



**United Nations Commission on
International Trade Law**
Working Group V (Insolvency Law)
Fifty-first session
 New York, 10-19 May 2017

Recognition and enforcement of insolvency-related judgments: draft model law

Note by the Secretariat

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I. 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-related judgments.¹

2. At its forty-sixth session in December 2014, Working Group V (Insolvency Law) considered a number of issues relevant to the development of a legislative text on the recognition and enforcement of insolvency-related judgments, including the types of judgments that might be covered, procedures for recognition and grounds to refuse recognition. The Working Group agreed that the text should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law), but that the Model Law provided an appropriate context for the new instrument.

3. At its forty-seventh session, the Working Group considered the first draft of a model law to be given effect through enactment by a State (A/CN.9/WG.V/WP.130). The content and structure of the draft text drew upon the Model Law, as suggested by the Working Group at its forty-sixth session (A/CN.9/829, para. 63) and sought to give effect to the conclusions of the Working Group at its forty-sixth session relating to the types of judgment to be included (A/CN.9/829, paras. 54 to 58), procedures for obtaining recognition and enforcement (A/CN.9/829, paras. 65 to 67) and the grounds for refusal of recognition (A/CN.9/829, paras. 68 to 71).

4. At its forty-seventh session, the Working Group had a preliminary exchange of views on draft articles 1 to 10 of the text and made a number of proposals with respect to the drafting (A/CN.9/835, paras. 47-69); draft articles 11 and 12 of that text were not reached due to lack of time and were included as draft articles 12 and 13 of the text considered at the forty-ninth session (A/CN.9/WG.V/WP.138). At its forty-eighth, forty-ninth and fiftieth sessions, the Working Group considered revised versions of the draft text, which reflected the decisions and proposals made at the forty-seventh, forty-eighth and forty-ninth sessions respectively (A/CN.9/WG.V/WP.135, 138 and 143).

5. The draft text below reflects the discussion and conclusions at the fiftieth session and the revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text. Notes to this draft text are included as footnotes. The proposal for revision of the definition of "insolvency-related judgment" made at the fiftieth session of the Working Group has not been repeated in this text, but remains available in the report of the fiftieth session (A/CN.9/898, para. 59); as requested, the Secretariat has prepared a further version for consideration.

¹ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 155.

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

Preamble²

Article 1. Scope of application³

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a proceeding taking place in a State that is different from the State where recognition and enforcement are sought.
2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

- (a) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation;⁴
- (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;⁵
- (c) “Judgment” means [any decision, [on the merits,] whatever it may be called,⁶ 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

² The Working Group may wish to consider whether a preamble is required. A provision might be included along the lines of: The purpose of this Law is to provide effective mechanisms of the recognition and enforcement of insolvency-related [foreign] judgments so as to promote the objectives of: (a) Efficient conduct of cross-border insolvency proceedings; (b) Protection and maximization of the value of the insolvency estate; and (c) Greater certainty for trade and investment.

³ A number of concerns have been expressed with respect to the scope of the draft text and what it is not intended to cover. The subparagraphs below, which are intended to capture those concerns, might be included as part of the text or as part of the guide to enactment:
This Law is not intended to:

- (a) Displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment (previously the second sentence of paragraph 1 of draft article 3bis);
- (b) Replace legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation if it is interpreted as applying to the recognition and enforcement of an insolvency-related [foreign] judgment;
- (c) Apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or
- (d) Apply to the judgment commencing the insolvency proceedings to which the foreign judgment is related.

⁴ Revised in accordance with [A/CN.9/898](#), para. 46.

⁵ Revised in accordance with [A/CN.9/898](#), para. 47.

⁶ The words “whatever it may be called” originate from the definition of “judgment” in the draft text of the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments (the draft Hague Conference text). A proposal at the fiftieth session to delete those words was not supported ([A/CN.9/898](#), paras. 50, 54).

decision includes a decree or order, and a determination of costs and expenses by the court. [An interim measure of protection is not a judgment];⁷

[(d) “Foreign court”];⁸

(e) “Insolvency-related [foreign] judgment”⁹ means a judgment that:

(i) Is related to an insolvency proceeding;

⁷ See A/CN.9/898, paras. 51-54. The words “on the merits” and the exclusion contained in square brackets in the third sentence were discussed at the fiftieth session. It was acknowledged that further discussion was required. It may be noted that although such a limitation is included in other instruments addressing recognition and enforcement of judgments more generally, matters related to insolvency are specifically excluded from those instruments. The special nature of insolvency proceedings and the various types of judgment that may be issued in the course of such proceedings, particularly judgments relating to preservation of the insolvency estate, and recognition and enforcement of those judgments, may be crucial to the successful resolution of those proceedings. The Working Group may wish to consider the specific relevance of interim or provisional measures to insolvency.

⁸ The term “foreign court” is not used in the draft text, and has thus been deleted.

⁹ See also A/CN.9/898, para. 59 for proposals made at the fiftieth session. The word “foreign” has been added to the text in response to a suggestion that received some support at the fiftieth session (A/CN.9/898, para. 55), but is placed in square brackets pending resolution of the final definition. If the word is not retained, the Working Group may wish to consider whether the definition should include a cross-border element along the lines of art. 1, that is, confirming that the judgment was issued in a State other than the State in which recognition and enforcement is sought (see also footnote 3, subpara. (c)).

This version of the definition has been prepared by the Secretariat in response to a request by the Working Group at the fiftieth session to provide an alternative for future consideration. Subparas. (i) to (iii) establish the basic definition and reflect the characteristics generally agreed upon by the Working Group, with the exception of the words “on or after” in subpara. 2 (e) (ii) and “interests of the” in subpara. 2 (e) (iii), which remain in square brackets. With respect to the latter, it is not clear whether those additional words add anything to the subpara. and the words “affect the insolvency estate” may be sufficient. The substance of draft art. 2, subpara. (e) 1 also reflects general agreement and has been included as an explanatory paragraph of the definition. Subpara. (e) 2 is included to address concerns that the draft text might overlap with the Model Law on Cross-Border Insolvency if it were to apply to decisions commencing insolvency proceedings (see also footnote 3, subpara. (d)).

It is suggested that the remaining material from the definitions included in A/CN.9/898, para. 59 might usefully be placed in a guide to enactment of the model law, as follows:

“Additional factors that may be relevant to determining whether a judgment is insolvency-related might include consideration of whether the judgment was issued in pursuit of a cause of action that arose under a law related to insolvency or that could not have been pursued but for the commencement of the insolvency proceedings.

Insolvency-related foreign judgments might include, inter alia, judgments determining whether:

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

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

(c) 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;

(d) Sums not covered by (i) or (ii) are owed to or by the debtor or its insolvency estate — the enacting State may wish to consider adding the following wording to paragraph 3(d): “and the cause of action relating to the recovery or payment of those sums arose after the commencement of insolvency proceedings in respect of the debtor”; or

(e) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary or out-of-court restructuring agreement should be approved. With respect to the list of examples, that approach may avoid concerns that including examples in the definition could raise uncertainty as to how the list should be interpreted.”

- (ii) Was issued [on or] after the commencement of the insolvency proceeding to which it is related; and
- (iii) Affects the [interests of the] insolvency estate.

For the purposes of this definition:

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

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

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

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

2. An “insolvency-related [foreign] judgment” does not include a judgment commencing an insolvency proceeding.

Article 3. International obligations of this State

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.

[Article 3 bis. International obligations of this State

1. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after this Law comes into force), and that treaty applies to the judgment.¹⁰

[1bis. A treaty applies [to a judgment] for the purposes of paragraph 1 if it is a treaty to which this State is a party, and is one which is open to accession by the State in which the judgment was issued.]¹¹

2. A judgment is to be treated for the purposes of paragraph 1 of this article as falling within the class of judgments to which a treaty applies even where the particular judgment is not enforceable under the treaty because of the particular circumstances of the case.]

Article 4. Competent court or authority

1. The functions referred to in this Law relating to recognition and enforcement of an insolvency-related [foreign] judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting*

¹⁰ The words previously at the end of para. 1 (“or where the provisions of the law of this State on recognition of insolvency proceedings apply to that judgment”), which did not relate to the international obligations of the enacting State, but rather to the relationship of the draft text to the existing legislation of an enacting State, have been added to the issues addressed in footnote 3.

¹¹ Para. 1bis has been added to draft art. 3bis and it remains in square brackets following the fiftieth session (A/CN.9/898, paras. 14-17). With respect to this para., it might be noted that other instruments dealing with the recognition and enforcement of judgments, e.g. the draft Hague Conference text, apply only as between States that are contracting parties and not by virtue of the instrument being open for accession, but not acceded to, by one of the relevant States (see the draft Hague Conference text, art. 17).

State] and by any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.¹²

Article 5. Authorization to [seek recognition and enforcement of an insolvency-related judgment in a foreign State] [act in another State 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 seek recognition and enforcement of an insolvency-related judgment in another State, as permitted by the applicable foreign law] [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].¹³

Article 6. Additional assistance under other laws

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

Article 7. Public policy exception

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

Article 8. Interpretation

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

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

1. An insolvency-related [foreign] judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.¹⁴
2. Recognition and enforcement of an insolvency-related [foreign] judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make enforcement conditional on the provision of such security as it shall determine.

¹² The words at the end of the paragraph have been added pursuant to a decision at the fiftieth session (A/CN.9/898, para. 19) to broaden art. 4 beyond any specified court to address courts before which recognition may be raised as an incidental question or as a defence.

¹³ It has been suggested that the first alternative text in draft art. 5 may not be sufficiently broad to capture all of the acts that might be covered by the draft text. Accordingly, it is suggested that the formulation “authorized to act in another State”, based on the language of art. 5 of the Model Law, might resolve that concern in the draft article.

¹⁴ Para. 1 has been revised to align it with the formulation used in art. 4 (3) of the draft Hague Conference text.

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

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. [The issue of recognition may also be raised as a defence by an insolvency representative or [...] or as an incidental question in the course of proceedings taking place in a court referred to in article 4].¹⁵

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

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

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

(c) Evidence as required by the law of this State that the party against whom relief is sought was notified that recognition and enforcement of the insolvency-related [foreign] judgment was being sought in this State; and

(d) 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.

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

An insolvency-related [foreign] judgment shall be recognized and enforced provided:

(a) The requirements of article 9, paragraph 1 with respect to effectiveness and enforceability are met;¹⁶

(b) The person seeking recognition and enforcement of the insolvency-related [foreign] judgment is a person or body¹⁷ within the meaning of article 2, subparagraph (b) or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

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

¹⁵ A proposal was made at the fiftieth session (A/CN.9/898, para. 25) to add the following as a separate provision: "The recognition of an insolvency-related judgment may be raised by an insolvency representative or any other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment by way of defence in the course of proceedings taking place in the court referred to in article 4 or in another court of this State, and should be accompanied by the documents specified in article 10 (2)." A version of that drafting has been added to the chapeau. However, the Working Group may wish to consider who may seek to raise recognition by way of defence or as an incidental question, e.g. whether it would be limited to the insolvency representative or the person authorised to seek recognition and enforcement of the judgment or include other persons. Art. 10 has otherwise been revised in accordance with

A/CN.9/898, para. 26.

¹⁶ A/CN.9/898, para. 27.

¹⁷ A/CN.9/898, para. 27.

- (d) Recognition and enforcement is sought from [or arises by way of defence or as an incidental question before]¹⁸ a court referred to in article 4; and
- (e) Articles 7 and 12 do not apply.

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

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

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

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

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

[(b) The judgment was obtained by fraud [in connection with a matter of procedure]];¹⁹

(c) The judgment is inconsistent with a judgment²⁰ issued in this State in a dispute involving the same parties;

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

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings or would be inconsistent with a stay or other order issued in insolvency proceedings relating to the same debtor commenced in this State or another State;²¹

(f) The judgment falls within article 2, subparagraph (e) (v) and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:²²

(i) The court exercised jurisdiction on the basis of the [express] consent [or submission] of the party against whom the judgment was issued; [The court exercised jurisdiction on the basis that the party against whom the judgment was issued entered an appearance and presented their case without contesting

¹⁸ The words in square brackets in subpara. 11 (d) have been included on the basis that the word "sought" by itself may not be sufficient to include cases where recognition arises by way of defence or as an incidental question.

¹⁹ Subpara. 12 (b) was placed in square brackets pending further consideration ([A/CN.9/898](#), para. 32).

²⁰ The word "prior" has been deleted from subpara. 12 (c) ([A/CN.9/898](#), para. 33).

²¹ Subpara. 12 (e) has been revised in accordance with [A/CN.9/898](#), para. 32.

²² Subpara. 12 (g) has been revised in accordance with [A/CN.9/898](#), para. 36.

jurisdiction, provided that the law of the originating State permitted jurisdiction to be contested;]²³

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

(iii) The court exercised jurisdiction on a basis that was not inconsistent with the law of this State;²⁴

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

(h) The judgment is related to an insolvency proceeding that [is not recognizable] [has not been, could not be or could not have been recognized] under [insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency].²⁵

[The judgment relates to a debtor that had neither the centre of its main interests nor an establishment in the originating State, unless the judgment relates solely to assets that were located in the originating State at the time the insolvency proceeding [to which it is related] commenced.]

Article 13. Equivalent effect

1. An insolvency-related [foreign] judgment recognized or enforceable under this Law shall be given the same effect it has in the originating State.

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

Article 14. Severability

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

Article 15. Provisional relief

1. From the time recognition and enforcement of an insolvency-related [foreign] judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related [foreign]

²³ Additional language has been included in subpara. 12 (g) (i) as decided at the fiftieth session (A/CN.9/898, para. 37), to more clearly explain what is meant by the word “express”. It might be noted that the equivalent provision in the draft Hague Conference text (art. 5 (f)) now includes the following drafting: “The defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law.”

²⁴ Subparas. previously numbered 12 (g) (iv) and (v) have been deleted in accordance with A/CN.9/898, paras. 40-41.

²⁵ The first sentence of subpara. 12 (h) has been revised in accordance with A/CN.9/898, para. 42 and alternative language proposed to simplify the drafting, referring to a judgment that “is not recognizable” under that Model Law. Since no comment was made with respect to the second sentence it remains in square brackets for further consideration; a few changes to the language of the subpara. have been made to conform it to the changes made to the definitions in art. 2.

judgment,²⁶ the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 10, paragraph 1, grant relief of a provisional nature, including:

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

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

2. *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]*

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

States that have enacted the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact article 16

Article 16. Recognition of an insolvency-related [foreign] judgment under *[insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency]*²⁷

Variant 1

For greater certainty, the relief available under *[insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency]* includes recognition and enforcement of an insolvency-related [foreign] judgment.

Variant 2

Where an insolvency-related [foreign] judgment relates to:

(a) Insolvency proceedings, whether pending or closed, recognized under *[insert a cross-reference to the legislation of this State enacting the Model Law on Cross-Border Insolvency]*; or

(b) The debtor in respect of which those insolvency proceedings commenced, the relief available in respect of those insolvency proceedings under *[insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency]* includes recognition and enforcement of that judgment.

²⁶ The text of draft art. 15, para. 1 has been retained as drafted and the square brackets removed in accordance with A/CN.9/898, para. 45.

²⁷ This art. was proposed at the fiftieth session (A/CN.9/898, para. 41) to replace subparas. (g) (iv) and (v) of draft art. 12. Since this draft art. does not establish a ground for refusal of recognition, but relates to interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, it has been placed at the end of the draft instrument. Variant 1 reflects the language as proposed at the fiftieth session. Variant 2 attempts to clarify the concerns giving rise to this provision and separate the various elements that might be included in such a provision.