

JUDGMENTS  
JUGEMENTS

Info. Doc. No 1  
Doc. info. No 1

May / mai 2016

(E)



## **ONGOING UNCITRAL WORK IN THE AREA OF JUDGMENTS**

*prepared by the Permanent Bureau  
in co-operation with the UNCITRAL Secretariat*

\* \* \*

## **TRAVAUX EN COURS À CNUDCI DANS LE DOMAINE DES JUGEMENTS**

*préparé par le Bureau Permanent  
en coopération avec le Secrétariat de la CNUDCI*

*(disponible en anglais uniquement)*

*Information Document No 1 of May 2016 for the attention of the Special Commission  
of June 2016 on the Recognition and Enforcement of Foreign Judgments*

*Document d'information No 1 de mai 2016 à l'attention de la Commission spéciale  
de juin 2016 sur la reconnaissance et l'exécution des jugements étrangers*

Churchillplein 6b, 2517 JW The Hague - La Haye | The Netherlands - Pays-Bas  
☎ +31 (70) 363 3303 📠 +31 (70) 360 4867 | secretariat@hcch.net | www.hcch.net

Asia Pacific Regional Office - Bureau régional Asie-Pacifique | S.A.R. of Hong Kong - R.A.S. de Hong Kong | ☎ +852 2858 9912  
Latin American Regional Office - Bureau régional Amérique latine | Buenos Aires | Argentina - Argentine | ☎ +54 (11) 4310 8372

## A. PRELIMINARY REMARKS

1. The Permanent Bureau has been following work of other international organisations whose scope may overlap with the Judgments Project. This was done in order to inform the discussions of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments (“Special Commission”), and was recommended by the Working Group on the Judgments Project.<sup>1</sup> In particular, the Permanent Bureau has been observing the current activity of two Working Groups instituted in the framework of the United Nations Commission on International Trade Law (“UNCITRAL”):

- a. Working Group II on Arbitration and Conciliation, in the part of its activity which focuses on enforcement of settlement agreements resulting from international commercial conciliation;<sup>2</sup> and
- b. Working Group V on Insolvency Law, which was given a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments.<sup>3</sup>

2. The Permanent Bureau, in co-operation with the UNCITRAL Secretariat, has prepared this Information Document, which outlines the salient features of the activities of UNCITRAL’s Working Group II and Working Group V, respectively. A representative of the UNCITRAL Secretariat will attend the first meeting of the Special Commission, and will be able to provide additional information if requested by the Special Commission.

3. This Information Document briefly addresses the objectives, scope, and status of the work carried out by the abovementioned Working Groups.

## B. RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS

4. One of the current projects of Working Group V is the development of a Draft Model Law on the recognition and enforcement of insolvency-related judgments (“Draft Model Law”).<sup>4</sup> The Draft Model Law takes into account in several parts the provisions of the Proposed Draft Text.<sup>5</sup>

5. Article 2(1)(e) of the Proposed Draft Text excludes “insolvency, composition and analogous matters” from its scope of application *ratione materiae*. This draws from Article 2(2)(e) of the 2005 Choice of Court Convention. In the framework of the 2005 Choice of Court Convention, this exclusion is construed narrowly; in fact, proceedings are only excluded from the scope of the 2005 Choice of Court Convention if they directly concern insolvency. The Hartley / Dogauchi Report notes that insolvency covers the bankruptcy of individuals as well as the winding-up or liquidation of corporations that are insolvent, but does not cover the winding-up or liquidation of corporations for reasons other

---

<sup>1</sup> With respect to the usefulness of following ongoing developments of international instruments, see the suggestion put forth by the Working Group on the Judgments Project in Prel. Doc. 7A of November 2015 for the attention of the Council on General Affairs and Policy of the Conference, p. 5, as well as Prel. Doc. No 2 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments, paras 34 and 239-240. Information concerning the developments of the Judgments Project from 2010 to date may be retrieved at <[www.hcch.net](http://www.hcch.net)>, under “Judgments” and “Recent developments (2010 onwards)”.

<sup>2</sup> More information is available at <<http://www.uncitral.org/uncitral/en/index.html>> under “Working Group II: Arbitration and Conciliation”.

<sup>3</sup> More information is available at <<http://www.uncitral.org/uncitral/en/index.html>> under “Working Group V: Insolvency Law”.

<sup>4</sup> See the latest available document: A/CN.9/WG.V/WP.138 Insolvency Law Cross-border recognition and enforcement of insolvency related judgements. Note by the Secretariat of 19 February 2016.

<sup>5</sup> Prel. Doc. No 1 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments (hereinafter: “Proposed Draft Text”). For instance, variant 2 of the definition of judgment provided at Art. 2 of the Draft Model Law includes additional language (the proviso in the second sentence) to reflect changes made to the definition of the term “judgment” in the Proposed Draft Text (Art. 3(1)(b)). With respect to the effect and enforceability of an insolvency-related judgment in the State in which it was issued, Art. 7-*bis* of the Draft Model Law provides that “An insolvency judgment shall be recognized and enforced only if it has effect and is enforceable in the State in which it was issued”: the addition of Art. 7-*bis* was suggested to address the issue of finality of a judgment, and it is based on Art. 4(3) of the Proposed Draft Text. Art. 8-*bis* of the Draft Model Law, on postponement or refusal of recognition and enforcement, repeats the first two sentences of Art. 4(4) of the Proposed Draft Text. Finally, Art. 12 of the Draft Model Law, on severability, is based on Art. 14 of the Proposed Draft Text.

than insolvency (which is dealt with by Art. 2(2)(m) of the Choice of Court Convention). The term “composition” refers to procedures whereby 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 matters” covers a broad range of other methods whereby insolvent persons or entities can be assisted to regain solvency while continuing to trade.<sup>6</sup>

6. In comparison, Article 2(d) of the Draft Model Law defines an insolvency-related judgment as a judgment that is “closely related to a foreign proceeding and was issued after the commencement of that proceeding. A judgment is presumed to be ‘closely related to a foreign proceeding’ if it has an effect upon the insolvency estate of the debtor and either is based on a law relating to insolvency or, due to the nature of its underlying claims, would not have been issued without the commencement of the foreign proceeding”.

7. Drawing a clear distinction between the two scopes of application becomes all the more pertinent in light of the fact that Article 3-*bis* of the Draft Model Law adopts a “conflict clause” to avoid overlaps and conflicts. It provides that “1. This [Law] shall not apply to an insolvency-related judgement 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 insolvency-related judgement.”

### *Objectives*

8. Working Group V agreed that their model law or model legislative provisions on the recognition and enforcement of insolvency-related judgments should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL 1997 Model Law on Cross-Border Insolvency. However, Working Group V also established that the 1997 Model Law provided an appropriate context for the new instrument.<sup>7</sup>

### *Scope*

9. The future Model Law should apply to the recognition and enforcement of insolvency-related judgments rendered in a foreign proceeding. Working Group V has proposed the following definitions:

10. “*Foreign proceeding*”: 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 a debtor are or were subject to control or supervision by [a foreign] court for the purpose of reorganization or liquidation;<sup>8</sup>

11. “*Insolvency-related judgement*”: A judgment that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. A judgment is presumed to be “closely related to a foreign proceeding” if it has an effect upon the insolvency estate of the debtor and either is based on a law relating to insolvency or, due to the nature of its underlying claims, would not have been issued without the commencement of the foreign proceeding.<sup>9</sup>

12. An insolvency-related judgment would include any equitable relief, including the establishment of a constructive trust, provided in the judgment itself or required for its enforcement. Insolvency-related judgments may include, [inter alia,] judgments concerning any of the following matters:

---

<sup>6</sup> Hartley / Dogauchi Report, para. 56. On the peculiarities that justify a separate treatment of cross-border insolvency from other cross-border civil and commercial matters see the *Report on the Convention on Insolvency Proceedings* by Miguel Virgos and Etienne Schmit (“Virgos / Schmidt Report”), EU Council reference 6500/1/96, REV 1 DRS 8 (CFC), 8 July 1996, paras 8-9, where it is observed that “insolvency proceedings are collective proceedings. Collective action needs clearly determined legal positions to provide for an adequate bargaining environment. This is true not only once the insolvency proceedings have been opened, but also before they have been opened (when the debtor is already in economic difficulties), as the rights ‘in bankruptcy’ will influence negotiations for a possible ‘pre-bankruptcy’ reorganization”.

<sup>7</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 Model Law is available at [http://www.uncitral.org/uncitral/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html).

<sup>8</sup> See Art. 2(a) of the Draft Model Law, A/CN.9/WG.V/WP.138.

<sup>9</sup> See Art. 2(d) of the Draft Model Law, A/CN.9/WG.V/WP.138.

- (i) Turnover of property of an insolvency estate;
- (ii) Sums and assets due to an insolvency estate [pursuant to an obligation arising after the commencement of the foreign proceeding];
- (iii) Sale of assets by an insolvency estate;
- (iv) Requirements for accounting related to a foreign proceeding;
- (v) Overturn of transactions involving the debtor or assets of an insolvency estate that have had the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors;
- (vi) Modification or enforcement of a stay of actions in a foreign proceeding;
- (vii) Validity [and effectiveness] of a secured claim;
- (viii) A cause of action pursued by a creditor with approval of the court, based on [an insolvency] [a foreign] representative's decision not to pursue that cause of action [where any judgment arising from that action would otherwise be enforceable under this Law];
- (ix) Liability of a director in the period approaching insolvency [that could be pursued by or on behalf of an insolvency estate];
- (x) Confirmation of a plan of reorganization or liquidation or approval of a [composition] [voluntary restructuring agreement] [in a foreign proceeding];
- (xi) The discharge of a particular debt;
- (xii) Recognition of the discharge of a debtor; and
- (xiii) [A cause of action [related to insolvency] pursued by a party to whom it has been assigned by a foreign representative in accordance with the applicable law] [where any judgment arising from that action would otherwise be enforceable under this Law].

#### *Status of work*

13. At its forty-ninth session, Working Group V considered a revised version of the Draft Model Law on the recognition and enforcement of insolvency-related judgments, which reflected the decisions and proposals made at the forty-eighth session.<sup>10</sup>

### **C. ENFORCEABILITY OF INTERNATIONAL COMMERCIAL SETTLEMENT AGREEMENTS RESULTING FROM CONCILIATION**

14. Working Group II aims to identify relevant problems and develop possible solutions with respect to the enforcement of international commercial settlement agreements resulting from conciliation. Such solutions include the possible preparation of a convention, model provisions or guidance texts.<sup>11</sup>

15. In Working Group II it was cautioned that the inclusion of settlement agreements that were recorded in a judicial decision within the scope of the instrument could overlap or conflict with the Judgments Project (see Art. 10 of the Proposed Draft Text), as well as the 2005 Hague Convention on Choice of Court Agreements (Art. 12). Such inclusion could result in unnecessary complications in the implementation of the future instrument and possibly open doors to abuse by parties. Along the same line, it was mentioned that even if a judicial decision recorded the terms of a settlement agreement, it deserved a different treatment and should be duly enforced under the relevant regime. Accordingly, it was generally felt that a settlement agreement recorded in a judicial decision should not fall within the scope of the instrument.<sup>12</sup>

16. Overall, Working Group II is mindful of the need to ensure that their work on the enforceability of settlement agreements resulting from conciliation does not duplicate work undertaken by the

<sup>10</sup> See A/CN.9/WG.V/WP.138.

<sup>11</sup> *Report of the United Nations Commission on International Trade Law. Forty-eighth session (29 June-17 July 2015) A/70/17*, para. 136. For further information, see also the note prepared by UNCITRAL's Secretariat on *Settlement of Commercial Disputes. International commercial conciliation: enforceability of settlement agreements document*, A/CN.9/WG.II/WP.195, paras 59-64.

<sup>12</sup> A/CN.9/867, para. 123.

Hague Conference on Private International Law (namely, the Judgments Project, as well as the 2005 Hague Convention on Choice of Court Agreements).<sup>13</sup>

17. For instance, acknowledging that a settlement agreement might include a dispute resolution clause, Working Group II considered that the future instrument on the enforceability of international commercial settlement agreements resulting from conciliation would not need to include any provisions on the matter, as the treatment of such dispute resolution clauses were dealt with in other texts (e.g., the 2005 Convention on Choice of Court Agreements).<sup>14</sup>

18. However, careful consideration is needed to ensure co-ordination between the two future instruments, and avoid any areas of possible overlays.

19. For instance, it is recommendable that the difference between judicial and non-judicial settlements be indicated in a clear and consistent manner in the two future instruments. This is due to the fact that the distinction may be hard to discern in situations such as when a settlement agreement results from (i) a judge's initiation of the conciliation process with a third party acting as a conciliator, or (ii) a judge's facilitation of an amicable settlement. However, both types of settlement agreements would fall in the scope of the future instrument on the enforceability of international commercial settlement agreements resulting from conciliation (see also *infra*, para. 29). Therefore, both the Explanatory Report of the future Convention on the recognition and enforcement of judgments and UNCITRAL's Guide to enactment and use of its future instrument should provide a careful and coherent representation of what qualifies as a judicial settlement for the purposes of the two instruments in light of such borderline situations.<sup>15</sup> Similarly, careful consideration and consistent interpretation should be provided with respect to (i) settlement agreements that were recorded in a judicial decision, and (ii) a judicial decision recording the terms of a settlement agreement (see *supra*, para. 15).

20. Additionally, the interrelationship between the effects of the enforceability of an international commercial settlement agreement resulting from conciliation and Article 7(1)(e)-(f) of the Proposed Draft Text is another area that may be worthy of consideration. Should a settlement agreement that is eligible for enforcement under UNCITRAL's future instrument be construed as having comparable legal effects to those of a judgment given in the requested State that enables the application of either Article 7(1)(e) or (f) of the Proposed Draft Text? That is, should a ground for refusing recognition or enforcement of a judgment arise if the judgment is inconsistent with a settlement agreement rendered in the same State, or in another State, respectively? Also, should an earlier settlement agreement which was reached in another State and is eligible for enforcement under UNCITRAL's future instrument be construed as having legal effects that are comparable to those of a judgment for the purposes of objecting to the recognition and enforcement of a judgment given in accordance with Article 7(1)(f) of the Proposed Draft Text? According to Article 3(1)(b) of the Proposed Draft Text, which defines judgment as "any decision in the merits given by a court", this should not be the case. However, if this understanding is adopted, inconsistent settlement agreements and judgments may result, to the detriment of legal certainty and predictability of the law.

### *Objectives*

21. A regime of expedited enforcement of settlements reached during international commercial conciliation would increase both the attractiveness of conciliation and legal certainty.<sup>16</sup>

22. Article 14 of the 2002 Model Law leaves the issue of enforceability of settlement agreements to the applicable domestic law. In general, settlement agreements reached through conciliation are already enforceable as contracts between the parties. However, enforcement under contract law may be burdensome and time-consuming, thus undermining the attractiveness of conciliation. In deciding

---

<sup>13</sup> A/CN.9/867, para. 91.

<sup>14</sup> A/CN.9/867, para. 177.

<sup>15</sup> See the commentary to Art. 10 of the Proposed Draft Text in Prel. Doc. No 2 of May 2016, cit., paras XX. See, further, Art. 12 of the 2005 Choice of Court Convention and the Hartley / Dogauchi Report, paras. 206-209.

<sup>16</sup> See the commentary on Article 14 in *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use – 2002*, para. 87.

whether to invest time and resources in the process of conciliation, parties may want greater certainty that, if they do reach a settlement, enforcement will be effective and not costly.<sup>17</sup>

23. Moreover, bolstering enforceability across borders helps promote finality in settlement of cross-border disputes to the extent that it reduces the possibility of parties pursuing duplicative litigation in other jurisdictions.

### Scope

24. The future instrument should apply to the enforcement of international commercial settlement agreements resulting from conciliation.<sup>18</sup>

25. *"International"*: Within Working Group II, it was widely felt that the scope of the instrument should be limited to "international" settlement agreements and that the instrument should provide clear and simple criteria for determining whether or not a settlement agreement falls within the scope of the instrument.<sup>19</sup>

26. *"Commercial"*: Working Group II considered how to define the commercial nature of the settlement agreement. Preference was generally expressed for stating in general terms that the instrument would apply to commercial settlement agreements, without providing for an illustrative list or definition of the term "commercial".<sup>20</sup>

27. *"Settlement agreement"*: "Settlement agreement" has currently been defined as "A settlement agreement is an agreement in writing that is concluded by the parties to a commercial dispute, that results from conciliation, and that resolves all or part of the dispute."<sup>21</sup>

28. With respect to settlement agreements reached during judicial proceedings but not recorded in a judicial decision, it was widely felt that they should fall within the scope of the instrument. It was mentioned that even if the parties initially sought to resolve their dispute through judicial proceedings, that should not result in excluding the settlement agreement from the scope of the instrument, as long as the agreement resulted from conciliation and was not recorded in a judicial decision award (see *supra*, para. 15).<sup>22</sup>

29. In that context, Working Group II also considered the possible impact that the involvement of a judge in the conciliation process could have on the applicability of the instrument to settlement agreements resulting from that process. It was mentioned that there could be instances where a judge might initiate the conciliation process with a third party acting as a conciliator and where the judge might itself facilitate an amicable settlement, if permitted to do so. It was felt that a settlement agreement resulting from either scenario would fall under the scope of the instrument and that the mere involvement of a judge should not exclude the settlement agreement from the scope of the instrument.<sup>23</sup>

30. Working Group II reiterated its understanding that it would not be desirable for the instrument to include a blanket exclusion of settlement agreements involving government entities as those entities also engage in commercial activities and might seek to use conciliation to resolve disputes.<sup>24</sup>

31. *"Conciliation"*: Working Group II expressed its understanding that the instrument should apply to settlement agreements resulting only from conciliation. With respect to the possible definition of the term "conciliation", it was reiterated that it should be broad and inclusive, in order to cover different types of conciliation techniques.<sup>25</sup> It was also widely felt that the definition of "conciliation"

---

<sup>17</sup> UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use – 2002, paras 88-89.

<sup>18</sup> See Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015) A/CN.9/861, paras 19, 39, and 40.

<sup>19</sup> See the Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, 1-5 February 2016) A/CN.9/867, para. 94. Possible formulations of this notion are discussed *id.*, paras 95-101.

<sup>20</sup> A/CN.9/867, para. 103.

<sup>21</sup> A/CN.9/867, para. 132.

<sup>22</sup> A/CN.9/867, para. 125.

<sup>23</sup> A/CN.9/867, para. 131.

<sup>24</sup> A/CN.9/867, para. 109.

<sup>25</sup> A/CN.9/867, para. 116.

should not be overly prescriptive and should illustrate the key features of the process (*i.e.* that a third person assisted the parties to reach an amicable settlement of their dispute) irrespective of the terminology used to refer to that process. There was general support that the definition contained in Article 1(3) of UNCITRAL's 2002 Model Law on International Commercial Conciliation<sup>26</sup> provided a good basis for discussion.<sup>27</sup>

32. *Exclusions from scope:* Consumers, family and employment law matters are currently the only explicitly excluded matters.<sup>28</sup>

#### *Status of work*

33. At its sixty-fourth session, Working Group II agreed to further consider at a future session whether a settlement agreement would need to be given effect through a procedure akin to recognition and what legal value such a procedure would give to settlement agreements.<sup>29</sup> Possible defences to enforcement were considered, based on the assumption that the instrument would provide direct enforcement. It was reiterated that the defences in the instrument should be limited and not cumbersome for the enforcement authority to implement.<sup>30</sup>

---

<sup>26</sup> Art. 1(3) of the 2002 Model Law on International Commercial Conciliation states: "For the purposes of this Law, 'conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute". The text of the 2002 Model Law on International Commercial Conciliation is available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html).

<sup>27</sup> A/CN.9/867, para. 121.

<sup>28</sup> A/CN.9/867, para. 106.

<sup>29</sup> A/CN.9/867, para. 146.

<sup>30</sup> A/CN.9/867, para. 147.