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**United Nations Commission
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Working Group V (Insolvency Law)
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Draft legislative guide on insolvency law

Note by the Secretariat

Background remarks

1. The Commission, at its thirty-second session (1999), had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law. That proposal had recommended that, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that have expertise and interest in the law of insolvency, the Commission was an appropriate forum for the discussion of insolvency law issues. The proposal urged that the Commission consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.
2. Recognition was expressed in the Commission for the importance to all countries of strong insolvency regimes. The view was expressed that the type of insolvency regime that a country had adopted had become a “front-line” factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work on an international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, the fear was expressed that the work might not be brought to a successful conclusion. It was said that a universally acceptable model law was in all

* This document was submitted late because of the need to finalize substantive Addenda in order to include correct references in this document.



likelihood not feasible and that any work needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

3. To facilitate that further study, the Commission decided to convene an exploratory session of a working group to prepare a feasibility proposal for consideration by the Commission at its thirty-third session. That session of the Working Group was held in Vienna from 6 to 17 December 1999.

4. At its thirty-third session in 2000 the Commission noted the recommendation that the Working Group had made in its report (A/CN.9/469, para. 140) and gave the Group the mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.¹

5. It was agreed that in carrying out its task the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), INSOL International (INSOL) (an international federation of insolvency professionals) and Committee J of the Section on Business Law of the International Bar Association (IBA). In order to obtain the views and benefit from the expertise of those organizations, the Secretariat, in cooperation with INSOL and IBA organized the UNCITRAL/INSOL/IBA Global Insolvency Colloquium in Vienna, from 4-6 December 2000.

6. At its thirty-fourth session in 2001, the Commission had before it the report of the Colloquium (A/CN.9/495).

7. The Commission took note of the report with satisfaction and commended the work accomplished so far, in particular the holding of the Global Insolvency Colloquium and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, in particular with respect to the form that the future work might take and interpretation of the mandate given to the Working Group by the Commission at its thirty-third session. The Commission confirmed that the mandate should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide. In order to avoid the legislative guide being too general or too abstract to provide the required guidance, the Commission suggested that the Working Group should bear in mind the need to be as specific as possible in developing its work. To that end, model legislative provisions, even if only addressing some of the issues to be included in the guide, should be included as far as possible.²

8. The twenty-fourth session of the Working Group on Insolvency Law (New York, 23 July to 3 August 2001) commenced consideration of this work with the first draft of the legislative guide on insolvency law. The report of that meeting is

contained in document A/CN.9/504. Work continued at the twenty-fifth (Vienna, 3-14 December 2001) and twenty-sixth (New York, 13-17 May 2002) sessions of the Working Group. The reports of those meetings are contained in documents A/CN.9/507 and A/CN.9/511 respectively.

9. At its thirty-fifth session in 2002, the Commission had before it the reports of the twenty-fourth, twenty-fifth and twenty-sixth sessions of the Working Group. The Commission noted that, at its twenty-sixth session, the Working Group had discussed the likely timing for the completion of its work and had considered that it would be in a better position to make a recommendation to the Commission after its twenty-seventh session (Vienna, 9-13 December 2002) when it would have the opportunity to review a further draft of the legislative guide. The Commission requested the Working Group to continue the preparation of the legislative guide and to consider its position with respect to completion of its work at its twenty-seventh session.³

10. This note and the accompanying addenda set forth the revised draft Legislative Guide on insolvency law. Documents A/CN.9/WG.V/WP.63/Add.3-15 will be available for consideration by the Working Group at its twenty-seventh session; documents A/CN.9/WG.V/WP.63/Add.1, 2, 16 and 17 will be available for consideration at the twenty-eighth session (24-28 February 2003, New York) of the Working Group. Document A/CN.9/WG.V/WP.64 is intended to assist the deliberations of Working Groups V and VI at their joint session on 16 December 2002 and sets forth those paragraphs and recommendations of the draft insolvency guide that refer to the treatment of secured creditors in insolvency.

11. The chapters of the draft Guide are set out in the following addenda:

Part one

Add.1 Glossary and Preamble (Key objectives)

Part two

Chapter I. Introduction to insolvency procedures

Add.2 A (General features of an insolvency regime); B (Types of insolvency procedures); C (Structuring an insolvency regime)

Chapter II. Application and commencement

Add.3 A (Eligibility and jurisdiction)

Add.4 B (Commencement)

Chapter III. Treatment of assets on commencement of insolvency proceedings

Add.5 A (Assets to be affected)

Add.6 B (Protection and preservation of the insolvency estate)

Add.7 C (Use and disposition of assets)

Add.8 D (Treatment of contracts)

Add.9 E (Avoidance proceedings); F (Setoff, netting and financial contracts)

Chapter IV. Participants and institutions

Add.10 A (The debtor); B (The insolvency representative)

Add.11 C (Creditors); D (Institutions)

Chapter V. Reorganization

Add.12 A (Reorganization); B (Expedited reorganization procedures)

Chapter VI. Management of proceedings

Add.13 A (Creditor claims)

Add.14 B (Post-commencement finance); C (Priorities and distribution)

Add.16 D (Creditor and debtor protection); E (Consolidation of proceedings)
[new sections]

Chapter VII. Resolution of proceedings

Add.15 A (Discharge); B (Conclusion of proceedings)

Add.17 Choice of law [new section]

12. The commentary and recommendations contained in these addenda have been revised on the basis of the previous discussions of the Working Group. Paragraph numbers in [...] refer to relevant paragraph numbers in A/CN.9/WG.V/WP.58, the previous version of the text of the Guide. Recommendation numbers in [...] refer to relevant recommendations in A/CN.9/WG.V/WP.61 and A/CN.9/WG.V/WP.61/Add.1, the previous version of the recommendations. Additions to the recommendations are indicated by underlined text. The version of the Glossary, Preamble and Part one of the draft Guide that will be available to the Working Group is contained in document A/CN.9/WG.V/WP.57.

Notes

¹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 400-409.*

² *Ibid., Fifty-sixth Session, Supplement No. 17 (A/56/17), paras. 296-308.*

³ *Ibid., Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 194.*