



United Nations Commission on International Trade Law

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Report of Working Group V (Insolvency Law) on the work of its forty-third session (New York, 15-19 April 2013)

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I. Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (Insolvency Law) (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. At its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The Working Group continued its discussion of topics (a) and (b) at its fortieth session in 2011 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.99, 100 and 101), at its forty-first session in 2012 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.103 and Add.1, 104 and 105), and at its forty-second session in 2012 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.107 and 108).

4. At its forty-third session in June 2010, the Commission discussed a proposal to study the feasibility of developing an international instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, para. 5). It was agreed that the Secretariat should prepare a comprehensive report on all or any number of the issues set forth in the proposal. At its forty-second session in 2012, the Working Group first considered this topic on the basis of a note prepared by the Secretariat (A/CN.9/WG.V/WP.109). The deliberations and conclusions of the Working Group on this topic are included in the report of that session (A/CN.9/763, paras. 95-96).

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its forty-third session in New York from 15-19 April 2013. The session was attended by representatives of the following States members of the Working Group: Argentina, Brazil, Canada, Chile, China, Colombia, Croatia, Czech Republic, El Salvador, France, Germany, India, Israel, Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Spain,

Thailand, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America.

6. The session was attended by observers from the following States: Denmark, Dominican Republic, Guatemala, Hungary, Indonesia, Kuwait, Lithuania, Nicaragua, Oman, Poland, Qatar and Switzerland.

7. The session was attended by the following non-member States: Holy See.

8. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: World Bank;

(b) *Invited inter-governmental organizations*: Islamic Development Bank (IDB);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), Inter-American Bar Association (IABA), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Sra. Maria del Pilar Escobar Pacas (El Salvador)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.111);

(b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.112);

(c) A note by the Secretariat on directors' obligations in the period approaching insolvency (A/CN.9/WG.V/WP.113);

(d) A note by the Secretariat on the centre of main interests in the context of an enterprise group (A/CN.9/WG.V/WP.114); and

(e) A note by the Secretariat on directors' obligations in the period approaching insolvency in the context of enterprise groups (A/CN.9/WG.V/WP.115).

11. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda, noting that there was no report on insolvency of large and complex financial institutions.

4. Consideration of (a) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; (c) the centre of main interests in the context of an enterprise group; and (d) directors' obligations in the period approaching insolvency in the context of enterprise groups.
5. Noting of the updates to the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.
6. Other business, including future work.
7. Adoption of the report.

III. Deliberations and decisions

12. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; (c) the centre of main interests in the context of an enterprise group; and (d) directors' obligations in the period approaching insolvency in the context of enterprise groups, on the basis of documents A/CN.9/WG.V/WP.112, A/CN.9/WG.V/WP.113, A/CN.9/WG.V/WP.114 and A/CN.9/WG.V/WP.115. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests

13. The Working Group started its discussion of the draft revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency as contained in document A/CN.9/WG.V/WP.112.

A. Purpose and origin of the Model Law

14. The Working Group agreed that the words "(enacting States)" in the second sentence should be deleted on the basis that the footnote in paragraph 3(a) explained the use of the words "enacting State". It was also agreed that the last sentence of paragraph 2 should be revised as follows: "By adopting legislation based upon the Model Law, States recognize that certain laws relating to insolvency may have to be or might have been amended in order to meet internationally recognized standards."

15. It was further agreed that with respect to the closing words of the second sentence of the chapeau of paragraph 3, the phrase "a certain level of harmonization" should be replaced with the phrase "and promote a uniform approach to cross-border insolvency."

16. With those amendments, the Working Group adopted the substance of paragraphs 1, 2, 3, 3A, 18, 4, 5, 6 and 7 as drafted.

B. Purpose of the Guide to Enactment and Interpretation

17. The Working Group adopted the substance of paragraphs 9 and 10 as drafted.

C. The Model Law as a vehicle for the harmonization of laws

18. The Working Group adopted the substance of paragraphs 20 and 21 as drafted.

D. Main features of the Model Law

19. It was suggested that under the heading “Cooperation and coordination”, reference should be made to cooperation in and coordination of insolvency proceedings in the context of enterprise groups. Noting paragraph 9 of the introduction to A/CN.9/WG.V/WP.112, the Working Group agreed to revert to this issue when it had completed its consideration of the draft text (see para. 52 below).

20. The Working Group adopted the substance of paragraphs 49A to 49D, 37A to 37H, 32, and 33A to 33G as drafted.

E. Article-by-article remarks

Preamble

21. The Working Group adopted the substance of paragraph 54 as drafted.

Use of the term “insolvency”

22. The Working Group considered a proposal to insert the following sentence at the end of paragraph 51: “Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a), of the Model Law only if the debtor is insolvent or in severe financial distress.” In association with that proposal it was noted that the footnote to paragraph 23B provided an explanation of the term “winding up”. After discussion, the Working Group approved that proposal. In the course of its discussion, the Working Group noted the need to ensure consistent use of the phrase “insolvency or severe financial distress” throughout the text. With that amendment, the Working Group adopted the substance of paragraph 51.

23. A related proposal, which did not receive sufficient support, was to revise the last sentence of paragraph 24B to delete the words “that does not seek to restructure the financial affairs of the entity, but rather” to ensure consistency with paragraph 51 as revised.

24. The Working Group adopted the substance of paragraph 51A as drafted.

“State”

25. The Working Group adopted the substance of paragraph 56 as drafted.

Chapter I. General provisions — articles 1-8

Article 1. Scope of application

26. The Working Group adopted the substance of paragraphs 59 and 65 as drafted.

Article 2. Definitions

Subparagraphs (a) to (f)

27. The Working Group agreed that the phrase “or possessed” should be inserted after the phrase “a foreign proceeding possesses” in the final sentence of paragraph 23.

28. With that amendment, the Working Group adopted the substance of paragraphs 68, 68A, 71, 72, 23 to 23C, 24 to 24G, 70, 31 to 31C, and 73 to 75B as drafted.

Article 3

29. The Working Group adopted the substance of paragraph 78 as drafted.

Articles 5 and 8

30. The Working Group adopted the substance of paragraphs 84 and 91 as drafted.

Chapter II. Access of foreign representatives and creditors to court in this State

Articles 9 to 12

31. The Working Group adopted the substance of paragraphs 93, 96, 98, and 101 to 102 as drafted.

Chapter III. Recognition of a foreign proceeding and relief

Article 15

32. The Working Group agreed to replace the word “fast” in the second sentence of paragraph 112 with the word “expedited”. With that amendment, the Working Group adopted the substance of paragraphs 112, 119 and 120 as drafted.

Article 16. Presumptions concerning recognition

Paragraph 1

33. The Working Group adopted the substance of paragraphs 122 to 122B as drafted.

Paragraph 3

34. In respect of paragraph 123B, the Working Group agreed to replace the words “is likely to be” with the words “may be at” in the second sentence.

35. The Working Group considered several proposals to revise paragraph 123C to clarify that the court continued to have an obligation to determine independently the location of the debtor's centre of main interests irrespective of whether or not there was a challenge to it being located at the place of registration. After discussion, there was insufficient support in the Working Group to adopt any of the proposals.

36. The Working Group adopted the substance of paragraph 123A to 123C as drafted.

Centre of main interests

37. The Working Group agreed to delete the word "always" in the fifth sentence of paragraph 123D. It was further agreed to delete in the penultimate sentence the words "Where it is uncertain that the debtor's place of registration is its centre of main interests" and replace them with the words "In those circumstances". With those amendments, the Working Group adopted the substance of paragraph 123D.

Factors relevant to the determination of centre of main interests

38. The Working Group agreed that the second sentence of paragraph 123F should be redrafted as follows: "The factors are the location: (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors." It was also agreed to add the words "as readily ascertainable by creditors" to the end of the final sentence of paragraph 123G.

39. With those amendments, the Working Group adopted the substance of paragraphs 123F, 123G and 123I as drafted.

Movement of centre of main interests

40. Having considered a proposal to delete paragraphs 123K and M, the Working Group agreed that they should be retained and adopted the substance of those paragraphs as drafted. The Working Group further considered footnote 22 to paragraph 123K and agreed that the second sentence should end after the words "third parties", deleting both the words "or undertaken as the result of insider exploitation or biased motivation" and the square brackets around the footnote.

Article 17. Decision to recognize a foreign proceeding

Paragraph 1

41. The Working Group adopted the substance of paragraphs 124 to 124C as drafted.

Paragraph 2

Date at which to determine centre of main interests and establishment

42. The Working Group adopted the substance of paragraphs 128A to D as drafted.

Abuse of process

43. The Working Group adopted the substance of paragraphs 123J and 123L as drafted.

Paragraphs 3 to 4

44. The Working Group adopted the substance of paragraphs 125 to 131 as drafted.

Article 18. Subsequent information

Subparagraphs (a) and (b)

45. The Working Group adopted the substance of paragraphs 133 and 134 as drafted.

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

Paragraphs 1 to 4

46. The substance of paragraphs 135 to 140 was adopted as drafted.

Article 20. Effects of recognition of a foreign main proceeding

47. The Working Group adopted the substance of paragraphs 141, 143, 144 to 146, 149, and 151 to 153 as drafted.

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

48. The Working Group adopted the substance of paragraphs 154, 156, 158 and 160 was adopted as drafted.

Article 22. Protection of creditors and other interested persons

49. The Working Group adopted the substance of paragraphs 162 to 164 as drafted.

Article 23. Actions to avoid acts detrimental to creditors

50. The substance of paragraphs 165 to 167 was adopted as drafted.

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

51. The Working Group adopted the substance of paragraph 170 as drafted.

Chapter IV. Cooperation with foreign courts and foreign representatives

52. The Working Group adopted the substance of paragraphs 173A, 181, 183 and 183A as drafted, with the addition of the following text to the footnote to paragraph 183A: “The Model Law applies to individual debtors whether corporate or natural. Part three of the Legislative Guide on Insolvency Law, however, addresses the treatment of enterprise groups in insolvency and recommendations 240 to 254 focus on cooperation and communication to facilitate the conduct of cross-border insolvency proceedings where they concern members of an enterprise group.” In support of that addition, it was noted that notwithstanding that the Model Law does not specifically apply to enterprise groups, the footnote should be included to draw attention to UNCITRAL’s work on enterprise groups (see para. 19 above).

Chapter V. Concurrent proceedings

53. The Working Group adopted the substance of paragraphs 184 to 186, 187A, 188 and 197 as drafted.

F. Assistance from the UNCITRAL Secretariat

54. The Working Group adopted the substance of paragraphs 201 and 202 as drafted.

V. Directors' obligations in the period approaching insolvency

55. The Working Group resumed its consideration of the topic of directors' obligations in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.113, focusing in the first instance on the draft recommendations.

A. Draft recommendations**Recommendations 1 and 2 — The obligations****Purpose of legislative provisions**

56. The Working Group adopted the substance of the purpose clause for draft recommendations 1 and 2 as drafted.

Contents of legislative provisions

57. It was proposed that the sequence of the recommendations be adjusted by placing recommendation 1 after recommendations 3 and 4 in order to avoid the need for the cross-references in recommendation 1, but that proposal was not taken up. The Working Group adopted the substance of draft recommendation 1 as drafted, with the deletion of the square brackets around the phrase “[accordance with]” and retention of the text.

58. The Working Group agreed to revise the phrase “not committing the company to enter into the types of transaction” to “not committing the company to the types of transaction” in subparagraph (a) of draft recommendation 2.

59. The Working Group agreed to revise the opening words of subparagraph (b) of draft recommendation 2 as follows: “Commencing or requesting the commencement of” in place of “Commencing” and to delete the words “where it is appropriate to do so or where it is required by national law” at the end of the sentence.

60. With those amendments, the Working Group adopted the substance of draft recommendations 1 and 2 as drafted.

Recommendation 3 — The time at which the obligation arises**Purpose of legislative provisions**

61. The Working Group agreed to revise “the obligations should arise” to “the obligations arise” at the end of purpose clause and to remove the square brackets.

With those amendments, the Working Group adopted the substance of the purpose clause as drafted.

Contents of legislative provisions

62. The Working Group adopted the substance of draft recommendation 3 as drafted.

Recommendation 4 — Persons that owe the obligations

Purpose of legislative provisions

63. The Working Group agreed to revise the phrase “identify the persons to whom the obligations should apply” to “identify the persons owing the obligations in recommendation 1” at the end of the purpose clause and to remove the square brackets. With those amendments, the Working Group adopted the substance of the purpose clause as drafted.

Contents of legislative provisions

64. The Working Group agreed to revise the phrase “the persons who owes the obligations” to “the persons owing the obligations in recommendation 1”. With that amendment, the Working Group adopted the substance of draft recommendation 4 as drafted.

Recommendation 5 and 6 — Liability

Purpose of legislative provisions

65. The Working Group adopted the substance of the purpose clause as drafted, deleting the square brackets around the text.

Contents of legislative provisions

66. The Working Group adopted the substance of draft recommendation 5 as drafted.

67. A proposal to merge draft recommendations 5 and 6 by adding the words “but only to the extent to which the breach caused loss or damage” to the end of draft recommendation 5 and deleting draft recommendation 6 did not receive sufficient support. The Working Group was of the view that the current drafting was clearer and that it was more appropriate to deal with the two issues addressed by the draft recommendations separately. The Working Group agreed to delete the square brackets and the word “for” and to retain the words “arising from” without the square brackets. With those amendments, the Working Group adopted draft recommendation 6 as drafted.

Recommendations 7 to 11

68. A proposal to relocate draft recommendation 7 (together with paragraphs 31 to 47 of the commentary) to section D on liability was supported on the basis that it addressed liability as opposed to the enforcement of the directors’ liabilities. As a consequence, it was further agreed that the purpose clause for recommendations 5 and 6 should be adjusted to add a new subparagraph (b) along the following lines:

“to identify defences to an allegation of breach of the obligations” and to renumber the current subparagraph (b) as subparagraph (c). It was also agreed that the heading to section E of the commentary should be renamed “Enforcement of directors’ liabilities”.

Purpose of legislative provisions

69. The Working Group agreed to revise the opening phrase of the purpose clause from “enforcement of the obligations” to “enforcement of directors’ liabilities” and to delete the square brackets. With that amendment, the Working Group adopted the substance of the purpose clause as drafted.

Recommendation 7 — Elements of liability and defences

Contents of legislative provisions

70. The Working Group adopted the substance of draft recommendation 7 as drafted.

Recommendation 8 — Remedies

Contents of legislative provisions

71. The Working Group agreed to delete the phrase “[as compensation for that breach]”. Reservations were expressed with respect to the second sentence, particularly as to its potential operation as a disincentive to directors to make loans to companies in the period approaching insolvency in order to stave off insolvency and after commencement of insolvency proceedings to facilitate reorganization and in terms of its relationship to recommendation 100 of the Legislative Guide. After considerable discussion, the Working Group approved draft recommendation 8 with the deletion of the second sentence.

Recommendation 9 — Conduct of actions for breach of the obligation

Contents of legislative provisions

72. The Working Group adopted the substance of draft recommendation 9 as drafted.

Recommendation 10 and 11 — Funding of actions for the breach of obligation

Contents of legislative provisions

73. The Working Group adopted the substance of draft recommendations 10 and 11 as drafted.

Recommendation 12 — Additional measures

Contents of legislative provisions

74. The Working Group recalled its discussion of the draft recommendation at its previous session. Various concerns were expressed as to the appropriateness of including the draft recommendation on the basis that it could not properly be considered part of the law relating to insolvency, but belonged instead in corporate or criminal laws, and that it could operate as a disincentive for directors to remain

on the boards of financially distressed companies to assist with their reorganization. A different view was that draft recommendation 12 sought to extend to the corporate bankruptcy context the sorts of measures that were available in a number of jurisdictions in the context of natural person insolvency regimes and that, in any event, the draft recommendation was merely permissive and intended not to punish but rather to encourage appropriate behaviour. After discussion, the Working Group agreed to retain the word “compensation”, deleting the square brackets, and to delete “[damages]”. With that amendment, the Working Group adopted the substance of draft recommendation 12 as drafted.

Proposal for an additional recommendation

75. The Working Group heard a proposal concerning the specification of prerequisites for commencing an action against a director for breach of the obligations in draft recommendation 1. The proposal was designed to address the issue arising in some States where actions against directors unnecessarily delayed the closure of insolvency proceedings. The prerequisites proposed were to require the person seeking to commence an action against a director to demonstrate that the director in question possessed sufficient assets to satisfy any eventual judgement and that there be a reasonable probability of success on the merits in order to justify provisional measures to ensure preservation of the director’s assets. The Working Group noted that while this was an important issue in some States, in many States the commencement of such actions did not delay the closure of insolvency proceedings and the duty of care of the insolvency representative would in any event require an analysis of the likelihood of success of such an action for the benefit of the estate. Whilst there was insufficient support for including a new recommendation along the lines proposed, the Working Group agreed that the issue could be addressed in the commentary (see para. 99 below).

B. Draft commentary

Introduction and purpose of this [part]

76. The Working Group adopted the following revision of paragraph 1:

“This [part] focuses on the obligations that might be imposed upon those responsible for making decisions with respect to management of an enterprise when that enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which are enforceable once insolvency proceedings commence, is to protect the legitimate interests of creditors and other stakeholders and provide incentives for timely action to minimize the effects of financial distress experienced by the enterprise. The constitution of a board of directors is an important factor in addressing these issues. Where a company has independent directors, who do not own a significant proportion of the equity and who do not represent equity-owners, such directors may not have access to information to the same extent that it is known or available to inside directors. Liability may vary between independent and inside directors depending on the factual situation.”

77. The Working Group agreed to move the final three sentences of the text of paragraph 1 as adopted above to the end of paragraph 35.

78. The Working Group agreed to delete the square brackets around paragraph 2 and adopted the text as drafted.

1. Background

79. The Working Group adopted paragraphs 1 to 15 as drafted, including removing the square brackets around the text in paragraph 2 and retaining the text.

2. Elements of directors' obligations in the period approaching insolvency

The nature of the obligations

80. The Working Group adopted paragraphs 16 to 18 as drafted.

81. With the deletion of the opening phrase, "Except under those laws that require directors to report or make formal declarations," the Working Group adopted paragraph 19 as drafted.

82. The Working Group adopted paragraph 20 with the following changes:

(a) Retention of the text and deletion of the square brackets in subparagraphs (d), (f) and (j);

(b) Replacement of the words "also taking" with "take" in the second sentence of subparagraph (g); and

(c) Replacement of the words "One example" with "Examples" in the second sentence of the footnote to subparagraph (h).

83. The Working Group agreed to delete the square brackets in paragraphs 21 and 21A and to adopt both paragraphs as drafted.

When the obligations arise: the period approaching insolvency

84. The Working Group adopted paragraphs 22, 23 and 24 as drafted.

85. The Working Group agreed to retain the second sentence of paragraph 25, deleting the square brackets, and to revise the fifth sentence as follows: "Essentially, the standard requires a director's judgement to be assessed against the knowledge that a reasonably competent director should or ought to have had in the circumstances." With those amendments, the Working Group adopted paragraphs 25 as drafted.

86. The Working Group adopted a new paragraph 25A as follows: "The recommendations do not preclude States from imposing liabilities on directors that might be enforceable outside insolvency proceedings when, due to the lack of assets to cover the costs of proceedings, the commencement of insolvency proceedings is denied."

Identifying the parties who owe the obligations

87. The Working Group agreed to delete the footnote to paragraph 26. With that amendment, the Working Group adopted the substance of paragraphs 26 to 29 as drafted.

Liability

88. The Working Group adopted the substance of paragraphs 30 and 31 as drafted.
89. The Working Group agreed to delete the last sentence of paragraph 32, and adopted the remainder of paragraph 32 as drafted.
90. The Working Group agreed to retain the second and third sentences, deleting the square brackets, and adopted the substance of paragraph 33 as drafted.
91. The Working Group agreed to delete the first sentence of paragraph 34 and to replace the phrase “Laws adopting this approach” at the beginning of the second sentence with “Other laws”. The Working Group further agreed to add the phrase “where directors fail to obtain or to study management accounts;” before the phrase “where directors neglect the proper financial administration of the company”, and to revise the following phrases to read “where they neglect to take preventative measures against clearly foreseeable risks; or where bad personnel management by the directors leads to unrest and strikes.” With those amendments, the Working Group adopted the substance of paragraph 34 as drafted.
92. The Working Group agreed to remove the square brackets around paragraph 35 and to replace the first sentence with the following: “Determining whether a particular director has breached their obligations involves consideration of the facts regarding the conduct of that director leading up to the commencement of insolvency proceedings with respect to the debtor.” The Working Group noted that it had agreed earlier in the session (see para. 77 above) to move the final three sentences of the text of paragraph 1 to the end of paragraph 35.
93. With those amendments, the Working Group adopted the substance of paragraph 35.
94. The Working Group removed the square brackets from paragraph 36 and adopted its substance as drafted.

Enforcement of the directors’ liabilities

95. The Working Group agreed to retain the text and delete the square brackets in paragraph 41, and with that amendment adopted the substance of paragraphs 37 to 41 as drafted.
96. The Working Group agreed to retain the words “A number of” without the square brackets and to delete “[Many]” in paragraphs 42 and 47; to delete the last sentence of paragraph 43; and to delete the square brackets around the second sentence of paragraph 48. With those amendments the Working Group adopted the substance of paragraphs 42 to 48.
97. The Working Group agreed to delete the words “in some circumstances” in the second sentence of paragraph 51 and to delete the square brackets around the third sentence in the same paragraph. With those amendments, the Working Group adopted the substance of paragraphs 49 to 51.
98. The Working Group agreed to replace the second sentence of paragraph 52 with: “Depending upon the applicable law relating to insolvency, an action against a director, if authorized, may be brought by the insolvency representative for the benefit of the insolvency estate. If permitted by the law relating to insolvency, an

action against a director may be brought by a creditor for the benefit of the insolvency estate if the action is not brought by the insolvency representative. In some States and subject to the law relating to insolvency, an action against a director may be brought by a creditor for its own benefit. All such actions will be on the basis that the conduct being examined occurred in the vicinity of insolvency.” With that amendment, the Working Group adopted the substance of paragraphs 52 to 54.

99. The Working Group agreed to replace paragraph 55 with the following: “An action against the directors for breach of their obligations can be a significant asset of the insolvency estate and increase returns to creditors. However, in many jurisdictions, the pendency of such an action prevents the closure of an insolvency proceeding and the final distribution of proceeds. Therefore, it is desirable that the insolvency representative, before commencing an action against a director, considers the likelihood of success of that proceeding as well as other circumstances such as the ability of the director to respond to an award of damages, the scope of insurance coverage available to the director, and the effect of the litigation on the duration of the insolvency proceedings.”

100. The Working Group agreed to delete the brackets around the second sentence of paragraph 57 and to revise the fourth sentence as follows: “Where the cause of action is pursued by a party other than the insolvency representative in the collective interests of creditors, the costs of commencing such a proceeding might be recovered from any compensation paid.” With those amendments, the Working Group adopted the substance of paragraphs 56 and 57.

VI. Finalization of the work on centre of main interests and directors’ obligations

101. After five sessions (between December 2010 and April 2013) of extensive study, analysis and deliberation, the Working Group advises the Commission that it has completed the substance of its work on those parts of its current mandate relating to: (a) revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency with respect to selected aspects of the centre of main interests and (b) directors’ obligations in the period approaching insolvency (as set forth in documents A/CN.9/WG.V/WP.112 and 113, respectively). With respect to the work on topic (b), the Working Group recommends that this text be adopted as Part four of the Legislative Guide on Insolvency Law.

102. The Working Group requested the Secretariat to circulate the two draft texts to States and international organizations for information and comment, noting that, although desirable, it may not be possible to translate for the information of the Commission any comments received.

VII. The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective

103. The Working Group noted the updates prepared by the Secretariat in consultation with experts on The UNCITRAL Model Law on Cross-Border

Insolvency: The Judicial Perspective in conformance with the decision of the Commission in 2011 adopting that text. The Working Group expressed its appreciation and support for the work updating the Judicial Perspective to ensure its continuing currency and noted the usefulness of the text to judges, as well as for the dissemination of information on best practices beyond States that have enacted the Model Law.

VIII. Implementing remaining aspects of the Working Group's current mandate

104. The Working Group recalled the discussion at its forty-second session of two issues raised by the Commission at its forty-fifth session relating to whether the Working Group's mandate on centre of main interests covered issues relating to enterprise groups and if so when the Working Group should handle this topic. In relation to the scope of the mandate on centre of main interests, the Working Group had noted that it was necessary to look at issues of centre of main interests as it related to enterprise groups because most commercial activity was currently conducted through enterprise groups. The Working Group had also noted the description of the mandate contained in paragraph 10 of document A/CN.9/WG.V/WP.107 and that, as originally worded, it was intended to cover centre of main interests in the context of enterprise groups.

105. The Working Group further recalled that it had agreed that that topic should be handled upon completion of the current revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests of individual debtors. With respect to issues relating to directors of enterprise group members, the Working Group recalled it had agreed that although the topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, the possibility of further work should be given serious consideration. The Working Group had agreed that once it had completed its consideration of the recommendations and related commentary on directors' liabilities, it could consider whether to address the issues that might be relevant in the context of enterprise groups. To facilitate those deliberations, the Secretariat had been requested to provide further information, particularly as to different national approaches and solutions that might inform the discussion in the Working Group.

106. Having completed its work on those two topics, the Working Group turned its attention to enterprise groups and documents A/CN.9/WG.V/WP.114 and 115, together with the part of its mandate relating to the possible development of a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.¹

107. The Working Group had a general discussion of the issues raised with respect to enterprise groups and of the issues relating to the remaining part of the mandate granted by the Commission.

¹ See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

108. After discussion, the Working Group agreed that it had not yet completed its work on implementing the mandate received from the Commission and that there were pending issues to be addressed before the mandate was exhausted. The Working Group also acknowledged that it was not yet clear how that part of the mandate could best be pursued. The Working Group heard a proposal to hold a colloquium to examine how and by what type of instrument that remaining part of the mandate might be addressed, as well as to identify possible topics for future work. The Working Group agreed that such a colloquium could be useful; however, the suggestion that it should take the place of the Working Group sessions necessary to complete the mandate granted by the Commission did not attract sufficient support. Several delegations suggested that Commission approval should be sought for any future projects but that view did not attract sufficient support.

109. In addition to the topics relating to the remainder of the mandate, the following topics for possible future work were mentioned, acknowledging that a further mandate for such topics would have to be sought from the Commission: private international law rules applicable in insolvency proceedings, especially as they relate to enterprise groups; the effectiveness of current instruments in the light of the global financial crisis, in particular, the provisions of the legislative guide relating to financial contracts; the relevance of the model law on cross-border insolvency to the resolution of financial institutions; and enforcement of substantive rights and claims in a cross-border insolvency context.

IX. Other business

110. The following additions were made with respect to paragraphs 17 and 18 of document A/CN.9/WG.V/WP.115:

- (a) At the end of footnote 23, the phrase “which regulates corporations”; and
- (b) At the end of paragraph 18, the sentence: “However, different provisions may apply to other companies under civil law.”