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**United Nations Commission on
International Trade Law
Working Group V (Insolvency Law)
Thirty-eighth session
New York, 19-23 April 2010**

Annotated provisional agenda for the thirty-eighth 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 enterprise groups in insolvency and future work.
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 (Plurinational State of), 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-eighth session of Working Group V (Insolvency Law) is scheduled to be held in New York from 19-23 April 2010. 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, 19 April 2010, 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 enterprise groups in insolvency

1. Previous deliberations

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

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

Legislative Guide on Insolvency Law, and that the treatment in the Insolvency 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).

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.

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 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), thirty-fifth (November 2008), thirty-sixth (May 2009) and thirty-seventh (November 2009) 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, A/CN.9/WG.V/WP.82 and Add.1-3, A/CN.9/WG.V/WP.85 and A/CN.9/WG.V/WP.90 covering domestic issues; A/CN.9/WG.V/WP.76/Add.2, A/CN.9/WG.V/WP.82/Add.4, A/CN.9/WG.V/WP.85/Add.1 and A/CN.9/WG.V/WP.90/Add.1 covering international issues).

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.92.

2. Future work

16. The Working Group started a preliminary discussion on possible future work at its previous session in November 2009 (see Report of Working Group V (Insolvency Law) on the work of its thirty-seventh session, document A/CN.9/686, paras. 126-131). Topics suggested for future work included an international insolvency convention, liability of directors and officers of enterprises in insolvency or in proximity to insolvency, insolvency of banks and financial institutions, the concept of centre of main interests (COMI) of an enterprise and the factors relevant to its determination, as well as issues of jurisdiction and recognition. The discussion on future work will be continued, pursuant to the Working Group's decision at its thirty-seventh session (see A/CN.9/686, para. 131), at the present session.

3. Documentation for the thirty-eighth session

17. 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.92 and addenda, as applicable) and (b) future work (A/CN.9/WG.V/WP.93 and addenda, as applicable).

18. 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.1-2, A/CN.9/WG.V/WP.76 and Add.1-2, A/CN.9/WG.V/WP.78 and Add.1, A/CN.9/WG.V/WP.80 and Add.1, A/CN.9/WG.V/WP.82 and Add.1-4, A/CN.9/WG.V/WP.85 and Add.1, A/CN.9/WG.V/WP.90 and Add.1-2);

(b) Reports of Working Group V (Insolvency Law) on the work of its thirty-first to thirty-seventh sessions (A/CN.9/618, A/CN.9/622, A/CN.9/643, A/CN.9/647, A/CN.9/666, A/CN.9/671 and A/CN.9/686);

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

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

(e) If available in published format, the final text of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

19. 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.

20. 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-eighth session of the Working Group. The Glossary and Recommendations of the Legislative Guide will be made available separately for the information of participants.

Item 6. Adoption of the report

21. The Working Group may wish to adopt, at the close of its session, on Friday, 23 April 2010, a report for submission to the forty-third session of the Commission (planned to be held in New York, from 21 June to 9 July 2010). The main conclusions reached by the Working Group at its ninth half-day meeting (that is, on the morning of Friday, 23 April 2010) 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

22. The Working Group's thirty-eighth 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,⁷ 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).

⁷ *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".