

**Third Meeting of the Special Commission  
on the Recognition and Enforcement of Foreign Judgments  
13-17 November 2017**

<b>Document</b>	Preliminary Document <input type="checkbox"/> Procedural Document <input type="checkbox"/> Information Document <input checked="" type="checkbox"/>	No 12 of October 2017
<b>Title</b>	UNCITRAL draft model law on the recognition and enforcement of insolvency-related judgments – <i>available in English only</i>	
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<b>Agenda item</b>		
<b>Mandate(s)</b>		
<b>Objective</b>		
<b>Action to be taken</b>	For Approval <input type="checkbox"/> For Decision <input type="checkbox"/> For Information <input checked="" type="checkbox"/>	
<b>Annexes</b>	N/A	
<b>Related documents</b>		

## **UNCITRAL draft model law on the recognition and enforcement of insolvency-related judgments**

*Prepared by Jenny Clift, Principal Legal Officer, UNCITRAL Secretariat, October 2017.*

### **Objectives**

1. Working Group V is developing a model law on the recognition and enforcement of insolvency-related judgments as a stand-alone instrument; it does not form part of the UNCITRAL 1997 Model Law on Cross-Border Insolvency (MLCBI), although related to that text, as reflected in several provisions.<sup>1</sup>

### **Scope**

2. The draft model law should apply to the recognition and enforcement of insolvency-related judgments rendered in a foreign proceeding; the insolvency proceeding to which the judgment relates could be either a foreign or a local proceeding.<sup>2</sup>

3. At this stage of the draft, no distinction is drawn between the notions of recognition and enforcement, although it is noted that while recognition of a judgment should precede enforcement, not all judgments require enforcement.<sup>3</sup> Accordingly, the text refers generally to “recognition and enforcement”. This usage needs to be further examined by the Working Group to consider whether any articles might require more specific references to recognition “or” enforcement.

### **Definitions**

4. Working Group V has adopted the following draft definitions in draft article 2:

“(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 by the court. An interim measure of protection is not to be considered a judgment for the purposes of this Law.”<sup>4</sup>

“(d) ‘Insolvency-related judgment’ means a judgment that:

(i) [Is related to] [Derives directly from or is closely connected to] [Stems intrinsically from or is materially associated with] an insolvency proceeding;

(ii) Was issued on or after the commencement of the insolvency proceeding to which it is related; and

(iii) Affects the insolvency estate;

and subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has [been concluded] [closed].

For the purposes of [this definition] [subparagraph (d)]:

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

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<sup>1</sup> Report of Working Group V (Insolvency Law) on the work of its forty-sixth session (Vienna, 15-19 December 2014) A/CN.9/829, paras 60 and 74. The text of the MLCBI is available at [http://www.uncitral.org/uncitral/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html).

<sup>2</sup> The most recent draft of the model law is contained in document A/CN.9/WG.V/WP.150.

<sup>3</sup> Draft guide to enactment contained in A/CN.9/WG.V/WP.151, paras. 22-24.

<sup>4</sup> See art. 2(c) of the draft model law, A/CN.9/WG.V/WP.150.

(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."

5. Examples of the types of judgment that might be considered an insolvency-related judgment that were previously included in the definition have been moved to the draft guide to enactment of the model law.<sup>5</sup>

6. The issue of substance to be resolved with respect to the definitions is the language to be used in subparagraph (d) to describe the connection or relationship between the judgment and the relevant insolvency proceeding. Other text in square brackets reflects possible drafting revisions.

### ***Substantive provisions***

7. Draft article 3 adopts two conflicts clauses to avoid overlaps and conflicts. Paragraph 1 is drawn from the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and provides that in the event of a conflict between the model law and a treaty obligation, the treaty prevails. Paragraph 2 provides that the model law does not apply 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.

8. Draft articles 4-8 are based upon articles 4-8 of the MLCBI.

9. Draft article 9 draws upon article 4, paragraphs 3 and 4 of the proposed Hague Conference draft text on judgments.

10. Draft article 10 specifies the procedure for seeking recognition, including providing for the issue of recognition to be raised as a defence or incidental question in the course of proceedings. The procedure outlined is largely based upon the procedure for seeking recognition under the MLCBI.

11. Draft article 11 addresses provisional relief and draft article 12 the decision to recognize and enforce an insolvency-related judgment. The latter provision is based upon the MLCBI, with the goal of ensuring recognition and enforcement if the conditions specified in the article are met.

12. Draft article 13 specifies the grounds for refusal of recognition. A public policy exception to recognition and enforcement is contained in draft article 7 of the draft model law, to which draft article 13 is subject. Some of the grounds for refusal in draft article 13 draw upon the grounds included in articles 5 and 7 of the Hague Conference draft text as follows:

Subparagraph (a) is based upon article 7, subparagraph 1(a);

Subparagraph (b) is the same as article 7, subparagraph 1(b);

Subparagraph (c) is based upon article 7, subparagraph 1(e);

Subparagraph (d) is based upon article 7, subparagraph 1(f); and

Subparagraph (g)(i) and (ii) draw upon article 5, subparagraphs (e) and (f).

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<sup>5</sup> Draft guide to enactment, A/CN.9/WG.V/WP.151, para. 54.

13. Draft article 14 addresses equivalent effect and as such, draws upon article 9 of the proposed Hague Conference draft text, while draft article 15, which addresses severability, is based upon article 10 of that draft Hague Conference text.

14. Draft articles 13 (h) and X, both optional provisions for possible enactment by States that have enacted the MLCBI, address the relationship between the draft model law and the MLCBI. This relationship is explained further in the draft guide to enactment.<sup>6</sup> Draft article 13(h) seeks to preserve the possibility of enforcing a judgment that comes from a State in which the insolvency debtor has neither its COMI nor an establishment (and thus an insolvency proceeding from that State would not be capable of recognition under the MLCBI), provided certain conditions are met. Draft article X addresses interpretation of the scope of article 21 of the MLCBI in terms of the recognition and enforcement of a judgment.

### ***Status of work***

15. At its fifty-first session (May 2017), Working Group V considered a revised version of the draft model law.<sup>7</sup> The draft model law and the draft guide to enactment will be considered at the fifty-second session (18-22 December 2017), with a view to finalizing both texts and circulating them to States for comment in time for reference to the Commission in 2018 for finalization and adoption.

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<sup>6</sup> *Ibid.*, paras. 29-34.

<sup>7</sup> The report of the fifty-first session is contained in document A/CN.9/903.