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**United Nations Commission on  
International Trade Law  
Working Group V (Insolvency Law)  
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### **Insolvency Law**

### **Cross-border recognition and enforcement of insolvency-related judgements**

#### **Proposal by the United States of America**

#### **Note by the Secretariat**

The Government of the United States of America has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following proposal in order to provide the Working Group with additional information for its deliberations. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.



## Annex

### **Proposals by the United States of America for articles 2 and 10 of the draft model law on the recognition and enforcement of insolvency-related judgements**

1. The United States would like to thank the Secretariat for its latest version of the draft model law on the recognition and enforcement of insolvency-related judgments, A/CN.9/WG.V/WP.138, which very helpfully builds on the progress made during the Working Group's discussions in December 2015 and sets forth a number of options for the Working Group's consideration.

2. During the previous session, two issues led to some of the most difficult discussions: the scope of the new model law (i.e., which types of judgments would be encompassed) and how it would interact with the Model Law on Cross-Border Insolvency. The United States would like to propose two pieces of new text that seek to find common ground on these issues and provide a potential path forward.

#### **A. Definition of insolvency-related judgment: scope of Model Law and interaction with existing Model Law**

3. The first piece of text is a new version of article 2, paragraph (d) (the definition of "insolvency-related judgment") that would provide States with two options for implementing the model law — a broader approach and a narrower approach — depending on their policy preferences regarding the scope of the law. This new text also simplifies the definition in order to allow easier discussion of any controversial issues (e.g., by reorganizing the list of types of judgments and shortening the chapeau), and clarifies that a judgment is not covered by the model law if an applicable treaty to which the State is a party governs its recognition and enforcement.

##### **"Article 2.**

"(d) Insolvency-related judgment" means a judgment that is closely related to a foreign proceeding and was issued after the commencement of that proceeding, but does not include any judgment for which recognition and enforcement is governed by an applicable treaty to which this State is a party. Insolvency-related judgments include, inter alia, judgments determining whether:

- (i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;
- (ii) A transaction involving the debtor or assets of the insolvency estate should be overturned because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate;
- (iii) A representative of the debtor is liable for action taken when the debtor was insolvent or in the vicinity of insolvency;
- (iv) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved; or

(v) [Option A: other sums are owed to or by the debtor or estate;]

[Option B: other sums are owed to or by the debtor or estate, and the cause of action arose after debtor entered insolvency proceedings];

including instances in which the cause of action was pursued by (a) a creditor with approval of the court, based on an insolvency representative's decision not to pursue that cause of action, or (b) the party to whom it has been assigned by an insolvency representative in accordance with the applicable law.”

4. The text divides insolvency-related judgments into five categories.<sup>1</sup> The fifth category is broader than the first four, as it seeks to encompass other judgments that would affect the size of the insolvency estate. Some delegations have taken the position that otherwise-applicable rules for recognition and enforcement of non-insolvency-related judgments — rather than this model law — should apply to this fifth category unless the judgment in question was based on a cause of action arising after insolvency. By contrast, other delegations have taken the position that the judgments in this category are very important for the insolvency estate even if the underlying cause of action arose before insolvency, and thus that this model law should provide for their recognition and enforcement. The United States strongly believes that the broader approach, reflected in Option A, would be more appropriate.<sup>2</sup> However, the divided views in the Working Group suggest that States may need to have two options for implementation of this aspect. States could select one of the two options based on their policy preferences and on how their pre-existing law on the recognition and enforcement of judgments would interact with the draft model law.

5. The proposed text also reduces the overlap with the existing Model Law on Cross-Border Insolvency, as some delegations have expressed strong concerns about such overlap. “Modification or enforcement of a stay” is not included as a category of insolvency-related judgments, as this type of cooperation during ongoing insolvency proceedings is a central component of the existing Model Law; thus, the existing Model Law should be enacted as the framework to govern these issues. However, other categories of judgments are retained, even though the existing Model Law could in some situations enable recognition and enforcement of many judgments, including those in category (iv). Even if a State declines to enact the existing Model Law or has construed it not to cover judgments within the scope of category (iv), recognition and enforcement of the final results of those proceedings should still fall within the scope of this new model law.

<sup>1</sup> The text proposed here does not address judgments concerning the validity and effectiveness of a secured claim. It may be appropriate to cover such judgments. However, in doing so, the Working Group would likely need to consider a new exception for article 10, to permit refusal of recognition and enforcement if the judgment does not originate from a court that is competent to adjudicate such issues with respect to the property in question. Such a provision may be very difficult to draft, particularly while seeking to maintain consistency with existing instruments.

<sup>2</sup> In fact, we believe there would be merit in including relevant judgments even if they were issued prior to the commencement of insolvency proceedings, in order to facilitate the collection of assets for the estate. However, given the wide range of views in the Working Group, we are not proposing to broaden the definition in that respect.

## B. Exceptions to recognition and enforcement: jurisdictional issues and interaction with existing Model Law

6. The second piece of text proposed consists of some additions to Article 10 — in particular, amendments to article 10, subparagraph (i)(i) (variant 2) and new proposals for article 10, paragraphs (j) and (k) (in place of the existing article 10, paragraph (j) and Article 11).

### “Article 10.

Recognition and enforcement of an insolvency-related judgment may be refused if:

[(a)-(h) unchanged]

“(i) The insolvency-related judgment was not issued by a court that:

*(i) [For States that have enacted the existing Model Law: was supervising a main proceeding regarding the insolvency of*

*(1) The party against whom the judgment was issued, or*

*(2) A debtor for which the party against whom the judgment was issued was serving as a director; if the judgment was based on that party’s conduct as a director, including breach of fiduciary duty,*

*or by another court in the State where such a main proceeding occurred;]*

(ii) Exercised jurisdiction based on the consent of the party against whom the judgment was issued;

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

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

“(j) The judgment falls within Article 2, subparagraph (d)(iv) and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

“*[For States that have enacted the existing Model Law:*

*“(k) The judgment was not issued in a proceeding that has been, or could have been, recognized under [Article 17 of the existing Model Law], unless the judgment is related solely to assets that were located in the State of origin at the time the proceeding was commenced.]”*

7. Article 10 provides a list of situations in which recognition and enforcement can be denied; article 10, paragraph (i) in particular permits refusal of recognition and enforcement if the originating court exercised jurisdiction (over the party against whom the judgment was issued) on grounds other than those listed. This proposed text includes two changes to article 10, subparagraph (i)(i) (variant 2), which is a clause that is only intended for enactment in States that have already implemented the existing Model Law. First, the addition of article 10,

subparagraph (i)(i)(2) addresses situations in which a judgment is issued against a director of an insolvent company by a court in that company's COMI jurisdiction. As long as such a judgment was based on the director's conduct as a director, the court's exercise of jurisdiction would not provide grounds for refusal. Second, a new clause at the end of article 10, subparagraph (i)(i) clarifies that recognition and enforcement should not be refused for jurisdictional reasons solely because the judgment came from a different court in the COMI State, rather than from the specific court that was actually supervising the main proceeding.

8. Next, the new proposed article 10, paragraph (j) would take the place of both the existing article 10, paragraph (j) and Article 11 but would only apply to judgments falling within article 2, subparagraph (d)(iv) as proposed above — i.e., judgments determining whether “a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved.” Such judgments directly affect the rights of creditors and other stakeholders, and thus their interests should have been taken into account in the proceeding where the judgment originated. For other types of insolvency-related judgments that simply resolve bilateral disputes between two parties, although creditors and other stakeholders are often affected, any such effects are only indirect (e.g., via the judgment's effect on the size of the 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. For example, if a court in jurisdiction A determines that the debtor owns a particular asset and issues a judgment against a local creditor resolving that ownership dispute, and the insolvency representative then seeks to enforce that judgment in jurisdiction B, the creditor should not be able to resist enforcement in B by raising arguments about the interests of other creditors and stakeholders.

9. Finally, the new proposed article 10, paragraph (k) would address another issue related to overlap with the existing Model Law (for States in which that Model Law has also been enacted). In some situations, it may be useful for the insolvency representative to seek recognition and enforcement of a judgment from a jurisdiction in which the debtor had neither its COMI nor an establishment. For example, in the hypothetical situation described above, the debtor may have had neither its COMI nor an establishment — only the disputed assets — in jurisdiction A. The proceeding in which that judgment was issued could not have been recognized under the existing Model Law, even though recognition and enforcement of the resulting judgment may still be useful. By facilitating the recognition and enforcement of such judgments, this model law could help address this limitation in the existing Model Law and enable the recovery of additional assets for the estate. At the same time, a limitation is needed to help ensure that the existing Model Law framework is not undermined by the recognition and enforcement of judgments resolving issues that ought to have been addressed by a court in a COMI or establishment State. The proposed article 10, paragraph (k) would permit a court to deny recognition or enforcement if the judgment did not relate only to assets in jurisdiction A, while still allowing recognition and enforcement of some judgments that do not come from main or non-main proceedings.