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**United Nations Commission on
International Trade Law**
Working Group V (Insolvency Law)
Thirty-sixth session
New York, 18-22 May 2009

Annotated provisional agenda for the thirty-sixth session of Working Group V (Insolvency Law)

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the treatment of corporate groups in insolvency.
5. Other business.
6. Adoption of the report of the Working Group.

II. Composition of the Working Group

1. The Working Group is composed of the following States: Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Gabon, Germany, Greece, Guatemala, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Latvia, Lebanon, Madagascar, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Nigeria, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Serbia, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.
2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the



deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The thirty-sixth session of Working Group V (Insolvency Law) is scheduled to be held at the UN Headquarters, New York from 18-22 May 2009. Meeting hours will be from 10:00 a.m. to 1:00 p.m. and from 3:00 p.m. to 6:00 p.m., except on Monday, 18 May 2009, when the session will commence at 10:30 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Consideration of the treatment of corporate groups in insolvency

1. Previous deliberations

(a) Enterprise groups

5. At its thirty-eighth session (2005), the Commission had before it a number of proposals (A/CN.9/582 and Add.1-7), on which it heard presentations, for future work in the area of insolvency law, specifically on treatment of corporate groups in insolvency, cross-border insolvency protocols in transnational cases, post-commencement finance in international reorganizations, directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases, and commercial fraud and insolvency.

6. After discussion, some preference for the topics of corporate groups, cross-border protocols and post-commencement financing was expressed.¹ The Commission agreed that to facilitate further consideration and obtain the views and benefit from the expertise of international organizations and insolvency experts, an international colloquium should be held. The Commission agreed that in preparing the programme and determining the priorities for a colloquium, to be held in Vienna from 14 to 16 November 2005, the Secretariat should take into account the discussion of the various topics in the Commission.

7. At its thirty-ninth session (2006), the Commission had before it a note by the Secretariat (A/CN.9/596) reporting on the international colloquium that took place from 14 to 16 November 2005.

8. With respect to the proposals made by the Secretariat for possible future work, the Commission recalled, in particular, that treatment of corporate groups in insolvency had arisen in the context of the development of the UNCITRAL Legislative Guide on Insolvency Law, and that the treatment in the Insolvency

¹ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, paragraph 210.

Guide was either limited to a brief introduction, as in the case of treatment of corporate groups in insolvency, or limited to domestic insolvency law, as in the case of post-commencement financing. It was acknowledged that undertaking further work on those two topics would build upon and complement the work already completed by the Commission. The Commission also noted that the proposal on cross-border insolvency protocols was closely related and complementary to the promotion and use of a text already adopted by the Commission, the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law),² which was the subject of increasing interest and discussion. It was therefore appropriate to consider how implementation of the coordination and cooperation provisions of the Model Law could be facilitated by making the legal and judicial experience with respect to the negotiation, use and content of protocols available, in some form, to the international legal community.

9. After consideration, the Commission agreed that:

(a) The treatment of corporate groups in insolvency was sufficiently developed for the topic to be referred to Working Group V (Insolvency Law) for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems the Working Group would identify under that topic;

(b) Post-commencement finance should initially be considered as a component of work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic;

(c) Initial work to compile practical experience with respect to negotiating and using cross-border insolvency protocols should be facilitated informally through consultation with judges and insolvency practitioners. A preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007;

(d) The Secretariat should have flexibility to organize the work to be undertaken with respect to topics (b) and (c), as appropriate, in view of limited resources;

(e) Work being undertaken by other organizations in relation to the topics of directors' and officers' responsibilities in insolvency and pre-insolvency, and insolvency and commercial fraud should be monitored to facilitate consideration, at some future date, of work that might be undertaken by the Commission.

10. The Working Group commenced its consideration of the treatment of corporate groups in insolvency at its thirty-first session in December 2006, on the basis of a note by the Secretariat covering both domestic and international treatment of corporate groups (A/CN.9/WG.V/WP.74 and Add.1 and 2).

11. The Working Group continued its consideration of the treatment of corporate groups in insolvency at its thirty-second session in May 2007, on the basis of notes

² *Ibid.*, *Fifty-second Session, Supplement No. 17 (A/52/17)*, annex I, and United Nations publication, Sales No. E.99.V.3, which also contains the accompanying Guide to Enactment.

by the Secretariat covering both domestic and international treatment of corporate groups (A/CN.9/WG.V/WP.76 and Add.1). For lack of time, the Working Group did not discuss the international treatment of corporate groups contained in document A/CN.9/WG.V/WP.76/Add.2.

12. At its fortieth session (2007), the Commission noted the Working Group's progress regarding consideration of the treatment of corporate groups in insolvency as reflected in the reports of the Working Group's thirty-first (Vienna, 11-15 December 2006) and thirty-second (New York, 14-18 May 2007) sessions (A/CN.9/618 and A/CN.9/622, respectively) and reaffirmed that the mandate of the Working Group was to consider the treatment of corporate groups in insolvency, with post-commencement finance to be included as a component of that work.³

13. The Commission took note of the Working Group's agreement at its thirty-first session that the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross-Border Insolvency provided a sound basis for the unification of insolvency law and that the current work on corporate groups was intended to complement those texts, not to replace them (A/CN.9/618, para. 69). The Commission further noted the suggestion made at that session of the Working Group that a possible method of work entailed consideration of the provisions contained in those existing texts that might be relevant in the context of corporate groups and the identification of those issues that required additional discussion and the preparation of additional recommendations.⁴

14. The Commission also noted concerns expressed with respect to some components of that work, in particular substantive consolidation and its effect on the separate identity of individual members of a corporate group and the possibility of submitting a solvent member of a corporate group to collective procedures, and requested the Working Group to bear them in mind in its deliberations.⁵

15. The Working Group continued its consideration of the treatment of enterprise groups⁶ in insolvency at its thirty-third (November 2007), thirty-fourth (March 2008) and thirty-fifth (November 2008) sessions, on the basis of notes by the Secretariat (A/CN.9/WG.V/WP.78 and Add.1, A/CN.9/WG.V/WP.80 and Add.1 and A/CN.9/WG.V/WP.82 and Add.1-3 covering domestic issues; A/CN.9/WG.V/WP.76/Add.2 and A/CN.9/WG.V/WP.82/Add.4 covering international issues).

(b) *Cross-border insolvency agreements*

16. At its thirty-ninth session, in 2006, the Commission had agreed that initial work to compile practical experience with negotiating and using cross-border insolvency agreements should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its

³ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, paragraphs 186-187.

⁴ *Ibid.*, paragraph 188.

⁵ *Ibid.*, paragraph 189.

⁶ At its thirty-third session, the Working Group adopted the term "enterprise groups", which is explained in the glossary included in document A/CN.9/WG.V/WP.78.

fortieth session, in 2007.⁷ At its fortieth session (Part I, Vienna, 25 June-12 July 2007), the Commission considered that preliminary report reflecting experience with respect to negotiating and using cross-border insolvency protocols (A/CN.9/629) and expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency agreements and reaffirmed that that work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.⁸

17. At its forty-first session, in 2008, the Commission had before it a note by the Secretariat reporting on further progress with respect to that work (A/CN.9/654). The Commission noted that further consultations had been held with judges and insolvency practitioners and a compilation of practical experience, organized around the outline of contents annexed to the previous report to the Commission (A/CN.9/629), had been prepared by the Secretariat. Because of timing and translation constraints, that compilation could not be submitted to the Commission's forty-first session.⁹

18. The Commission expressed its satisfaction with respect to the progress made on the work of compiling practical experience and decided that the compilation should be presented as a working paper to Working Group V (Insolvency Law) at its thirty-fifth session (17-21 November 2008) for an initial discussion. Working Group V could then decide to continue discussing the compilation at its thirty-sixth session in the Spring of 2009 and make its recommendations to the forty-second session of the Commission in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in searching solutions for the international treatment of enterprise groups in insolvency. The Commission decided to plan its forty-second session in 2009, so that it would be able to devote, if necessary, time to discussing recommendations of Working Group V.¹⁰

19. The Working Group considered the draft Notes on cooperation, coordination and communication in cross-border insolvency proceedings at its thirty-fifth session and requested that they be circulated to Governments for comment prior to its thirty-sixth session (May 2009) (see A/CN.9/666, para. 22). The Notes were circulated in November 2008.

(c) *Insolvency and intellectual property*

20. At its forty-first session, the Commission noted that Working Group VI was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-103) were sufficiently linked with secured transactions law so as to justify their discussion in the Annex to the Guide. Working Group VI had decided to revisit

⁷ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paragraph 209.

⁸ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, paragraph 191.

⁹ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, paragraph 320.

¹⁰ *Ibid.*, paragraph 321.

those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider those matters. The Commission decided that Working Group V should be informed and invited to express any preliminary opinion at its thirty-fifth session. It was also decided that, should any remaining issue require joint consideration by the two Working Groups after that session, the Secretariat should have discretion to organize, after consulting with the chairpersons of the two Working Groups, a joint discussion of the impact of insolvency on a security right in intellectual property when the two Working Groups meet back to back in the Spring of 2009.¹¹

21. At its thirty-fifth session, Working Group V expressed its views on some of the matters raised by Working Group VI, reserving the consideration of others until further background information had been provided to it by the Secretariat (see A/CN.9/666, paras. 115-116).

2. Documentation for the thirty-sixth session

22. The Working Group will have before it, and may wish to use as a basis for its consideration notes by the Secretariat concerning:

(a) The treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.85 and addenda, as applicable);

(b) Cross-border insolvency agreements (A/CN.9/WG.V/WP.86), and the compilation of comments by Governments (A/CN.9/WG.V/WP.86/Add.1-3); and

(c) The discussion of intellectual property in the Legislative Guide on Insolvency Law (A/CN.9/WG.V/WP.87).

23. In planning the attendance of their representatives, States and interested organizations may wish to note the following background documents:

(a) Notes by the Secretariat concerning the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.74 and Add.1 and 2; A/CN.9/WG.V/WP.76 and Add.1 and 2; A/CN.9/WG.V/WP.78 and Add.1; A/CN.9/WG.V/WP.80 and Add.1 and A/CN.9/WG.V/WP.82 and Add.1-4);

(b) Reports of Working Group V (Insolvency Law) on the work of its thirty first to thirty-fifth sessions (A/CN.9/618, A/CN.9/622, A/CN.9/643, A/CN.9/647 and A/CN.9/666);

(c) The UNCITRAL Model Law on Cross-Border Insolvency (1997);

(d) The UNCITRAL Legislative Guide on Insolvency Law (2004);

(e) With respect to cross-border insolvency, notes by the Secretariat on facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings (A/CN.9/629 and A/CN.9/654);

(f) With respect to insolvency and intellectual property, a note by the Secretariat on security rights in intellectual property rights in insolvency (A/CN.9/WG.VI/WP.37/Add.4) and an extract from the Report of Working Group VI (Security Interests) on the work of its fifteenth session (A/CN.9/WG.V/XXXVI/CRP.2).

¹¹ Ibid., paragraph 326.

24. UNCITRAL documents are posted on the UNCITRAL website (<http://www.uncitral.org>) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Commission and Working Groups Documents" section of the UNCITRAL website.

25. Delegates may wish to note that only a very limited number of copies of the UNCITRAL Legislative Guide on Insolvency Law will be available at the thirty-sixth session of the Working Group. The Glossary and Recommendations of the Legislative Guide will separately be made available for the information of participants.

Item 6. Adoption of the report

26. The Working Group may wish to adopt, at the close of its session, on Friday, 22 May 2009, a report for submission to the forty-third session of the Commission (planned to be held in Vienna, from 29 June to 17 July 2009). The main conclusions reached by the Working Group at its ninth half-day meeting (that is, on the morning of Friday, 22 May) will be summarily read out for the record at the tenth half-day meeting and subsequently incorporated into the Working Group's report.

IV. Scheduling of meetings

27. The Working Group's thirty-sixth session will last for five working days. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,¹² the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with adoption of the report, as noted above, at the tenth and last meeting of the Working Group (on Friday afternoon).

28. The Working Group may wish to consider when issues relating to (a) cross-border insolvency agreements and (b) insolvency and intellectual property should be scheduled for discussion.

¹² *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paragraph 381, available on the UNCITRAL website under "Commission and Working Groups Documents" on the left side, then "Commission Sessions" and then "34th session, 25 June-13 July 2001, Vienna".