

United Nations Model Law on Cross Border Insolvency (1997)

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United Nations Model Law on Cross Border Insolvency (1997) 1
ANNEX I - of the Report of the 30th session of UNCITRAL
(A/52/17)

PREAMBLE 2

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of: 3

- (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; 4
- (b) greater legal certainty for trade and investment; 5
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; 6
- (d) protection and maximization of the value of the debtor's assets; and 7
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment. 8

Chapter I. GENERAL PROVISIONS 9

Article 1. Scope of application 10

(1) This Law applies where: 11

- (a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or 12
- (b) assistance is sought in a foreign State in connection with a proceeding under [identify laws of the enacting State relating to insolvency]; or 13
- (c) a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or 14
- (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [identify laws of the enacting State relating to insolvency]. 15

(2) This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law]. 16

Article 2. Definitions 17

For the purposes of this Law: 18

- (a) "foreign proceeding" means a collective judicial or administrative proceeding in a 19

foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) “foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests; 20

(c) “foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article; 21

(d) “foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding; 22

(e) “foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding; 23

(f) “establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. 24

Article 3. International obligations of this State 25

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. 26

Article 4. [Competent court or authority](1) 27

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts, authority or authorities competent to perform those functions in the enacting State]. 28

Article 5. Authorization of [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to act in a foreign State 29

A [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law. 30

Article 6. Public policy exception 31

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 of this State. 32

Article 7. Additional assistance under other laws 33

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 representative under other laws of this State. 34

Article 8. Interpretation 35

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. 36

Chapter II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE 37

Article 9. Right of direct access 38

A foreign representative is entitled to apply directly to a court in this State. 39

Article 10. Limited jurisdiction 40

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application. 41

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency] 42

A foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met. 43

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency] 44

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [identify laws of the enacting State relating to insolvency]. 45

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency] 46

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State. 47

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].(2) 48

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency] 49

(1) Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known. 50

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required. 51

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall: 52

(a) indicate a reasonable time period for filing claims and specify the place for their filing; 53

(b) indicate whether secured creditors need to file their secured claims; and 54

(c) contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court. 55

Chapter III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF 56

Article 15. Application for recognition of a foreign proceeding 57

(1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. 58

(2) An application for recognition shall be accompanied by: 59

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or 60

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or 61

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. 62

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. 63

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State. 64

Article 16. Presumptions concerning recognition 65

(1) If the decision or certificate referred to in article 15(2) indicates that the foreign proceeding is a proceeding within the meaning of article 2(a) and that the foreign representative is a person or body within the meaning of article 2(d), the court is entitled to so presume. 66

(2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized. 67

(3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests. 68

Article 17. Decision to recognize a foreign proceeding 69

(1) Subject to article 6, a foreign proceeding shall be recognized if: 70

(a) the foreign proceeding is a proceeding within the meaning of article 2(a); 71

(b) the foreign representative applying for recognition is a person or body within the meaning of article 2(d); 72

(c) the application meets the requirements of article 15(2); and 73

(d) the application has been submitted to the court referred to in article 4. 74

(2) The foreign proceeding shall be recognized: 75

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or 76

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State. 77

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time. 78

(4) The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist. 79

Article 18. Subsequent information 80

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of: 81

(a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and 82

(b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative. 83

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding 84

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including: 85

(a) staying execution against the debtor's assets; 86

(b) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; 87

(c) any relief mentioned in article 21(1)(c), (d) and (g). 88

(2) [Insert provisions (or refer to provisions in force in the enacting State) relating to notice.] 89

(3) Unless extended under article 21(1)(f), the relief granted under this article terminates when the application for recognition is decided upon. 90

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding. 91

Article 20. Effects of recognition of a foreign main proceeding 92

(1) Upon recognition of a foreign proceeding that is a foreign main proceeding, 93

- (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; 94
- (b) execution against the debtor's assets is stayed; and 95
- (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. 96
- (2) The scope, and the modification or termination, of the stay and suspension referred to in paragraph (1) of this article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article]. 97
- (3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor. 98
- (4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding. 99

Article 21. Relief that may be granted upon recognition of a foreign proceeding 100

- (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including: 101
- (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20(1)(a); 102
- (b) staying execution against the debtor's assets to the extent it has not been stayed under article 20(1)(b); 103
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20(1)(c); 104
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; 105
- (e) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court; 106
- (f) extending relief granted under article 19(1); 107
- (g) granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State. 108
- (2) Upon recognition of a foreign proceeding, whether main or non-main, the court may, 109

at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding. 110

Article 22. Protection of creditors and other interested persons 111

(1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph (3) of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. 112

(2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate. 113

(3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief. 114

Article 23. Actions to avoid acts detrimental to creditors 115

(1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation]. 116

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding. 117

Article 24. Intervention by a foreign representative in proceedings in this State 118

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party. 119

Chapter IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES 120

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives 121

(1) In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]. 122

(2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives. 123

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives 124

(1) In matters referred to in article 1, a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives. 125

(2) The [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives. 126

Article 27. Forms of cooperation 127

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including: 128

(a) appointment of a person or body to act at the direction of the court; 129

(b) communication of information by any means considered appropriate by the court; 130

(c) coordination of the administration and supervision of the debtor's assets and affairs; 131

(d) approval or implementation by courts of agreements concerning the coordination of proceedings; 132

(e) coordination of concurrent proceedings regarding the same debtor; 133

(f) [the enacting State may wish to list additional forms or examples of cooperation]. 134

Chapter V. CONCURRENT PROCEEDINGS

135

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

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After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

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Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

138

Where a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

139

(a) when the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,

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(i) any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and

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(ii) if the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

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(b) when the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

143

(i) any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

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(ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in article 20(1) shall be modified or terminated pursuant to article 20(2) if inconsistent with the proceeding in this State;

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(c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

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Article 30. Coordination of more than one foreign proceeding

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In matters referred to in article 1, in respect of more than one foreign proceeding regard-

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ing the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding; 149

(b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding; 150

(c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings. 151

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding 152

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent. 153

Article 32. Rule of payment in concurrent proceedings 154

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received. 155

(1) A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision: 156

Nothing in this Law affects the provisions in force in this State governing the authority of [insert the title of the government-appointed person or body]. 157

(2) The enacting State may wish to consider the following alternative wording to replace article 13(2): 158

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference 159

claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

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