



Fellow of INSOL International

International Association of Restructuring, Insolvency & Bankruptcy Professionals

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

Report from the 47th Session, 26-29 May 2015, New York



By Lee Pascoe¹

Fellow, INSOL International
Libero Legal
(currently consulting to Mills
Oakley Lawyers)
Melbourne, Australia

New York was again the venue for some 120 insolvency lawyers, judges, academics and insolvency professionals from the state members of the United Nations Commission on International Trade (UNCITRAL) and various other governmental and non-governmental international organisations to meet for the biannual working group session on insolvency law (Working Group).

The discussions of the Working Group follow from mandates prescribed by UNCITRAL, to further progress the harmonisation and modernisation of the law of international trade through the use of legislative and non-legislative instruments in a number of key areas of commercial law including insolvency law.

The current three topics on the Working Group's agenda predominantly flow from a December 2013 decision that the Working Group should continue its work on the cross-border insolvency of multinational enterprise groups by developing provisions to extend the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) and the UNCITRAL Legislative Guide (Guide).

1. Directors Obligations in the Period Approaching Insolvency: Enterprise Groups

Preliminary consideration has been given, in many jurisdictions, to the concept of enterprise groups in insolvency scenarios. However, the question of the obligations of directors in such situations remains confused and in particular, the different obligations of directors of all or some members of an enterprise group does not appear to have been clearly addressed by domestic laws.

In December 2014 an expert group, from members of the

Working Group, reported to the Working Group as a whole on its proposals to address the situation by further developing recommendations 255-266 of part four of the Guide.² The proposal focuses on the obligations on directors and the reasonable steps that a director can take to satisfy such obligations, and the safeguards that should apply, in the enterprise group context in the period approaching insolvency. It has also been necessary to include additional recommendations to address the situation where a director holds an executive position in multiple companies within an enterprise group to address the potential conflicts that may arise and how such conflicts can be managed and/or addressed.

This work is now rapidly advancing toward completion. However, the Working Group confirmed at the May meeting that it would not be referring the text for adoption by the Commission whilst the work on the facilitation of cross-border insolvency of enterprise groups remains in its preliminary stages.

2. Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups

The Working Group used the May 2015 session to build on the work that had been done at previous sessions in developing a text to accommodate the management of enterprise groups in a cross-border insolvency to facilitate a "group insolvency solution" by way of a re-organisation or sale of the whole or part of a business or its assets. A "group insolvency solution" is intended to be a flexible concept dependant upon the circumstances of the enterprise group. However, it is anticipated that it will involve multiple insolvency proceedings in several jurisdictions with the objective of having such proceedings co-ordinated in a central State³.

It will be unsurprising to insolvency practitioners that these discussions are moving slowly while the Working Group works through issues such as the protection of the rights of stakeholders of each member company within an enterprise group, how to accommodate situations where group members have their centre of main interest in varying jurisdictions and how a cross-border insolvency of such a group could be commenced and centralised without offending well established principles of international law and the domestic laws of

¹ Lee was a participant at the 46th and 47th Working Group V sessions as a representative of the Law Association for Asia and the Pacific (LAWASIA).

² It is proposed that the additions will form an additional section of part four of the Guide.

³ Pg 3, A/CN.9/WG.V/WP.128, "Facilitating the cross-border insolvency of multinational enterprise groups. Note by the Secretariat," United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-seventh session, New York, 26-29 May 2015, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V15/016/07/PDF/V1501607.pdf>

each relevant group member.

Practical issues for the Working Group have included consideration of the necessary provisions of a State's domestic law to enable enterprise groups to manage such a group insolvency solution, the commencement of the necessary insolvency proceedings, voluntary participation of solvent group members and procedural co-ordination of the relevant proceedings.

Discussions also continue in relation to the necessary cross-border regime, to address issues such as recognition, relief and co-operation in cross-border insolvency proceedings, where a group insolvency solution is contemplated.

3. Cross-Border Recognition and Enforcement of Insolvency-Related Judgments

Finally, the Working Group was provided with a mandate in 2014 to develop a model law or model legislative provisions for the recognition and enforcement of insolvency-related judgments. The work follows the apparent conflicting approaches of the judiciary on the topic of recognition of

foreign insolvency judgments.⁴

The Working Group has determined that the text should be developed as a discrete model law (Judgments Model Law) with aspects of the content and structure drawing upon the Model Law⁵. In drafting the text the critical issue for consideration has been the scope of the judgments to be accommodated under the Judgments Model Law given the work being developed in The Hague, as part the Judgments Project,⁶ and also the need to maintain consistency with current operative instruments.⁷

The discussions of the Working Group will continue in Vienna in December 2015 where it is likely that the work will focus on the mandates in relation to facilitating the cross-border insolvency of enterprise groups and the further development of the Judgments Model Law.

Should anybody be interested in looking further at the development of the mandates and/or the future work of Working Group V all working papers and adopted reports are published at www.uncitral.org.

⁴ See *Rubin v Eurofinance SA*, [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895 and [2011] EWCA Civ 971) versus *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings PLC* [2006] 2 All ER (Comm) 695

⁵ A/CN.9/WG.V/WP.130, "Cross-border recognition and enforcement of insolvency-related judgements Note by the Secretariat," United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-seventh session, New York, 26-29 May 2015, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V15/017/25/PDF/V1501725.pdf>

⁶ The "Judgments Project" refers to the work being undertaken by Hague Conference on Private International Law on the international jurisdiction of courts and the recognition and enforcement of their judgments abroad.

⁷ Brussels Regulation (Council Regulation 44/2001) and Lugano Convention (L339/3)



INSOL International

INSOL BOARD DIRECTORS

Executive Committee Directors

Mark Robinson (Australia)	President
Adam Harris (South Africa)	Vice-President
Richard Heis (UK)	Treasurer
Julie Hertzberg	Executive Committee
Claire Broughton (UK)	Executive Director & Company Secretary

Board Directors

Scott Atkins	Australia	ARITA
Fellow, INSOL International		
Jasper Berkenbosch	The Netherlands	INSOLAD
Fellow, INSOL International		
Stephen Briscoe	Hong Kong	HKICPA
Paul M. Casey	Canada	CAIRP
Juanito Martin Damons	South Africa	SARIPA
Nick Edwards	UK	R3
Brendon Gibson	New Zealand	RITANZ
Melissa Kibler Knoll	USA	ABI
Prof. Li Shuguang*	P.R. China	
Jim Luby	Ireland	INSOL Europe
Leonardo Morato	Brazil	TMA
Andrew Thorp	BVI	RISA (BVI)
Mahesh Uttamchandani*	The World Bank	

*Nominated Director

Past Presidents

Ian K. Strang	(Canada)
Richard C. Turton	(UK)
C. Garth MacGirr	(Canada)
Richard A. Gitlin	(USA)
Stephen J. L. Adamson	(UK)
Dennis J. Cogle	(Australia)
R. Gordon Marantz	(Canada)
Neil Cooper	(UK)
John Lees	(Hong Kong)
Robert S. Hertzberg	(USA)
Sijmen de Ranitz	(Netherlands)
Robert O. Sanderson	(Canada)
Sumant Batra	(India)
Gordon Stewart	(UK)
James H.M. Sprayregen	(USA)

Scroll of Honour Recipients

1989	Sir Kenneth Cork	(UK)
1993	Ronald W. Harmer	(Australia)
1995	Gerry Weiss	(UK)
2001	Neil Cooper	(UK)
2001	Gerold Herrmann	(UNCITRAL)
2005	Stephen Adamson	(UK)
2010	Jenny Clift	(UNCITRAL)
2013	Ian Fletcher QC	(UK)