

INSOL Europe contributes to the UNCITRAL Working Group V (Insolvency law), 52nd session

INSOL Europe attended the 52nd session of Working Group V (Insolvency law) held in Vienna from 18 to 22 December 2018 in its capacity as an invited international non-governmental organisation (“NGO”) with observer status. Other observers included, *inter alia*, World Bank, European Investment Bank, European Banking Federation, the American Bar Association, the International Bar Association, INSOL International, International Insolvency Institute, European Law Institute.

Our INSOL Europe delegation was headed by its President Radu Lotrean and included past-president Steffen Koch, Frank Tschentscher and Florian Bruder. The delegation engaged in numerous discussions with delegations of the Working Group at this 52nd session so as to provide INSOL Europe's views on the matters discussed as we believe that our organisation has specific national and international insolvency expertise.

During the 52nd session, the UNCITRAL Working Group mainly focussed on two topics based on the respective working papers, namely:

1. Recognition and enforcement of insolvency-related judgments: draft model law and draft guide to enactment of the model law - *A/AC.9/WG.V/WP.150 and WP.151*
2. Facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions and obligations of directors of enterprise group companies in the period approaching insolvency - *A/CN.9/WG.V/WP.152 and WP.153*
3. Proposal by the United States of America for the development of model legislative provisions on civil asset tracing and recovery - *A/CN.9/WG.V/WP.154*

The above documents together with additional working papers (namely commentary and notes prepared by the Secretariat) are available on the UNCITRAL webpage (http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html).

It is intended to present the work on the draft model law on recognition and enforcement of insolvency-related judgements in more detail in a further contribution.

1. Based on the mandate by the Commission to develop a model law or model legislative provisions providing for the **recognition and enforcement of insolvency-related judgements**, in previous sessions, the Working Group had identified key issues to be addressed in a draft instrument, agreed

that a stand-alone model law should be developed, as opposed to forming part of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law), and discussed earlier drafts.

In preparation of the 52nd session the Secretariat prepared a revised draft text, including notes by the Secretariat, based on the comments of the 51st session (see Eurofenix #68, Summer 2017). The Working Group discussed the revised text, including the Secretariat's drafting proposals and agreed several revisions for the next revised version.

Among the matters discussed, the Working Group proposed a definition of "insolvency-related judgments", i.e. a judgment that "arises as a consequence of or is materially associated with an insolvency proceeding [...]". The draft guide to enactment contains (at paragraph 54) examples of the type of judgment that might be considered to fall within the definition. The Working Group noted the distinction between the *recognition* by a receiving court of a judgment made by a foreign originating court and the *enforcement* by the receiving court of that judgment. However a proposal to bring Article 9 of this draft model law in line with the most recent draft issued by the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgements (17 February 2017) by making only the enforcement of a judgment (as opposed to both its recognition and enforcement) conditional on the provision of security to ensure that the relevant party is not prejudiced pending an appeal or review of the originating court's judgment or order, did not receive sufficient support by the Working Group. The availability of provisional relief, including staying the disposition of any assets, was approved by the Working Group. The Working Group also agreed a revised version of the draft guide to enactment of this model law.

It is intended to circulate a revised version based on the discussions with a view to reviewing the text at the 53rd session in May 2018 and for the final draft text to be submitted to the Commission for possible adoption at its 51st session in 2018.

2. In previous sessions, the Working Group has developed draft legislative provisions facilitating the cross-border insolvency of multinational enterprise groups. Those provisions incorporated key principles including (a) coordination and cooperation of insolvency proceedings relating to an enterprise group; (b) elements needed for the development and approval of a group insolvency solution involving multiple entities; (c) the use of so-called "synthetic proceedings" in lieu of commencing non-main proceedings; and two supplemental areas (d) the use of "synthetic proceedings" in lieu of commencing main proceedings; and (e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

During the 52nd session the Working Group based its discussions on, a consolidated draft incorporating comments from the 51st session (see Eurofenix #68, Summer 2017). The Working Group, *inter alia*, discussed the proposed scope of the law, concluding that it should apply "to enterprise groups where insolvency proceedings have commenced for one or more members". Regard was also had to the concept, requirements and recognition of a "planning proceeding", i.e. the insolvency proceeding of an enterprise group member in which a group insolvency solution is being developed and implemented. The EU and some EU member states suggested that the definition should accommodate the group coordination proceedings provided for by the European Insolvency Regulation. It was proposed for further consideration during the next session that a planning proceeding should require, *inter alia*, (i) that the respective enterprise group member subject to the proceeding is a necessary and integral part of the group insolvency solution; (ii) that one or more other enterprise group members are participating in that proceeding for the purpose of developing and implementing a group insolvency solution, and (iii) that a group representative has been appointed. Substantial progress was made on the wording of provisions to accommodate the treatment, in main proceedings, of foreign claims with a view to facilitating the insolvency of an enterprise group and minimizing the commencement of both non-main proceedings as well as, by way of a supplemental provision, main proceedings.

Part IV of UNCITRAL's Legislative Guide to Insolvency Law addresses the obligations of directors in the period approaching insolvency. During previous sessions, the Working Group had agreed and discussed a revision of Part IV to address those obligations in an enterprise group context. The revised draft text was noted but will await further development of the work on enterprise group insolvency.

As that work has already reached an advanced stage, INSOL Europe's delegation anticipate that efforts are likely to be made during the next session(s) also to finalise this work.

3. The United States presented a proposal for future work by the Working Group regarding the development of model legislative provisions on civil asset tracing and recovery. The United States argued that the ability to trace and recover assets that have been moved across borders can be vital for enabling insolvency representatives to obtain the maximum possible recovery for creditors and therefore suggested that the Working Group request the Commission to grant a mandate to begin preliminary exploration. The Working Group conducted a preliminary discussion with a view to further consider the proposal in the next session.

We are looking forward to continuing the work at the 53rd session which is tentatively scheduled to take place in New York from 7 to 11 May 2018 and in particular to assisting in finalizing the revised

text of the draft model law on the recognition and enforcement of insolvency-related judgements and to progressing as expeditiously as possible, the work on multinational enterprise group insolvencies.

23 January 2018

Florian Bruder