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## United Nations Commission on International Trade Law Forty-fourth session

### Summary record of the 934th meeting

Held at the Vienna International Centre, Vienna, on Friday, 1 July 2011, at 2 p.m.

*Chairperson:* Mr. Sánchez Mejorada y Velasco.....(Mexico)

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*The meeting was called to order at 2.10 p.m.*

**Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency**

(A/CN.9/732 and Add.1-3, A/CN.9/733 and Add.1, A/CN.9/715, A/CN.9/XLIV/CRP.3)

1. **Ms. Clift** (Secretariat) said that the Commission had before it documents A/CN.9/732 and Add.1-3 containing draft judicial materials for the information and guidance of judges on cross-border insolvency issues and, in particular, on the UNCITRAL Model Law on Cross-Border Insolvency.

2. The Secretariat had received from the Commission a mandate to develop a text in a flexible manner as had been achieved with respect to the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*, through consultations with judges and with insolvency practitioners and professionals.

3. The draft text had been considered by Working Group V at its latest session, as reported in paragraphs 110-116 of document A/CN.9/715, and circulated to Member States. The comments received were contained in document A/CN.9/733 and Add.1, and they had been addressed to the extent possible.

4. The draft text had also been considered by judges and other participants in the Ninth Judicial Colloquium organized jointly by UNCITRAL, the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) and the World Bank, and held in Singapore in March 2011.

5. The provisions of the Model Law were examined in the draft text in a way that reflected the sequence in which applications for recognition and assistance would generally be considered by the receiving court. The draft text did not purport to instruct judges on how to deal with such applications or suggest that a single approach was possible or desirable, but provided general guidance on the issues that a judge might need to consider on the basis of the intentions of those who had crafted the Model Law.

6. To illustrate how the provisions had been interpreted and applied in practice and possible strands of reasoning that might be adopted in addressing specific issues, the draft text included references to court decisions from different jurisdictions. There was no attempt to criticize the decisions; attention was

drawn to issues that a judge might want to consider if dealing with a similar case, while taking account of domestic law including the terms of the legislation enacting the Model Law.

7. A new annex, contained in document A/CN.9/732/Add.3, consisted of short notes on the facts of the cases and the decisions taken to provide orientation for those who had not had the opportunity to read the judgements in question in their original languages.

8. In addition to considering the draft text, the Commission might wish to address the possibility of developing a mechanism for updating it periodically in a manner similar to that in which it had been developed and maintaining a neutral approach, as described in paragraphs 3 and 4 of document A/CN.9/732.

9. The Commission might also wish to consider acknowledging in a preface the substantial contribution to the project by Justice Paul Heath of New Zealand.

10. **Mr. González** (Argentina) expressed appreciation for the Secretariat's work in preparing the draft judicial materials, which would be important for the possible incorporation and subsequent application of the Model Law in his country.

11. In particular, Argentina welcomed the provision in the Model Law that the foreign representative must inform the receiving court of any other foreign proceeding regarding the same debtor, the definition of the "establishment" of a debtor, the fact that there was no requirement for reciprocity, the provisions regarding the presumption of the authenticity of documents, and the fact that the materials reflected the spirit of broad cooperation that was a key aspect of the Model Law.

12. Argentina would like to see a fuller reflection in the revised text of two issues raised by it in its comments contained in document A/CN.9/733/Add.1.

13. Firstly, under the Model Law courts were entitled to communicate directly with foreign courts or foreign representatives without the need for requests or letters rogatory. In many countries, including Argentina, letters rogatory were important for ensuring effective communication. Therefore, the judicial materials should stress the importance of ensuring more efficient cooperation with a view to effective recognition while safeguarding the interests of the parties.

14. The second issue was connected with recourse to public policy as grounds for declining recognition as discussed in paragraphs 47-51 of document A/CN.9/732. Argentina considered the situation to be more akin to fraud and abuse, which constituted hindrances or limits based on manipulation of the facts, and it would like to see that view reflected more fully in the judicial materials, possibly in a subsequent update.

15. **Mr. Redmond** (United States of America) expressed appreciation to the Secretariat for producing the draft judicial materials in such a short time. Intended to educate judges regarding the application of the Model Law, the materials would also provide useful background information for academics, practitioners and courts, also helping to provide uniformity, transparency and predictability and contributing to greater coordination in cross-border insolvency cases.

16. His country supported the proposal to acknowledge the contribution of Justice Paul Heath.

17. The United States strongly supported the proposal to update the text in consultation with experts to ensure that the materials stayed abreast of Working Group V's most recent work and of the emerging body of case law and decisions. His country also supported the neutral approach taken to the cases cited. The Secretariat should not change the context or scope of the text and should submit proposed updates to the Commission for its approval.

18. **Mr. D'Allaire** (Canada) said that his country was in favour of the adoption of the draft judicial materials, which represented a positive contribution to judicial collaboration in cross-border insolvency proceedings. During extensive consultations in Canada, both practitioners and the judiciary had expressed widespread support for the materials, which would be particularly useful as his country had recently adopted the Model Law and did not have a specialized insolvency or bankruptcy court.

19. He supported the proposal to update the text regularly and encouraged the Secretariat to report to the Commission on any deficiencies or proposed amendments.

20. His country also supported the proposal to acknowledge the contribution of Justice Paul Heath.

21. **Mr. Lara Cabrera** (Mexico) said that his country was in favour of adoption of the draft judicial materials, which would provide valuable guidance on the application of the Model Law. His country would welcome a flexible mechanism whereby the Secretariat might update the text in consultation with experts.

22. **Ms. Clift** (Secretariat), addressing the points raised by the representative of Argentina, said that the important issue of fraud and abuse had been discussed in Working Group V, as reflected in document A/CN.9/715 in paragraph 26 and below regarding public policy, and in paragraph 42 about the impact of fraud on factors to be considered in determining a debtor's centre of main interest (COMI). As noted in paragraph 43, the Working Group had agreed that the issue required further consideration. As a result, no view was reflected in the judicial materials, which could subsequently be updated to incorporate outcomes from Working Group V.

23. Communication was addressed in various texts including the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* and the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency. The matter needed to be taken into account insofar as the current work of Working Group V was connected with those texts. Approaches to communication in cross-border cooperation were frequently discussed in judicial colloquiums and meetings with judges, and the Secretariat was open to a specific proposal on that subject for inclusion in the judicial materials.

24. **Mr. González** (Argentina) said that the text could be modified to reflect his country's requirements when it was next updated.

25. **The Chairperson** took it that the Commission wished to adopt the draft judicial materials contained in documents A/CN.9/732 and Add.1-3, with an acknowledgement in the preface of the substantial contribution of Justice Paul Heath.

*It was so decided.*

26. **The Chairperson** invited the Commission to consider the draft decision contained in document A/CN.9/XLIV/CRP.3

27. **Mr. González** (Argentina), recalling the comment made by him during the discussion on the adoption of the UNCITRAL Model Law on Public Procurement,<sup>1</sup> said that he was pleased that at least in operative paragraph 5 of the draft resolution now under discussion the word “consider” was used.

28. **Mr. Redmond** (United States of America) expressed support for adoption of the draft decision without the square brackets around the words “and revisions adopted by” in operative paragraph 1.

29. **Mr. D’Allaire** (Canada), supported by **Mr. Redmond** (United States of America), suggested the deletion from operative paragraph 1 of document A/CN.9/XLIV/CRP.3 the words “and revisions adopted by” as he understood that the text of A/CN.9/732 and addenda had not been amended by the Commission.

30. **Ms. Clift** (Secretariat) said that the Commission had adopted no revisions to the UNCITRAL Model Law on Cross-Border Insolvency.

*Document A/CN.9/XLIV/CRP.3 was adopted without the bracketed phrase “[and revisions adopted by]”*

**Insolvency law: progress report of Working Group V (A/CN.9/715)**

31. **Ms. Clift** (Secretariat), introducing the item, said that the Commission had before it, in document A/CN.9/715, a report on the thirty-ninth session of Working Group V. The Group had discussed selected concepts in the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI) and the duties of directors and officers in insolvency and pre-insolvency cases. As the session had been the first dealing with the two topics, there had been a significant amount of preliminary discussion on the policy issues raised. The Group could now decide how to proceed.

32. Referring to the Ninth Judicial Colloquium, organized by UNCITRAL, the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International), together with the UNCITRAL Secretariat and the World Bank and held in Singapore in March 2011, she said that some 80 judges from about 40 States had attended. The topics discussed had included questions

arising in the insolvency of enterprise groups. Two panels had discussed how the various issues relating to two hypothetical insolvency scenarios, one domestic and one cross-border, would be handled in the different jurisdictions represented. Also, the Colloquium participants had also considered the draft text of the judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. A report on the Colloquium was available on the UNCITRAL website. The Tenth Judicial Colloquium was planned to be held in The Hague in 2013.

33. She expressed hope that the Commission would endorse the UNCITRAL Secretariat’s continued sponsorship of and active participation in INSOL International’s Judicials Colloquiums.

34. Regarding part three of the UNCITRAL Legislative Guide on Insolvency Law, adopted by the Commission in 2010, she said that she understood that Colombia had been the first State to pass legislation responding to the recommendations made in it, and she would welcome information on that enactment.

35. On 6 June 2011, the Committee on Legal Affairs of the European Parliament had released a draft report with recommendations to the Commission regarding insolvency proceedings in the context of European Union company law. One of the recommendations was that, a set of rules based on part three of the UNCITRAL Legislative Guide on Insolvency Law be drawn up to promote cooperation between the courts and insolvency representatives in cases of insolvency of enterprise groups. The draft report was available on the UNCITRAL website.

36. **Mr. Redmond** (United States of America) said that the two representatives of developing countries in particular had welcomed the fact that the topic of the duties of directors and officers in insolvency and pre-insolvency cases had been taken up by Working Group V. It had become clear early in the Group’s thirty-ninth session that States stood ready to address the topic of COMI despite its complexity.

37. His country looked forward to further consideration of both topics.

38. **Mr. D’Allaire** (Canada) said that his country was satisfied with the progress made so far in the consideration of the two topics.

<sup>1</sup> See document A/CN.9/SR.932, para. 62.

39. As regards concepts in the UNCITRAL Model Law on Cross-Border Insolvency relating to COMI, the difficulties lay not in the wording of the Model Law but in the fact that it took time for judicial decisions that could provide guidance to accumulate. His country welcomed the issues identified by the Secretariat, which should be fully explored.

40. As regards the duties of directors and officers in insolvency and pre-insolvency cases, a number of jurisdictions provided for remedies for breach of duty in such cases, but, in the event that proceeds were realized, they did not necessarily flow to all creditors. The Secretariat and Working Group V should consider the possibility of situations where the claimant was entitled to a security interest.

41. **The Chairperson** said — following comments by **Mr. D’Allaire** (Canada), **Mr. González** (Argentina) and **Mr. Sorieul** (Secretariat) — that the Secretariat had planned Working Group V sessions for November 2011 and February 2012, which allowed only limited time for the preparation of materials, but there was little flexibility with regard to the dates available.

42. He proposed that the Commission take up such matters under agenda item 21 — Date and place of future meetings.

43. **Mr. Mokal** (World Bank) said that the Insolvency Task Force of the World Bank had recently discussed the issue of establishing best practice standards for the treatment of natural persons in insolvency cases.

44. The patterns of financial intermediation had changed significantly since the Insolvency and Creditor Rights Standard had been formulated. There had been a significant growth in consumer credit, so that, in the wake of the recent financial crisis, problems in the consumer sector had resulted in a systemic risk to the economy as a whole in many jurisdictions. The World Bank, together with its international partners, had had to advise Governments on how to deal with such problems in situations that were unprecedented in its experience, and it had realized how useful it would be to have best practice standards for the treatment of natural persons in insolvency cases formulated with input from all relevant stakeholders, including client Governments.

45. The World Bank would like UNICTRAL to participate in their formulation.

46. **Mr. Redmond** (United States of America) said that UNCITRAL had cooperated with the World Bank and the International Monetary Fund on insolvency issues, and his country would like to see it participating in the formulation of best practice standards for the treatment of natural persons in insolvency cases.

47. **The Chairperson** took note of the World Bank’s wish that UNCITRAL participate in their formulation and of the support expressed by the representative of the United States of America.

*The meeting rose at 3.10 p.m.*