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Insolvency Law

Enterprise groups — Directors' obligations in the period approaching insolvency

Note by the Secretariat

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I. Introduction

1. At its forty-second session (November 2012), the Working Group considered the obligations of directors in the period approaching insolvency (A/CN.9/763, paras. 66-91) based upon information contained in A/CN.0/WG.V/WP.108, which also contained information on issues relating to directors of group enterprise members in the period approaching insolvency (A/CN.0/WG.V/WP.108, paras. 52-60). The Working Group agreed that although the latter 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 once work on recommendations 1-10 and the related commentary had been completed. At the request of the Working Group, the Secretariat prepared this paper on different national approaches and solutions to the issue of directors' obligations in a group context in the period approaching insolvency[1] in order to provide further information and facilitate the Working Group's deliberations on the topic (A/CN.9/763, para. 92).

2. The Working Group will recall that in preparing Part three of the UNCITRAL Legislative Guide on Insolvency Law, it acknowledged that the business of corporations was increasingly being conducted through enterprise groups. Enterprise groups were described as covering different forms of economic organization based upon the single legal entity and composed of two or more legal entities that are linked together by some form of direct or indirect control or ownership. It was recognized that enterprise groups are ubiquitous in both emerging and developed markets, with a common characteristic of operations across a large number of sometimes unrelated industries, often with family ownership in combination with varying degrees of participation by outside investors. Further, it was stated that the largest economic entities in the world include not only States, but also a number of multinational enterprise groups, which may be responsible for significant percentages of gross national product worldwide and have annual growth rates and turnovers that exceed those of many States.[2]

3. At its previous session (November 2012), the Working Group acknowledged various issues that may arise with respect to directors' obligations in the period approaching insolvency in a group context (A/CN.9/WG.V/WP.108, para. 52). Two main issues were identified for particular consideration and discussion:

(i) what is the appropriate definition of a director and the circumstances in which other group members might fall within that definition, particularly where parent and wholly owned or controlled subsidiary relationships are involved (A/CN.9/WG.V/WP.108, paras. 58-59); and

(ii) whether the single entity principle and its impact should prevail when there is a tension between acting in the interests of the group member of which

[1] The Secretariat based this paper on available existing studies on the topic of the obligations of directors in the period approaching insolvency and on any additional information in the context of enterprise groups (in particular, INSOL, Directors in the Twilight Zone III, 2009), as well as on information submitted to the Secretariat by some Member States. Only States on which there was relevant information available from these sources were included in this paper.

[2] Part three of the UNCITRAL Legislative Guide on Insolvency Law (Treatment of enterprise groups in insolvency), Section IA, paras. 2, 4 and 5, and in paras. 1-39 generally.

they are a director and the interests of the group as a whole (A/CN.9/WG.V/WP.108, paras. 53-57).

4. The Working Group may wish to recall the discussion in A/CN.9/WG.V/WP.113 with respect to the persons who owe obligations in the period approaching insolvency (paras. 26-29 and recommendation 4), in this paper referred to as "directors".

5. The Working Group may also wish to recall information prepared for its consideration at the previous session (A/CN.9/WG.V/WP.108, para. 53) indicating that while the individual group member's interests are of particular importance when the solvency of that enterprise group member may be or becomes an issue after any transaction designed to benefit the group as a whole has been entered into, the group structure may require directors to act for the benefit of the group. In such a context, the directors would have to balance the interests of their own group member against the possibly competing economic goals or needs of the group as a whole. Examples of such potential conflict could arise when one group member provides a loan to another group member or acts as a guarantor for a loan provided by an external lender to another group member; or when one group member enters into an agreement with another group member to transfer its business or assets or surrender a business opportunity to that other group member or to contract with that member on terms that could not be considered commercially viable; or where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations. The problem that may arise in relation with these transactions results from the relationship between the transacting parties or their position within the group, and because the nature of the transaction involves an allocation of benefit and detriment that differs from what might generally be considered commercially viable.

6. The Working Group may also wish to recall that information provided at its previous session indicated that the treatment of these issues is quite different from one jurisdiction to the next, particularly in terms of the duties owed by the directors to the company in the period approaching insolvency, and how the interest of the company must be evaluated by such directors in a group context (A/CN.9/WG.V/WP.108, paras. 54-57).

7. The following analysis reviews the law of several jurisdictions insofar as it deals with:

(i) the obligations of directors in the context of a group enterprise; and

(ii) any particular consideration of such obligations in the context of insolvency or the period approaching insolvency.

II. Different national approaches to directors' obligations in the period approaching insolvency in the context of enterprise groups

A. Argentina

8. The Argentine Companies Law imposes a general fiduciary duty on directors of solvent companies, which obliges them to act in good faith and with the diligence

of a good businessman.[3] Directors are therefore responsible for their loyalty and diligence in administering the company. The Law does not contain any special regime for a group of companies, nor any definition of the term.

9. According to the Argentine Bankruptcy Law,[4] the zone of insolvency is extended back to one year prior to the date of declaration of the cessation of payments.[5] In terms of the liability of natural persons, the Bankruptcy Law covers any representative, director, proxy holder or manager of the company that may have produced, facilitated, permitted or aggravated the financial situation of the debtor or its insolvency.[6] The Law does not contain any special provision for groups of companies.

10. However, groups of companies are taken into account under the Bankruptcy Law in terms of the extension of insolvency proceedings. In fact, insolvency can be extended to any person controlling the insolvent company who has improperly subjected the interests of the controlled company to the unified management of the group giving priority to the interests of the controlling company or the whole group to which it belongs.[7] The Bankruptcy Law provides for these purposes the following definition of a controlling person:[8] (i) one who directly or through another company holds any kind of ownership in the company that entitled the person to the necessary votes to make decisions;[9] or (ii) any group of persons who, acting together, hold the necessary ownership of the company entitling them to the necessary votes to make decisions.[10] The obligations of directors during insolvency proceedings are not specified, but the general regime of duties owed when the company is solvent remains applicable.

11. The Argentine Bankruptcy Law also provides a special regime for the insolvency of a group of companies: insolvency proceedings may be commenced by two or more natural or legal persons forming a permanent economic union.[11] As the duties of directors remain the same, the question arises whether such duties could be assessed on the basis of the interests of the entire group.

B. Australia

12. When a company is in liquidation, as contrasted with the period approaching insolvency, directors in Australia have a duty to prevent insolvent trading by the company, and will be held personally liable for any breach of that obligation, provided that certain requirements are met.[12] A holding company may also be held

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[3] Ley 19.550 de Sociedades Comerciales de 20 de Marzo de 1984, Boletín Oficial 30 de Marzo de 1984, Article 59.
[4] Ley 24.522 de Concursos y Quiebras de 20 de Julio de 1995, Boletín Oficial 28.203 de 9 de Agosto de 1995.
[5] Argentine Bankruptcy Law, Article 174.
[6] Argentine Bankruptcy Law, Article 173.
[7] Argentine Bankruptcy Law, Article 161(2).
[8] Ibid.
[9] Argentine Bankruptcy Law, Article 161(2)(a).
[10] Argentine Bankruptcy Law, Article 161(2)(b).
[11] Argentine Bankruptcy Law, Article 65.
[12] Corporations Act 2001 (Cth), Section 588G.

liable for insolvent trading by its subsidiary, but that liability does not extend to the directors of the holding company.[13]

13. In terms of a group of companies, the interests to be taken into account by directors depend on whether the company is solvent or insolvent. A group of companies has been defined at common law as "a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control".[14] If the company is solvent, the directors are entitled to give consideration to the interests of the companies as a group in determining whether the best interests of the company of which they are a director would be met by a proposed course of action,[15] provided that the interests of the group remain compatible with the interests of the individual company.[16] If the group as a whole is insolvent, the interests of the company as a result of any problematic transactions would diverge significantly from the interests of the group.[17] If the directors cause the company to prejudice the interests of its creditors in a circumstance of insolvency, they would fail to discharge their duty to act in the best interests of that company.[18]

14. The Bell case provides a good summary of what is expected from directors in a group context when facing insolvency: directors do not have to ignore the interests of the wider group but are required to consider the interests of each individual company when one or more companies in a group enter into a transaction.[19] In this case, it was held that the directors had exposed the companies to a probable prospect of loss and no probable prospect of gain when concentrating on the group and failing to look to the interests of individual companies.[20]

C. Belgium

15. Belgian law imposes duties on directors to act in the corporate interest of the company and not of any particular shareholder or the company's creditors. The definition of "corporate interest" is interpreted by courts on a case by case basis.[21] Even if the interests of a Belgian company usually coincide with the interests of the whole group, depending on the circumstances, the directors of the individual company may need to act more independently of the group.[22]

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[13] Corporations Act 2001 (Cth), Section 588V.

[14] *Walker v Wimborne & Ors* (1976) 3 ACLR 529 at 532 (Mason J).

[15] *Westpac Banking Corporation v Bell Group Ltd.* (in liquidation) (No. 3) [2012] WASCA 157 at 952 (Lee AJA); *Neat Domestic Trading Property Ltd. v AWB Ltd.* [2003] HCA 35 [47]; (2003) 216 CLR 277 (McHugh, Hayne, Callinan JJ).

[16] Ibid.

[17] *Westpac Banking Corporation v Bell Group Ltd.*, supra note 15 at 952.

[18] Ibid and *Walker v Wimborne & Ors*, supra note 14 at 532.

[19] *The Bell Group Ltd. v Westpac Banking Corporation* (No. 9) [2008] WASC 239 at [4621] (Owen J).

[20] Ibid at [9746].

[21] International Insolvency Institute, Committee on Corporate and Professional Responsibility, Survey on Director and Officer Duties, Responsibilities, and Accountability, Belgium (Nora Wouters), p. 2.

[22] Ibid., p.3.

16. When balancing the corporate interest of a company against the general interest of the group, Belgian law refers to principles set out in French case law to assess whether a particular transaction is well-balanced in terms of corporate interest (see France, paras. 22-24 below).

D. Brazil

17. Brazilian law has introduced the possibility of creating a contractual group of companies. The group of companies is a contract entered into by a controlling company and one or several controlled companies whereby they commit to combine resources or efforts to achieve mutual goals or participate in common activities or ventures.[23]

18. Although each company retains its legal capacity and its own assets,[24] the group of companies can define a group direction and the powers, duties and liabilities of its directors.[25] The directors of the subsidiaries must act within the powers and duties determined by the articles of association and the group contract, and should follow the instructions established by the group directors that do not entail a breach of legal or contractual duties.[26] It appears that directors are required to take into account the interest of the whole group when assessing whether to enter into a particular transaction.

E. Colombia

19. Colombia has enacted a definition of a group of companies. A subordinated or controlled company is one whose power to make decisions is subject to the will of one or more companies, either directly or indirectly.[27] The Code of Commerce also defines an enterprise group as one where there is a unity of purpose and direction, i.e. where there is a common objective determined by the controlling company by virtue of the control and direction it exercises over the whole group, even though each company has a different activity or purpose.[28]

20. There are no special obligations on directors in the context of a group of companies, but each director remains subject to a general duty of good faith and loyalty, and administering the company of which it is a director as a good businessman.[29]

21. In the case of insolvency, the parent company will be liable for the subsidiary's commitments if the insolvency or liquidation has been produced by the transactions implemented in the interest of the controlling company or any other subsidiary, and against the interests of the insolvent company.[30] It is presumed that

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[23] Lei 6404/76 of 15 December 1976, Article 265.
[24] Ibid.
[25] Ibid, Article 272.
[26] Ibid, Article 273.
[27] Code of Commerce of Colombia, Article 260.
[28] Ibid, Article 261.
[29] Ley 222 de 1995 (20 December 1995), Article 23.
[30] Ley 1116 de 2006 (27 December 2006), Article 61.

the company is in insolvency because of the actions derived from that control unless proved otherwise.[31]

F. France

22. In France, case law has defined a group of companies as the situation where certain companies are united by a dependency link and by unified control.[32] The purposes of the different companies do not have to be identical, as long as there is a certain subordination of each legal entity for the benefit of the single financial goal of the group.[33]

23. For directors to be discharged of their duties, the intra-group transaction (i) must have a financial, economic or social mutual interest that is considered together with regard to a common policy elaborated for the whole group; and (ii) it should neither be effected without consideration nor jeopardize the balance between the different commitments of the companies or exceed the financial capabilities of the company bearing the burden thereof.[34]

24. The interest of individual companies is the main rule to assess the validity of the transaction. It appears, however, that the group context is a factor that can influence the final outcome in terms of discharge of the director's duties towards the company.

G. Germany

25. Under German law, the concept of "group liability" has been introduced to create an obligation on a director who is also a controlling shareholder, to compensate for any loss due to the misuse of its managerial power.[35] The German Federal Court has held that this regime also applies where the shareholder is a natural person:[36] the director, who was also the sole shareholder, had conducted the business pursuing only his personal interests, and was regarded as a "dominating company" analogous to the concept of liability in a corporate group.

26. The doctrine of piercing the corporate veil has been further defined as a liability in tort of the director to the company when the management has induced a subsidiary into financial assistance that may have the consequence of causing the insolvency of the subsidiary.[37] As a consequence, the director has a duty in the period approaching insolvency to protect the survival of the company regardless of the existence of a group.[38]

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[31] Ibid.
[32] Cour de cassation [French Supreme Court] Chambre Criminelle, 4 February 1985, No. 84-91581.
[33] Ibid.
[34] Ibid.
[35] INSOL, Directors in the Twilight Zone III, supra note 1, p. 321.
[36] Ibid.
[37] Ibid.
[38] Ibid, p. 322.

H. Italy

27. Although Italian legislation has not enacted special provisions on directors' duties within enterprise groups in the period approaching insolvency, the Civil Code contains provisions relating to the liability of parent companies and their directors for damages caused to the subsidiaries' shareholders or creditors.[39] Legal entities exercising "direction and coordination" powers over an Italian company may be found liable to minority shareholders and creditors of the subsidiary for abuse of those powers when the controlling company acts in its own interest or in the interest of third parties.[40]

28. Although the concept of "direction and coordination" has not yet been judicially interpreted, commentators are of the view that there will be "direction and coordination" powers where a significant part of the management decisions at the subsidiary is continuously and substantively taken by management at the controlling entity, even if the decisions are formally implemented by the subsidiary's management. This legislation also applies to the case where those powers are exercised pursuant to any ad hoc arrangement or articles of association.

29. This liability regime is also extended to any person concurring in or benefitting from the mismanagement (such as the directors of the controlling entity or another of its subsidiaries), and they may be held jointly and severally liable.[41] However, liability may be avoided when such damages are fully reversed, even through subsequent transactions specifically effected for this purpose, or when damages are offset by the overall effect of the direction and coordination activities over the subsidiary.[42]

30. In addition, prejudiced parties (creditors and minority shareholders) can bring action against the controlling company and its directors only when they are unable to collect damages from the subsidiary.[43] Therefore, this action may in practice be limited to the case where the subsidiary has become insolvent.

31. Finally, in a group context, the parent company's directors can be held jointly liable with the subsidiary's directors for damages caused to the insolvent subsidiary by means of an abuse of direction powers within the group.[44]

I. Spain

32. Under Spanish law, a group of companies has been defined as the situation where a company exercises or has the possibility to exercise, directly or indirectly, control over another company, in terms of voting rights or appointment of the

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[39] INSOL, Directors in the Twilight Zone III, supra note 1, pp. 446-448.

[40] Italian Civil Code, Article 2497. Control is defined by Article 2359 of the Italian Civil Code as the situation where a company can: (i) exercise a particular influence on the general shareholders' assembly of another company, whether disposing of the majority of the voting rights or not, or (ii) exercise a particular influence on the controlled company by virtue of the contractual relationships entered into between those companies.

[41] Ibid.

[42] INSOL, Directors in the Twilight Zone III, supra note 1, p. 448.

[43] Italian Civil Code, Article 2497.

[44] INSOL, Directors in the Twilight Zone III, supra note 1, p. 448.

management of the controlled company, whether by ownership of shares entitling the controlling company to voting rights or by any agreement whatsoever.[45]

33. Directors under Spanish law are subject to a duty of loyalty, which must be exercised in light of the corporate interest of the company itself.[46] According to academic doctrine, Spanish law recognizes the existence and legitimacy of a group of companies, but it remains difficult to assess whether the interest of a company can be expanded to the interest of the whole group.[47]

J. Switzerland

34. Under Swiss law, there is no provision relating to the treatment of a group of companies in the field of company or insolvency law, except for some specific provisions on accountancy and banking law. The main question in terms of the obligations of a director of a company that is part of a group is whether the subordination of the interests of the controlled company to the interests of the group as a whole may be qualified as a breach of the director's duty. This analysis is unchanged whether or not there is an insolvency.

35. Generally, the Swiss Federal Supreme Court takes a conservative position, holding that the interests of the company should be regarded from the perspective of each individual company rather than from the group as a whole.[48] This view was recently confirmed by the Court:[49] the liability of a member of the board of directors of the parent company, who was also chair of the board of directors of the subsidiary, was upheld because the parent company, later insolvent, had granted a loan to its subsidiary which at the time had already become insolvent. It was held that such a shift of the parent company's assets to a subsidiary shall be considered a breach of duty to the parent company if there were no prospects of repayment. Further, being a director for both companies subjected the board member to stricter scrutiny in respect of his liability for intra-group transactions, as he was deemed to be better informed than any external party about the financial situation of both companies and of the risks associated with the transaction.

K. United States of America

36. In the United States,[50] it has been held that the focus of directors' duties shifts somewhat upon the event of insolvency of a company. In a solvent company,

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45 Spanish Code of Commerce, Article 42.

46 Ley de Sociedades de Capital [Spanish Companies Act] (Real Decreto Legislativo 1/2010, de 2 de Julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital), Article 226.

47 José Miguel Embrid Irujo, "Apuntes sobre los Deberes de Fidelidad y Lealtad de los Administradores de las Sociedades Anónimas" (2006) 46 Cuadernos de Derecho y Comercio 9.

48 Bundesgericht [Swiss Federal Supreme Court] BGE 138 II 57, 61; BGE 130 III 213, 216 et seq.

49 Bundesgericht [Swiss Federal Supreme Court] 4A_74/2012 (18 June 2012).

50 As in the case of the section on the United States of America in INSOL, Directors in the Twilight Zone III (supra note 1, at 697), this section will focus on the law of Delaware, as a popular jurisdiction for incorporation, and on Federal law (for those issues resolved in US Bankruptcy Court rather than the state courts).

fiduciary duties are owed by directors to the company and its shareholders,[51] and generally not directly to creditors.[52] Upon insolvency, however, it has been held that the fiduciary duties of directors shift at least partially to include the creditors of the company.[53] Although it has been said that the question of to whom directorial fiduciary duties are owed during insolvency is an issue subject to considerable debate and confusion,[54] there is broad agreement that courts should provide creditors with some additional rights when a company is insolvent or approaching the period of insolvency.[55]

37. However, the question of the extent of those rights and when they arise is not yet settled.[56] Although the law has been clear for some time that creditors are entitled to certain fiduciary duties by directors when the company crosses into insolvency,[57] a 1991 decision created uncertainty about the content and timing of those rights by holding that "[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise".[58] A more recent decision clarified that corporate creditors do not have direct fiduciary claims against a company regardless of its solvency, but held that upon insolvency, a company's creditors can take derivative claims on behalf of the company against the directors for breach of fiduciary duty.[59] Unfortunately, the decision did not address whether creditors have a similar right to bring derivative claims for breaches of fiduciary duty in the period approaching insolvency, nor has any case to date set out any guidelines for when a company is entering into the "vicinity of insolvency". In addition, some states still grant creditors standing to sue for breaches of fiduciary duties when the subsidiary company is in the "zone" or "vicinity" of insolvency,[60] and do not limit such standing to derivative claims on behalf of the subsidiary.

38. In the context of an enterprise group, it has been held that the directors of solvent wholly owned subsidiaries[61] are obligated to manage the affairs of the

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[51] See, e.g. *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, 930 A.2d 92, 99 (Del. 2007).

[52] J. Haskell Murray, "'Latchkey corporations': Fiduciary duties in wholly owned, financially troubled subsidiaries" (2011) 36 Delaware Journal of Corporate Law, p. 584; *Geyer v Ingersoll Publications Co.*, 621 A.2d 784, 787 (Del.Ch. 1992); and In re Netzel, 442 B.R. 896, 899 (Bankr. N.D. Ill. 2011).

[53] *Geyer v Ingersoll*, ibid at 787 and In re Netzel, ibid at 899.

[54] Murray, "Latchkey corporations", supra note 52 at 587.

[55] Ibid at 588 and *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, supra note 51 at 101.

[56] See, generally, INSOL, Directors in the Twilight Zone III, supra note 1 at pp. 704-706.

[57] *Geyer v Ingersoll Publications Co.*, supra note 52 at 787.

[58] *Credit Lyonnais Bank Nederland, N.V. v Pathé Communications Corp*. 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

[59] *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, supra note 51 at 101 and In re Netzel, supra note 52 at 901.

[60] Murray, "Latchkey corporations", supra note 52 at 588-591 and 608; *Carrieri v Jobs.com Inc.*, 393 F.3d 508, 534 n.24; In re James River Coal Co., 360 B.R. 139, 170 (Bankr. E.D. Va. 2007).

[61] Outside of the context of the wholly owned subsidiary, it has been said that the conflict between duties owed to the controlled company and to the parent is of little practical importance, since directorial decisions are usually protected by the business judgment rule and exculpatory charter provisions. See Murray, "Latchkey corporations", supra note 52 at p. 580 and *Orman v Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (noting that the business judgment rule presumption greatly

subsidiary only in the best interests of the parent company and its shareholders.[62] Other case law, some more recent, has limited the application of that case, and has held that directors of a solvent wholly owned subsidiary owe fiduciary duties to both the subsidiary company and to its sole shareholder, the parent company.[63]

39. However, the current state of the law in terms of directors' duties within enterprise groups in the period approaching insolvency is quite uncertain. As noted above in para. 37, creditors can bring derivative actions on behalf of an insolvent company for injuries caused to it by its directors or its controlling shareholder.[64] In addition, as noted above in footnote 61, directors of subsidiaries may be exposed to duty of loyalty claims or to "interested director" claims which can be brought derivatively by creditors of the subsidiary. In the period approaching insolvency, directors of wholly owned subsidiaries that simply follow the wishes of the parent company and approve deals that result in the insolvency of the subsidiary could be liable for breach of the duty of loyalty or to "interested director" claims.[65] Thus the current state of the law may encourage directors of wholly owned subsidiaries in the period approaching insolvency to focus on the interests of the creditors of the subsidiary rather than to manage the subsidiary with a view to the best interests of the parent company and of the subsidiary, even though there is no specific fiduciary duty owed to the creditors of the subsidiary because the subsidiary is not yet insolvent. In the period approaching insolvency, then, directors of wholly owned subsidiaries appear to be required to act in the best interests of the subsidiary, which may include the interests of the sole shareholder parent, and may also include the interests of the creditors of the subsidiary.[66]

III. Issues for consideration

40. From the above analysis, it may be observed that the issue of directors' duties in the zone of insolvency in the context of enterprise groups does not appear to be clearly or widely addressed within national legislation. The concept of enterprise groups has been considered and developed in many jurisdictions, but issues remain somewhat confused in terms of the obligations of directors in such situations.

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protects directorial decisions, but can be rebutted in certain circumstances, such as if the directors were "interested" in the outcome of the challenged transaction) and Del. Code Ann tit. 8 § 102(b)(7) (allowing corporations to eliminate liability for damages for breaches of duty of care except for breaches of "the director's duty of loyalty to the corporation or its stockholders").

[62] *Anadarko Petroleum Corp. v Panhalde Eastern Corp*. 545 A.2d 1171 (Supreme Court of Delaware, 1988) and *Trenwick Am. Litigation Trust v Ernst & Young*, L.L.P., 906 A.2d 168, 196 n.75 (Del. Ch. 2006).

[63] *First American Corporation v Al-Nahyan*, 17 F Supp. 2d 26 (DC, 1998) and In re Touch American Holdings, Inc., 401 BR 107, 129 (US Bankruptcy Court for the District of Delaware, 2009) As a practical reality, however, when a wholly owned subsidiary is solvent, only the parent has standing to bring a typical claim for breach of fiduciary duties: Murray, "Latchkey corporations", supra note 52 at 597.

[64] Murray, "Latchkey corporations", supra note 52 at 603.

[65] Ibid at 605.

[66] Ibid at 607-608.

41. In light of the increasing importance of enterprise groups in the conduct of modern global commerce, the Working Group may wish to consider whether it can offer some guidance in this area by including the issue of the obligations of directors of enterprise group members within the period approaching insolvency in its current work. If so, the Working Group may wish to consider how best to include this topic. In its deliberations, the Working Group may also wish to consider whether it would be of assistance to recall the approach taken in respect of avoidance provisions among enterprise group members in recommendation 217 of Part three of the UNCITRAL Legislative Guide on Insolvency Law (Treatment of enterprise groups in insolvency).