent conveyance actions; preference actions; actions to obtain turnover of property of the insolvency estate; enforcement actions for sums due to the insolvency estate. Non-monetary judgements might relate to equitable relief including the establishment of a constructive trust; requirements for accountings; recognizing the discharge of a debtor; actions to modify or enforce the stay of actions in an insolvency case; and actions to determine whether a particular debt is dischargeable.

18. If that approach were to be adopted, careful consideration would need to be given to what should be included in the list, whether each category of judgement included should be explained and whether the list could include a “catch-all” provision extending coverage to “other” judgements related to insolvency proceedings. Such a provision could have the benefit of avoiding inadvertent omission from the list of some relevant types of judgements. However, there is also the potential for such a provision to be applied more broadly than intended, and in such a way that might create conflicts (or at least overlap) with work on recognition of judgements more generally.[7]

19. A different approach might be to adopt a definition identifying general characteristics to be possessed by an insolvency-related judgement. The general characteristics identified above would provide a starting point, but something more might be required to delimit the connection between the judgement in question and the insolvency proceedings.

20. The European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation), for example, provides automatic

[7] Ongoing work of the Hague Conference on private international law might be one example.

recognition for judgements commencing insolvency proceedings; recognition and enforcement for other judgements depends on the type of judgement (article 25). Judgements on the course and closure of insolvency proceedings (article 25, subparagraph 1.1), judgements deriving directly from the insolvency proceedings and that are closely linked to the insolvency proceedings even if handed down by another court (article 25, subparagraph 1.3) and judgements relating to preservation measures taken after a request for commencement of insolvency proceedings (article 25, subparagraph 1.3) will be recognized automatically in the same manner as commencement decisions, except where they might result in the limitation of personal freedom or postal secrecy; other judgements are subject to recognition and enforcement under Brussels I,[8] if applicable.

21. Judgements under the EC Regulation concerning the following matters have been held to fall into the category of deriving directly from the insolvency proceedings and closely linked with them: avoidance actions,[9] 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.[10]

22. Judgements under the EC Regulation that have been held not to fall into that category have included: actions by and against an insolvency representative which would have been possible also 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;[11] 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.[12]

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[8] Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (1968).

[9] European Court of Justice (ECJ), *Seagon v Deko Marty* C-339/07.

[10] ECJ, SCT *Industri v Alpenblume* C-111/08.

[11] ECJ *German Graphics v can der Schnee* C-292/08.

[12] ECJ *F-Tex* C-213/10.

23. Drawing upon the information above, the characteristics relevant to defining the appropriate connection between the judgement and insolvency proceedings might include: that the judgement is related to the core of the insolvency proceeding concerning the debtor,[13] that the judgement affects the debtor or its insolvency estate,[14] and that the aim of the action leading to the judgement could not be achieved without the commencement of insolvency proceedings.

IV. Jurisdiction of the originating court

24. Existing conventions and uniform laws on enforcement and recognition of judgements uniformly require the recognizing court to assess the jurisdiction of the originating court in some way. Some, the so-called "double conventions," combine international agreement on permissible bases of jurisdiction for a specified list of judgements with agreement on the procedure for cross-border recognition and enforcement of such judgements once entered. Examples include the European Union Conventions of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the "Brussels Convention") and of 16 September 1988 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the "Lugano Convention"). Other conventions engage solely on the issue of recognition and enforcement — the so-called "single conventions" on the topic, which only deal with the jurisdiction of contracting States indirectly, that is to say, as a condition for the recognition of judgements.[15] Both sorts of conventions have benefits and detriments, but even with a single convention an "assessment of the jurisdiction of the originating state forms a basis for distinguishing between judgements that should be recognized and enforced and those that should not."[16]

25. The EC Regulation is a double convention on the recognition of insolvency proceedings in that it governs not only the recognition of such proceedings, but also agreed bases for jurisdiction. The UNCITRAL Model Law governs only recognition and not jurisdiction, but limits recognition to those foreign proceedings where jurisdiction is based either on the fact that those proceedings are pending at the

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[13] Where "insolvency proceedings" might be defined consistently with "foreign proceeding" in article 2 of the UNCITRAL Model Law or "insolvency proceedings" in subparagraph 12(u) of the UNCITRAL Legislative Guide. It should be noted that the definition of "foreign court", which forms parts of the definition of a "foreign proceeding" under the Model Law is limited to the court with authority to control or supervise "foreign proceedings" (article 2(e)), which in turn are defined as being, essentially, proceedings for the purpose of reorganization or liquidation of the debtor (article 2(a)). Such a definition of the relevant court might be too narrow, particularly, for example, in States that do not have dedicated insolvency courts; there may be a range of different courts or levels of court in some States with jurisdiction to enter a judgement in a matter related to the insolvency proceedings commenced in another court, but which lack the authority to control or supervise those insolvency proceedings that would qualify them as a "foreign court" under the Model Law.

[14] Where "insolvency estate" is defined in the Legislative Guide, introduction, subparagraph 12(t): "assets of the debtor that are subject to the insolvency proceedings".

[15] Peter Nygh and Fausto Pocar, Report of the Special Commission, appended to the Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters (2000), p. 27.

[16] Ibid.

location of the debtor's centre of main interests (COMI) for main proceedings or establishment for non-main proceedings.

26. The English *Dicey* Rules,[17] which restate the position at common law, allow for enforcement of foreign judgements where the defendant (i) was present in the foreign country when proceedings were instituted; (ii) was the claimant, or counterclaimed, in the proceedings in the foreign court; (iii) had submitted to the jurisdiction of the foreign court by voluntarily appearing; or (iv) had agreed, before the commencement of the proceedings to submit to the jurisdiction.

27. Canada adopts a test of "real and substantial connection" between the cause of action and the foreign court. Traditional indicia of jurisdiction, such as agreement to submit, residence and presence in the foreign jurisdiction, serve to bolster the real and substantial connection. Various cases have identified a non-exhaustive set of "presumptive factors" (as well as factors the court should use in recognizing new presumptive factors) that, if present in the case at issue, give rise to a rebuttable presumption of jurisdiction. These factors have been used in cases involving tort claims, but may not have been applied in cases involving *in personam* judgements to pay money, such as in the *Rubin*[18] case in the United Kingdom of Great Britain and Northern Ireland. In tort, the presumptive factors are: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province.[19]

28. A question to be considered by the Working Group is how the issue of jurisdiction might be approached. One approach might be to focus, as a starting point, on judgements issued by courts of the jurisdiction in which the debtor has its COMI or an establishment. Those two concepts are already used in the cross-border context and the Guide to Enactment and Interpretation of the UNCITRAL Model Law would provide a source of relevant explanatory material. Such an approach could lead, however, to the exclusion of judgements from courts[20] with no jurisdictional claim over main or non-main insolvency proceedings concerning the debtor (within the meaning of the Model Law), including judgements entered by a court with jurisdiction over insolvency proceedings concerning the debtor, but commenced on the basis of presence of assets or the place of the debtor's registration. Since judgements from those courts might also be relevant to the goal of any instrument to be developed, a wider formulation might be required using some of the more general criteria above such as jurisdiction over the debtor.

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[17] Dicey, Morris & Collins, *Conflict of Laws* (15th edition, 2012), Rule 43. This rule was the subject of the decision in *Rubin*, see footnote 1.

[18] See footnote 1.

[19] *Van Breda v Village Resorts* Ltd 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 90.

[20] The UNCITRAL Legislative Guide, glossary, paragraph 8, explains that while the word "court" includes 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 a court for the purposes of the Guide. See also footnote 13 above with respect to the definition of "foreign court" in the UNCITRAL Model Law.

V. Procedures for obtaining recognition and enforcement

29. Procedures for recognition are addressed in various conventions and instruments in addition to articles 15 and 16 of the UNCITRAL Model Law, covering who may apply and the procedure to be followed, particularly with respect to the documents and information to be supplied to the receiving court. As a starting point, the Working Group may wish to consider the procedure established under the Model Law.

A. Persons who may apply

30. The UNCITRAL Model Law regime (article 15) is limited to foreign representatives as defined, in keeping with the limited subject-specific nature of the regime. The Hague conventions, which focus on recognition and enforcement more broadly, refer only to the party seeking recognition or applying for enforcement of a judgement.

B. Documents to be produced

31. Article 15 of the UNCITRAL Model Law requires a certified copy of the foreign decision or a certificate from the foreign court affirming the substance of the decision or some other evidence acceptable to the recognizing court as to the substance of the foreign decision. Article 13 of the 2005 Hague Convention requires the party seeking recognition or applying for enforcement to produce a complete and certified copy of the judgement; if the judgement was given by default, the original or a certified copy of a document establishing that the document instituting the proceedings or an equivalent document was notified to the defaulting party; and any documents necessary to establish that the judgement has effect or, where applicable, is enforceable in the originating State. Additional information that might be useful could relate, in case the judgement is subject to an appeal, to identification of the appellate court where that appeal is pending, and the status of the appeal, unless recognition of such judgements were to be excluded.

32. With respect to translation of documents, article 15, paragraph 4, of the UNCITRAL Model Law makes the requirement for translation discretionary. The 2005 Hague Convention, in comparison, provides that if documents are not in an official language of the receiving State, they are to be accompanied by a certified translation into an official language, unless the law of the recognizing State provides otherwise (art. 13(4)). The 2001 draft Hague convention also specifies that no legalization or similar formality may be required (art. 29); article 16, paragraph 2, of the UNCITRAL Model Law provides a presumption of authenticity of documents, “whether or not they have been legalized”.

33. A court considering an application for recognition of an insolvency-derived judgement might be assisted by additional pieces of information that the foreign representative will be in the best position to provide. Those might include, for example, in addition to the type of evidence to be provided under article 15, paragraph 1, of the Model Law, information as to whether the party against whom enforcement of the judgement is sought was notified of the

proceeding in which the judgement was obtained and had an opportunity to be heard in that proceeding and as to known insolvency proceedings pending against the debtor (Model Law article 15, paragraph 3).

34. Where the originating court considered issues in its decision such as the basis for exercising jurisdiction over the party against whom relief is sought and the adequacy of service of documents on that party, that information could be extremely helpful to the receiving court, particularly if recognition and enforcement were likely to be challenged. The usefulness of a court including relevant information in its orders is recognized in the Guide to Enactment and Interpretation of the UNCITRAL Model Law in the context of articles 2 and 17 (paras. 139 and 152-153). Courts might thus be encouraged to include such information when issuing an insolvency-related judgement.

35. The recognition process might be assisted by establishing presumptions relating to the judgement in much the same way as article 16, paragraphs 1 and 2, of the Model Law establish presumptions concerning qualification of the foreign proceeding and the foreign representative (for the purposes of article 2 of the Model Law), and the authenticity of documents.

C. Decision to recognize

36. The decision to recognize is an essential part of a recognition and enforcement regime, requiring a court to recognize, and permitting a court to enforce, an insolvency-related judgement — without reopening the merits of the decision — as long as several conditions are met. This approach is similar to that taken by the UNCITRAL Model Law, which requires recognition of foreign proceedings if the specific conditions are met and does not permit the recognizing court to investigate whether the foreign proceedings were properly commenced. The 2005 Hague Convention, article 8, provides that in recognizing a foreign judgement there shall be no review of the merits of the judgement given by the originating court. The receiving court is bound by the findings of fact on which the originating court based its jurisdiction, unless the judgement was given by default. The consequence of such an approach is that foreign judgements would be recognized even when a domestic court might have reached a different decision on the issue.

37. As to the requirements for recognition, these generally relate to the application being made by the proper person, possibly a reference to the court issuing the judgement (especially if there were to be reliance on a COMI or establishment requirement), information required to be provided in support of the application (as discussed above), and ensuring that the request falls within the scope of the instrument and has been submitted to the correct court. Where the originating court is required, in order to ensure recognition and enforcement, to set forth in its judgement its conclusions of law and findings of fact that served as the basis of its judgement, the receiving court would only grant the application if that requirement was met. Without such information, a receiving court may not feel equipped to evaluate the propriety of the judgement (even without seeking to evaluate whether the decision was correct on the merits).

38. Article 15 of the 2005 Hague Convention addresses severability of a judgement, allowing for recognition or enforcement of only the part that is

severable. The ability to exclude certain elements of a judgement, such as a punitive damages award, might be relevant. Such an exclusion might also be covered by the grounds discussed below for refusing recognition, specifically the public policy exception along the lines of article 6 of the UNCITRAL Model Law.

39. Further requirements might reflect article 17, paragraph 3, of the UNCITRAL Model Law and article 14 of the 2005 Hague Convention, which require the receiving court to act expeditiously, as well as article 17, paragraph 4, of the Model Law, which allows modification or termination of recognition if it is shown that the grounds for granting recognition were fully or partially lacking or have ceased to exist. Article 18 of the Model Law, dealing with subsequent information, might also be relevant to a recognition regime to address, for example, changes in the status of the recognized decision or knowledge concerning judgements in other jurisdictions concerning matters covered by the recognized decision (such as might be grounds for non-recognition under paragraph 40 below).

VI. Grounds to refuse recognition

40. Relevant conventions and other laws provide a number of different grounds for refusing an application for recognition. These are typically broader than, although they include, the public policy exception to recognition in article 6 of the UNCITRAL Model Law. Grounds that might be relevant to refusing recognition of an insolvency-derived judgement might include:

(a) The judgement is subject to review or appeal in the originating State or the time limit for seeking review or appeal has not expired. This might be required information for the purposes of an application for recognition and the party against whom relief is sought might also have the opportunity to demonstrate the existence of further proceedings;

(b) Recognition or enforcement would be manifestly incompatible with the public policy of the receiving State (Model Law, article 6). This could potentially be used to deny recognition to judgements obtained by fraud or without due process, including for example, where there was a failure to provide notice to known affected parties;

(c) The judgement is inconsistent with a prior judgement given in the receiving State in a proceeding involving the same defendant and the same debtor (2001 draft Hague convention, article 28.1(b); 2005 Hague Convention, article 9(f)); or

(d) The judgement is inconsistent with an earlier judgement given in another State involving the same defendant and the same debtor, provided that the earlier judgement fulfils the conditions necessary for its recognition in the receiving State (2001 draft Hague convention, article 28.12(b); 2005 Hague Convention article 9(g)).

41. A form of reciprocity might also be a ground for refusing recognition in some States, where, for example, a comparable judgement from the receiving State would not be recognized or enforced by the originating court. Such an approach might alleviate any concerns that an enacting State might have regarding the possibility that it would be unilaterally offering to recognize and enforce another State's

judgements when that other State may itself be unwilling to recognize and enforce foreign judgements. Such an exception could be discretionary rather than mandatory and a receiving court could still choose to recognize and enforce the judgement if appropriate. It should be recalled, however, that suggestions to include such a reciprocity provision in the UNCITRAL Model Law were rejected and the text, accordingly, does not include such an exception to recognition. It applies on a unilateral basis without any guarantee that the originating State would recognize insolvency proceedings emanating from the receiving State.

42. Grounds for refusal might also relate to the nature of the judgement, including judgements raising money for public purposes such as those concerning taxes, fines and monetary penal judgements, as well as judgements relating to domestic relationships, which might be relevant in insolvency matters involving individuals.

43. Grounds for refusal are sometimes divided into mandatory and discretionary grounds. Depending on the manner in which a provision on grounds for declining recognition were to be drafted, the receiving court might be able, but not required, to decline to recognize and enforce an insolvency-related judgement on some or all of the grounds indicated above. The party against whom relief was sought would have the burden of demonstrating that one of those exceptions applied.

VII. Other potentially relevant articles of the Model Law

44. Other articles of the Model Law not specifically mentioned above might serve as models for provisions to be included in a model law or model provisions addressing recognition and enforcement of insolvency-derived judgements. These might include:

(a) Preamble;

(b) Scope: article 1;

(c) International obligations: article 3;

(d) Identifying the competent court: article 4;

(e) Additional assistance under other laws: article 7;

(f) Interpretation: article 8;

(g) Provisional relief: article 19;

(h) Access/standing/participation of a foreign representative in recognition proceedings: articles 12 and 24; and

(i) Presumption of insolvency: article 31.