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### Report of Working Group V (Insolvency Law) on the work of its fifty-seventh session (Vienna (online), 7–10 December 2020)

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## I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested Working Group V to conduct a preliminary examination of issues relevant to the insolvency of MSMEs.<sup>1</sup> At its forty-seventh session, in 2014, the Commission gave Working Group V a mandate to undertake work on the insolvency of MSMEs as a next priority, following completion of the work on facilitating the cross-border insolvency of multinational enterprise groups and recognition and enforcement of insolvency-related judgments.<sup>2</sup> At its forty-ninth session, in 2016, the Commission clarified the mandate of Working Group V with respect to the insolvency of MSMEs as follows: “Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed.”<sup>3</sup>

2. The Working Group held a preliminary discussion of the topic at its forty-fifth (April 2014) ([A/CN.9/803](#)), forty-ninth (May 2016) ([A/CN.9/870](#)) and fifty-first (May 2017) ([A/CN.9/903](#)) sessions. At its fifty-third session (May 2018), the Working Group had before it document [A/CN.9/WG.V/WP.159](#), upon which it made various observations ([A/CN.9/937](#), chapter VI). Based on that paper and those observations, a draft text on a simplified insolvency regime ([A/CN.9/WG.V/WP.163](#)) was presented to the Working Group for consideration at its fifty-fourth session (December 2018). At that session, the Working Group suggested revisions to that text ([A/CN.9/966](#), chapter VI). The Working Group continued its deliberations on the topic at its fifty-fifth (May 2019) and fifty-sixth (December 2019) sessions on the basis of revised drafts ([A/CN.9/WG.V/WP.166](#) and [A/CN.9/WG.V/WP.168](#), respectively) and suggested revisions to those texts ([A/CN.9/972](#), chapter V, and [A/CN.9/1006](#)).

3. At its fifty-sixth session, the Working Group requested the Secretariat to prepare a revised text for consideration by the Working Group at its fifty-seventh session ([A/CN.9/1006](#), para. 11). A revised paper [A/CN.9/WG.V/WP.170](#), which was expected to be considered by the Working Group at its fifty-seventh session scheduled to be held from 11 to 15 May 2020 but postponed due to the measures put in place by States and the United Nations to contain the spread of the coronavirus disease (COVID-19) pandemic, reflected the deliberations at the fifty-sixth session of the Working Group and results of the informal consultations held on 16, 23, 30 and 31 January and 6 February 2020 in preparation for the May 2020 session. The paper considered at the session (document [A/CN.9/WG.V/WP.170/Rev.1](#)) built on the text contained in document [A/CN.9/WG.V/WP.170](#), reflecting also the results of the informal consultations held by the Working Group on that text from 11 to 15 May 2020 and on 3 and 4 September 2020 as well as written communications received from States and organizations on that text subsequent to those consultations.

## II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fifty-seventh session in Vienna, from 7 to 10 December 2020, in accordance with the decision of the UNCITRAL member States of 19 August 2020

<sup>1</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 326.

<sup>2</sup> *Ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 156.

<sup>3</sup> *Ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 246.

on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease (COVID-19) pandemic (see [A/CN.9/1038](#), annex, I). Arrangements were made to allow delegations to participate at the session in person and remotely.

5. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Finland, France, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lebanon, Libya, Malaysia, Mexico, Pakistan, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

6. The session was attended by observers from the following States: Afghanistan, Angola, Brunei Darussalam, Bulgaria, Burkina Faso, Denmark, Egypt, El Salvador, Gabon, Greece, Kuwait, Lao People's Democratic Republic, Latvia, Lithuania, Malta, Morocco, Mozambique, Netherlands, Nicaragua, Portugal, Slovakia, Slovenia and Sudan.

7. The session was also attended by observers from Holy See and the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund and the World Bank Group;

(b) *Invited international governmental organizations*: Eurasian Economic Commission, European Bank for Reconstruction and Development, Hague Conference on Private International Law, Inter-American Development Bank and International Association of Insolvency Regulators;

(c) *Invited international non-governmental organizations*: Allerhand Institute, American Bar Association, European Centre for Peace and Development, Fondation pour le droit continental, Groupe de réflexion sur l'insolvabilité et sa prévention, INSOL Europe, INSOL International, International Association of Legal Science, International Bar Association, International Insolvency Institute, International Swaps and Derivatives Association, International Transport Workers' Federation, International Women's Insolvency and Restructuring Confederation, Kozolchyk National Law Center, Law Association for Asia and the Pacific, Moot Alumni Association and Union internationale des huissiers de justice.

9. According to the decision of the UNCITRAL member States of 19 August 2020 (see para. 4 above), the following persons continued their respective offices:

*Chairman*: Mr. Xian Yong Harold Foo (Singapore)

*Rapporteur*: Ms. Jasnica Garašić (Croatia)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda ([A/CN.9/WG.V/WP.169/Rev.1](#)); and

(b) A note by the Secretariat: draft text on a simplified insolvency regime ([A/CN.9/WG.V/WP.170/Rev.1](#)).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Consideration of micro and small enterprises (MSE) insolvency issues.
4. Other business.

### III. Deliberations

12. The Working Group discussed the draft glossary and draft recommendations 1 to 64 contained in the draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.170/Rev.1) and suggested revisions to them (see chapter IV). It deferred consideration of draft recommendations 65–88 to its next session (see para. 127). The Working Group also considered a proposal in relation to recommendations with references to employees (see paras. 128–131). The Working Group requested the Secretariat to prepare a revised text for consideration by the Working Group at its fifty-eighth session.

### IV. Consideration of a draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.170/Rev.1)

#### A. Comments on the draft glossary

*“(a) Competent authority”*

13. The Working Group approved the explanation of the term without the sentence in square brackets. It requested the Secretariat to find an appropriate location for that sentence in Section C (Institutional framework).

*“(b) Independent professional”*

14. The Working Group approved the explanation of the term unchanged. A suggestion to move the second sentence to Section C (Institutional framework) did not receive support.

*“(c) MSEs”, “(c)(i) Individual entrepreneurs”, “(c)(ii) Unlimited liability MSEs” and “(c)(iii) Limited liability MSEs”*

15. The Working Group approved the explanation of the term as provided in option 2 and deferred the consideration of references to limited and unlimited MSEs to a later stage.

*“MSE debtor”*

16. The Working Group approved the explanation of the term unchanged, taking note of the suggestion to find a better alternative to the word “initiated” in the Russian version of the text.

*“Simplified insolvency proceedings”*

17. The Working Group approved the explanation of the term unchanged.

#### B. Comments on the draft recommendations

##### Draft recommendation 1

18. With reference to footnote 159 of the paper, different views were expressed for the suggestion to add at the end of subparagraph (e) the words “and address, subject to national employment laws, employees’ involvement in simplified insolvency proceedings”. In support for that addition, it was explained that workers’ rights raised issues distinct from those of other creditors and should be the subject of a separate protection regime.

19. While acknowledging the importance of protection of workers’ rights in simplified insolvency proceedings, some delegations noted that workers’ rights enjoyed protection in insolvency proceedings by default and their protection in a simplified insolvency regime would not raise distinct issues. In the view of some

other delegations, subparagraph (d) that referred to protection of parties in interest sufficiently addressed protection of workers' rights. If an additional provision on that subject was at all necessary, it was suggested that it might draw on the last preamble paragraph of the UNCITRAL Model Law on Cross-Border Insolvency that referred to preservation of employment. Yet another view was that that subject might be appropriately addressed elsewhere in the text.

20. The Working Group, noting that views on the proposed amendments to draft recommendation 1 (e) were divided and taking note that additional provisions on workers' rights would be proposed for insertion throughout the text, agreed to consider them all, time permitting, by the end of the session (for subsequent discussion of that topic, see paras. 128–131 below).

#### **Draft recommendation 2**

21. The Working Group approved the draft recommendation as contained in option 2.

#### **Draft recommendation 3**

22. No support was expressed for suggestion to replace the words “other insolvency regimes” with the words “different special treatment”. The Working Group approved the draft recommendation unchanged.

#### **Draft recommendation 5**

23. The Working Group approved the draft recommendation retaining the words in square brackets. To ensure consistency with the amended subparagraph (b), the Working Group requested the Secretariat to include in subparagraph (c) a reference to review of an independent professional's decisions.

#### **Draft recommendation 5 bis**

24. In response to the suggestion to move examples from draft recommendation 5 bis to the draft commentary, the prevailing view was that providing an illustrative list of functions of the competent authority in the draft recommendation was helpful. Another suggestion was to delete the words “by way of example” in the opening sentence.

25. Questions arose about the content of subparagraph (b), in particular whether the competent authority would be in a position to verify accuracy of information supplied by the debtor or other parties and whether the subparagraph should instead refer to the competent authority's function to adjudicate disputes in relation to the debtor's assets and claims.

26. As regards a choice between the terms “liquidation report” and “liquidation schedule”, it was explained that the use of both terms would be appropriate depending on the context: in references to a document that listed steps to be accomplished, as in subparagraph (h), the term “liquidation schedule” should be used; and in references to a summary of the steps already accomplished in the simplified liquidation proceedings, the term “liquidation report” should be used.

27. The Working Group agreed to retain the draft recommendation unchanged and defer the consideration of whether the term “liquidation schedule” or “liquidation report” or both should be used in the context of the simplified liquidation proceedings to a later stage (for subsequent discussion of that point, see paras. 76–80 below). The Working Group heard that the proposal on workers' rights (see para. 20 above) would affect draft recommendation 5 bis as well.

#### **Draft recommendation 5 ter**

28. In the light of references to an independent professional throughout the text, it was considered essential to provide basic guidance about functions of an independent

professional. Retaining draft recommendation 5 ter was therefore considered important. Extensive provisions about the role and functions of the insolvency representative in the Legislative Guide were recalled for comparison.

29. The Working Group noted that the draft recommendation might change in the light of the Working Group's earlier request to the Secretariat (see para. 13 above).

#### **Draft recommendation 10**

30. Different views were expressed as regards the words in square brackets in the title and in the draft recommendation. While some delegations supported retaining those words, other delegations questioned whether cost-effectiveness would necessarily be always achieved through reduced formalities. The words "ensuring cost-effectiveness" raised additional concerns, as they might inadvertently be read as a guarantee of cost-effectiveness.

31. Support was expressed for the suggestion to delete the words in square brackets and add at the beginning the phrase: "Consistent with the objective of establishing a cost-effective simplified insolvency regime...".

32. Another proposal was to address cost-effectiveness in a separate recommendation.

33. Noting that cost-effectiveness was an overarching principle and objective in the simplified insolvency regime, the Working Group approved the draft recommendation with the suggested opening phrase (see para. 31 above) and deletion of the words in square brackets in the title and the draft recommendation.

#### **Draft recommendations 11, 11 bis and 11 ter**

34. The prevailing view was to retain option 2 consisting of draft recommendations 11, 11 bis and 11 ter. In support of retaining option 1, it was explained that that option was less prescriptive and eliminated the concern about debtor-in-possession in liquidation. In response, it was explained by delegations favouring option 2 that draft recommendation 11 bis would allow the debtor's involvement in simplified liquidation only in exceptional cases and, in the light of the debtor's business connection, such involvement might indeed be useful in some cases.

35. After discussion, the Working Group approved draft recommendations 11, 11 bis and 11 ter as contained in option 2.

#### **Draft recommendation 12**

36. Some delegations were of the view that there was inconsistency between the draft recommendation and the Legislative Guide as regards a mechanism of approval by creditors of matters that required their approval (voting vs. deemed approval). The view was expressed that the text should suggest the mechanism of a deemed approval as an alternative to voting and as an option for States to consider, like it was done in paragraph 58 of the draft commentary. To achieve that, it was suggested to start the second sentence of the chapeau provisions with the word "Alternatively".

37. The prevailing view was that no such inconsistency arose. Safeguards in the form of notices and notifications included in the text for protection of creditors' rights were recalled in that context.

38. With reference to subparagraph (a), a point was made that it might be burdensome for the competent authority to notify all relevant creditors. A suggestion to replace that requirement with a lighter one (e.g., notification of creditors through a creditors' representative) did not receive support.

39. After discussion, the Working Group agreed to retain the draft recommendation unchanged and noted the need to ensure consistency throughout the text regarding deemed approval, including in draft recommendation 57 and the draft commentary (see further paras. 117–120 below).

**Draft recommendation 14**

40. In support of retaining option 3 for subparagraph (b), it was stated that the competent authority might not always be in a position to provide assistance to the debtor with the collection of the relevant information; other bodies might be relevant in that context. In addition, it was noted that under options 1 and 2, the debtor might use the absence of adequate assistance either from the competent authority or an independent professional or both as an excuse not to comply with the obligation to collect information about its business affairs and financial position.

41. The prevailing view was to retain option 2 for subparagraph (b). Emphasizing the importance of providing assistance to the debtor with the collection of the required information and noting much similarity between options 1 and 2 in that respect, option 2 was preferred as being more flexible.

42. The Working Group approved subparagraphs (a), (c), (d) and (e) unchanged.

**Draft recommendation 21**

43. The suggestion was made to clarify in the commentary consequences of denial of application. The other view was that the recommendation itself should address that matter.

44. The Working Group considered that application could be denied for different reasons and that consequences of denial would also be different, including the commencement of an ordinary insolvency proceeding in cases referred to in footnote 144 of the paper. As such commencement would not be automatic but require decision of the competent authority or another competent State organ, some support was expressed for addressing this issue in the draft recommendation along the following lines: "The law should specify the consequences of denial of application depending on the type of proceedings".

45. The Working Group requested the Secretariat to add reference to possible consequences of denial of application in the draft recommendation, and also to add commentary for the draft recommendation along the lines of footnote 144 of the paper. The Working Group deferred the consideration of similar changes in draft recommendation 24 to a later stage (see para. 60 below).

**Draft recommendation 21 bis**

46. There was general support for the current location of the draft recommendation and the current text of subparagraph (a).

47. With respect to subparagraph (b), different views were expressed regarding the requirement for individual notification. Some delegations suggested deleting that requirement on the basis that such requirement would be cumbersome, costly and time-consuming for the competent authority and would thus defeat the purpose of a simplified proceeding. Instead, it was noted, subparagraph (b) should leave it to the competent authority to decide on the form of notice. Concerns were expressed by some other delegations about deleting such requirement, in particular as regards the debtor and creditors, emphasizing the importance of individual notification in the context of deemed approval.

48. In support of retaining the current text in subparagraph (b), several delegations were of the view that it struck a right balance between cost and time and the need to require individual notices to the debtor and all known creditors and other known parties in interest. It was pointed out that the current text allowed for individual notification to be carried out electronically and thus would not be costly. Ample flexibility given to the competent authority in the second part of subparagraph (b) was also emphasized. In addition, it was said that only few notifications would be needed in the context of MSEs and giving them would not place a burdensome obligation on the competent authority.

49. Other delegations supported retaining the requirement for individual notification but without the reference to “other known parties in interest” as such term was considered too broad. Considering that the Legislative Guide did not require individual notification to be given to other known parties in interest in the context of ordinary insolvency proceedings, several delegations cautioned against introducing such requirement for simplified insolvency proceedings. Another suggestion was to indicate the default means of communication for individual notification (such as traditional post or emails) as it would increase legal certainty.

50. With respect to the term “including employees” in square brackets, there was some support for retaining it, although in the view of some delegations the reference to employees was not necessary as it was already covered by the term “creditors”. Concerns were expressed that it might be cumbersome to notify all employees individually and a better approach would be to notify only the labour union or the representatives of employees.

51. Another suggestion was to delete subparagraph (b) and amend subparagraph (a) to ensure that notification would reach all parties in interest. In support of that suggestion, it was explained that subparagraph (b) invited different interpretations, in particular such terms as all known parties in interest and employees (e.g., current or also past employees).

52. The Working Group approved the recommendation with the deletion of the phrase “other known parties in interest” in subparagraph (b) and requested the Secretariat to reflect in the commentary how individual notification could be given. The Working Group deferred the consideration of the reference to employees to a later stage (see paras. 128–131 below).

### **Draft recommendation 23**

53. Views were divided on desirability of retaining the draft recommendation and, if it were to be retained, on the word to be used (“should” or “could” appearing in square brackets).

54. Opponents of retaining the draft recommendation raised several concerns: (a) no similar recommendation appeared in the Legislative Guide; (b) the draft recommendation did not raise issues unique for simplified insolvency proceedings; (c) the requirement of the public notice in draft recommendation 21 bis (a) would make this draft recommendation superfluous since all creditors would be notified about the proceeding one way or another; (d) the draft recommendation undermined universality, effectiveness and other objectives of simplified insolvency proceedings. In particular, by allowing loopholes in the system that could be abused by creditors that might decide not to join the proceedings preferring individual enforcement actions, it did not create incentives for creditors to join simplified insolvency proceedings and as a result, did not facilitate the full discharge of debts. The practical importance of the latter to achieve the widespread use of simplified insolvency proceedings was emphasized; and (e) the phrase “unaffected by the simplified insolvency proceeding” was very broad and invited different interpretations and implications for due process. Recognizing the importance of the issues that the draft recommendation raised, those delegations preferred explaining them in the commentary.

55. Several proponents of retaining the draft recommendation highlighted the importance of the provision as containing a key safeguard against possible fraudulent behaviour of the debtor. For that reason, they preferred the word “should” to “could”. Expressing reservations for the suggestion to delete the phrase “and having not joined the proceeding”, they agreed that the draft recommendation should be redrafted as follows: “The insolvency law providing for simplified insolvency regime should specify that claims of creditors not notified of the commencement of the simplified insolvency proceeding are not affected by the proceeding unless these creditors subsequently joined the proceeding”. The understanding was that the draft recommendation would be accompanied by a commentary that would discuss:

(a) risks of abuse of that provision by both the debtor and creditors; (b) measures to mitigate those risks; and (c) limitations on application of the draft recommendation (e.g., situations when the debtor might have forgotten to list some claims and creditors but subsequently rectified that omission with the result that the originally omitted creditors would be notified of the proceeding and join the proceeding at a later stage).

56. Some delegations, while not objecting to retaining the draft recommendation, preferred suggesting it as an option to States and hence opted for the word “could”.

57. Some delegations that favoured removing the draft recommendation, suggested that, if it were to be retained, its scope of application should be limited to creditors known to the debtor. Another view was that it would be unreasonable not to include creditors that learned about the proceeding and the recommendation should thus be applicable only to creditors that did not become aware of the proceeding. Yet another view was that application of the recommendation should be made conditional upon fulfilment by the competent authority of all steps required for notification of creditors under domestic law, irrespective of whether notification was successful or not.

58. Another view was that issues raised by the draft recommendation were sufficiently addressed by existing rules, such as (a) rules on consequences of the failure to notify the reorganization plan, (b) rules that exclude certain debts from the discharge, such as those concealed by the debtor, and (c) rules sanctioning the debtor for fraud.

59. In the light of those divergent views, the Working Group was unable to reach agreement on the draft recommendation. A point was made that since the text was new and no similar recommendation appeared in the Legislative Guide, sufficient support had to exist for it to be retained in the text. Interested delegations were encouraged to consult with a view to reaching a compromise.

#### **Draft recommendation 24**

60. The Working Group recalled the need to amend the draft recommendation in the light of the amendments agreed to be made in draft recommendation 21 (see para. 45 above).

#### **Draft recommendation 25**

61. The Working Group approved the draft recommendation retaining the words in square brackets.

#### **Draft recommendation 26**

62. The Working Group agreed to delete the words “and any other known party in interest” to ensure consistency with amendments agreed to be made in draft recommendation 21 bis (b) (see para. 52 above).

#### **Draft recommendation 31**

63. The view was expressed that the meaning of the draft recommendation was unclear. Introducing a commentary that would explain how avoidance proceedings would function in a simplified insolvency regime, in particular in the context of the debtor-in-possession and in the light of short time periods for all procedural steps, was considered helpful.

64. The Working Group requested the Secretariat to include a commentary to the draft recommendation, which would address *inter alia* those issues, for consideration by the Working Group at its next session.

#### **Draft recommendation 32**

65. In the light of the drafting suggestion made with respect to the phrase “upon request of any party in interest”, the Working Group requested the Secretariat to improve the drafting of the text.

**Draft recommendation 33**

66. The need for subparagraph (a) was questioned. The Working Group recalled that the content of that subparagraph was taken from the second sentence of recommendation 47 of the Legislative Guide, which was accompanied by a footnote that referred to article 20, paragraph 3 of the UNCITRAL Model Law on Cross-Border Insolvency and that paragraphs 186 and 187 of the Guide to Enactment and Interpretation of that Model Law explained the content of that provision.

67. The Working Group approved the draft recommendation unchanged.

**Draft recommendation 35**

68. The Working Group approved the draft recommendation as contained in option 3, taking note of the views expressed that that option provided most flexibility and appropriately acknowledged the role of both the competent authority and an independent professional.

**Draft recommendation 36**

69. With respect to the chapeau, several delegations expressed support for retaining the phrase in square brackets because in some legal systems secured creditors were not required to submit claims. It was, however, pointed out that the phrase in square brackets might cause confusion and be understood as applying to all creditors, not only secured creditors. Considering that the text did not specify the consequences of secured creditors not submitting their claims, a suggestion was made to delete the phrase “including secured creditors” and the phrase in square brackets. There was general support for that suggestion, provided that the accompanying commentary would discuss issues concerning the submission of claims by secured creditors.

70. With respect to subparagraph (b), there was general support for retaining the word “reasonable” and adding the word “expeditiously” at the end of that subparagraph, noting that it would give creditors reasonable time but encourage them to submit claims within a short time period. Suggestions to give “sufficient” time to creditors or to require creditors to submit their claims “as soon as reasonably possible” did not receive support. It was noted that draft recommendations 21 ter (d) and 36 (a) required the competent authority to specify the time period for submission of claims.

71. The Working Group approved the draft recommendation with the following amendments: (a) deletion of the phrase in square brackets and the phrase “including secured creditors” in the chapeau; and (b) retention of the word “reasonable” without square brackets, deletion of the alternatives in square brackets and insertion of the word “expeditiously” at the end of subparagraph (b).

**Draft recommendation 37**

72. The Working Group approved the draft recommendation unchanged. In the context of the discussion of draft recommendation 38 (see paras. 73–75 below), it was queried whether the competent authority should perform functions envisaged in sub-item (a). It was noted that those functions should instead be performed by an independent professional or the debtor-in-possession. The opposite view was that the debtor-in-possession should not be allowed to perform them and that they should be left with the competent authority. After discussion of draft recommendation 38, it was noted that the amendments agreed to be made in that draft recommendation (see para. 75 below) addressed concern that conflicts of interest might arise if the same competent authority would perform functions envisaged in draft recommendations 37, sub-item (a), and 38.

**Draft recommendation 38**

73. Support was expressed for replacing the word “should” with the word “could” in the second sentence on the ground that in some jurisdictions it would not be the

competent authority that would be authorized to review disputed claims and decide on their treatment. Some delegations preferred retaining the word “should” expressing concern about ambiguity that the word “could” raised. Other delegations found both words acceptable.

74. In ensuing discussion, the Working Group agreed to expand reference to the competent authority in that sentence by reference to competent State authorities, in particular judicial bodies, which would not necessarily be the competent authority in the meaning provided to that term in the draft glossary. In the light of that change, the Working Group agreed to retain the word “should” in that sentence. In that context, reference was also made to the importance of provisions on review and appeal of the competent authority’s decisions in draft recommendation 5 (c) and the accompanying commentary.

75. With reference to the words in square brackets, some delegates preferred deleting them while others supported the suggestion to retain them but with the deletion of the words “ordering disputing parties in interest to exercise their rights at law and”. After discussion, the Working Group took up the latter suggestion.

#### **Draft recommendation 40**

76. Several delegations expressed support for the suggestion that draft recommendations should require the competent authority or another relevant party to issue a document that would list steps expected to be taken in a simplified liquidation proceeding. The importance of such document for transparency, accountability and protection of all parties in interest was emphasized. The use of the term “liquidation schedule” in that context was preferred, for reasons explained in paragraph 26 above.

77. The other view was that requiring issuance of such document in all cases unnecessarily complicated simplified liquidation proceedings, especially in situations where the MSE debtor might have only few assets. It was considered that the draft recommendation should recommend instead that the insolvency law providing for a simplified insolvency regime should itself contain default provisions on the main steps involved in the simplified liquidation proceedings, including the default method for sale of assets, which would eliminate the need to issue such document. In response, it was noted that even in cases of one or very few assets, certainty, transparency and accountability as regards insolvency estate assets and their realization ought to be ensured to prevent fraud and self-dealing.

78. The prevailing view was to retain the words “require” and “liquidation schedule” in square brackets in subparagraph (a).

79. As regards subparagraph (b), deletion of the words in square brackets was broadly supported on the ground that the closure of the proceedings and discharge would not necessarily take place simultaneously. Suggestions to add the phrase “take a prompt decision to” before the word “close” and to add a sentence referring to a decision by the competent authority on discharge were not taken up by the Working Group. Draft recommendation 69 addressing discharge of natural persons in simplified liquidation proceedings was considered relevant in that regard.

80. The Working Group approved the draft recommendation retaining the words “require” and “liquidation schedule” in subparagraph (a) and deleting the words in square brackets in subparagraph (b). The Working Group requested the Secretariat to make consequential changes throughout the text as regards the use of the term “liquidation schedule” and consider including an explanation of that term in the commentary. It also noted that consequential changes might need to be made in draft recommendations 48 to 50 as regards deletion of references to discharge (see further paras. 96–98 below). In response to concerns that the text of the draft recommendation might suggest that discretion was given to the competent authority to decide whether the sale of disposable assets should take place, the Working Group requested the Secretariat to clarify in the commentary that no such discretion was intended: the sale

of disposable assets was to take place except in situations referred to in draft recommendation 48.

#### **Draft recommendation 41**

81. Although some support was expressed for option 1, the majority of delegations preferred retaining either option 2 or 3.

82. Option 2 was considered by its proponents as more appropriate in the liquidation context since it did not envisage involvement of parties in interest and thus reduced risks of abuses. It was also considered more efficient since delays in proceedings could be avoided if a liquidation schedule were to be prepared by the competent authority or an independent professional with sufficient knowledge of adequate means for selling assets.

83. Option 3 was considered by its proponents as more flexible since it allowed other persons, including the debtor or a creditor, to prepare a liquidation schedule in appropriate circumstances. The view prevailed among those delegations that the word “may”, not “should”, should stay in that option. A suggestion to delete the phrase “or another person” did not receive support.

84. The Working Group agreed to delete option 1 and to keep both options 2 and 3 for discussion at its next session, retaining the word “may” in option 3.

#### **Draft recommendation 42**

85. There was general support for the suggestion to explain in the commentary the consequences of the failure to prepare a liquidation schedule on time. It was noted that in such case the competent authority might be expected to take over the task of preparing a liquidation schedule; default provisions of the insolvency law on realization of assets might also apply. The importance of recalling in the commentary that realization of assets should take place in the most expeditious manner was emphasized in that context. The Working Group requested the Secretariat to prepare an accompanying commentary accordingly.

#### **Draft recommendation 43**

86. Proposals to include the words “where relevant” at the end of the chapeau provisions and to expand subparagraph (c) by mentioning liens and other securities attached to the assets were not taken up.

87. Several delegations preferred deleting subparagraph (c), highlighting the need to distinguish two separate processes – realization of assets and distribution of proceeds. In their view, comingling the two processes risked delaying realization of assets.

88. The prevailing view was to retain subparagraph (c) for transparency. Including information about amounts and priorities of admitted claims in the liquidation schedule was considered helpful to creditors, for example in estimating prospects of receiving proceeds from the realization of assets. In ensuing discussion, in the context of draft recommendations 45–46 (see paras. 92–94 below), it was clarified that such information would be provided solely for information purposes; admission of claims and resolution of disputes related to claims would be handled through different processes. A cross reference in that respect was made to section I and draft recommendation 5 (c).

89. There was broad support for deleting subparagraph (e) since its content was not considered relevant for a liquidation schedule, which as explained in footnote 66 of the paper should be nothing more but a programme for realization of assets. Concern was expressed that bringing debt repayment plans within the ambit of liquidation schedules would make the process of realization of assets complex. In addition, it was noted that the content of any debt repayment plan might depend on the outcome of the realization of assets. It was recognized that disclosure of debt repayment plans

was important but should be addressed elsewhere, noting that they were relevant only in the context of individual entrepreneurs. The alternative view was that, for the sake of completeness and practical convenience, the liquidation schedule should contain all information relevant to the liquidation proceeding.

90. The Working Group approved the draft recommendation with retention of subparagraph (c) and deletion of subparagraph (e).

#### **Draft recommendation 44**

91. The following drafting suggestions were made with respect to that draft recommendation: (a) to align its title with its content, including as regards reference to all known parties in interest; and (b) to make it clear that certain provisions would apply only when the liquidation schedule would be prepared by another person, not the competent authority. The Working Group requested the Secretariat to revise the draft recommendation accordingly. After discussion of draft recommendations 45 and 46 (see paras. 92–94 below), the Working Group agreed to delete the words “or opposition”.

#### **Draft recommendations 45 and 46**

92. There was general support for option 2 because it provided more clarity and simplicity. Noting that the liquidation schedule would not need to be approved by creditors, it was agreed that the use of the words “deemed to be approved” in draft recommendation 45 should be avoided. Otherwise, it was noted, confusion arose with “deemed approval” by creditors envisaged in draft recommendation 12, which was not intended to apply in the context of recommendation 45. In response to a suggestion to address the effect of approval of the liquidation schedule in the text, it was noted that an explanation of the term “liquidation schedule” in the commentary (see para. 80 above) might address that point.

93. The following proposals were not taken up: (a) to require the approval of the liquidation schedule by secured creditors; (b) to include the possibility of modification of the originally submitted liquidation schedule by a person who prepared it; (c) to require the modified schedule to be notified to all known parties in interest; and (d) to envisage involvement of a mediator or another third party if disputes arose as regards the liquidation schedule.

94. The Working Group approved the draft recommendations as contained in option 2 with changes to be made to the phrase “deemed to be approved” in draft recommendation 45.

#### **Draft recommendation 47**

95. The Working Group approved the draft recommendation as contained in option 2 for reasons stated in footnote 68 of the paper.

#### **Draft recommendations 48–50**

96. Although some support was expressed for retaining references to both discharge and the closure of the proceedings so as to clarify the effect of the closure of the proceeding, the prevailing view was that references to discharge should be deleted. Reasons for such deletion provided in the context of deletion of similar references in subparagraph (b) of draft recommendation 40 (see para. 80 above) were recalled.

97. The Working Group agreed to delete references to discharge in draft recommendations 48–50 and the words “or no income for debt repayment” in the heading of the sub-section. It requested the Secretariat to consider inserting footnotes to the draft recommendations that would cross-refer to section L and to add such cross references also in the commentary to the draft recommendations.

98. It was suggested to explain in the commentary that, although primarily designed for natural persons, discharge was also available to limited and unlimited liability

entities under some domestic laws. The Working Group deferred consideration of that suggestion to a later stage, noting its relevance to section L that addressed discharges.

#### **Draft recommendation 51**

99. Concerns were expressed about both options on the ground that they deviated from international best practice. It was noted in particular that option 1 envisaged that the competent authority, rather than creditors, would decide on viability of business and it would do so before considering a reorganization plan. Option 2, it was noted, also allowed the competent authority to take a decision on conversion before a reorganization plan was submitted and without consulting creditors and the debtor.

100. The rationale for including draft recommendation 51 was recalled: to avoid the need to follow all steps and deadlines for preparation and submission of a reorganization plan where it was clear from the outset that reorganization efforts would be futile. It was explained that risks of abusive filing for reorganization by non-viable businesses were real in simplified insolvency proceedings because of simple commencement procedures. At the same time, the need to provide some safeguards against unjustified conversion of simplified reorganization to liquidation was also acknowledged.

101. Some delegations preferred option 1 as more appropriate for simplified insolvency proceedings since it provided for simpler mechanisms of prompt conversion of hopeless cases to liquidation. The prevailing view was to retain option 2.

102. Delegations that preferred option 2 suggested deleting the last sentence from paragraph xx or the words “in considering such conversion” in that sentence. They also suggested improving drafting, in particular by clarifying the phrase “should be mindful of the time”.

103. Different views were expressed among delegations that preferred option 2 on whether the first or the second square bracketed text in paragraph yy should be retained. The second bracketed text received more support. Some delegations preferred that text but with amendments that would make it optional for the competent authority to seek views of an independent professional on conversion. It was considered that in some cases such step would be unnecessary or even counterproductive. Other delegations that preferred that text considered that consulting an independent professional where one was appointed on conversion should be required. To make the connection with paragraph xx closer, it was suggested inserting the phrase “In considering such conversion” at the beginning of either option or merging two paragraphs. Another view was that the entire paragraph yy might be deleted since it stated the obvious.

104. As regards paragraph zz, some preference was expressed for retaining the phrase in square brackets. Another suggestion with respect to that paragraph was to delete the last part of the first sentence starting with the words “or another person”.

105. The Working Group requested the Secretariat to revise provisions contained in paragraphs xx to zz reflecting deliberations at the current session and suggest the new location for them in section K. It was agreed that the last sentence in paragraph xx and the part proposed to be deleted in paragraph zz should stay in square brackets for consideration by the Working Group at its next session. It was also agreed that the Working Group should consider at its next session whether provisions should require or allow the competent authority to seek an opinion of an independent professional on conversion.

#### **Draft recommendation 52**

106. Support was expressed for a proposal to replace the last sentence with the following: “If the reorganization plan is not submitted within the established time period, an insolvent debtor is deemed to enter the liquidation proceeding. For a

solvent debtor, the reorganization proceeding will terminate.” The Working Group agreed to amend the draft recommendation accordingly.

107. The following proposals were not taken up: (a) to allow the competent authority to extend the maximum period if it determined that delays were not caused by the debtor’s fault; and (b) to introduce a caveat in the last sentence to ensure that the debtor would not face the consequences envisaged in that sentence where the submission of the plan was delayed by other parties responsible for preparing the reorganization plan (such as an independent professional or creditors).

#### **Draft recommendation 55**

108. Option 1 did not receive support. Some support was expressed for option 2 for simplicity and reference to an independent professional.

109. The following proposals with respect to option 2 did not receive support: (a) to replace the phrase “parties in interest” with the word “creditors”; (b) to replace the phrase “send notification” with the word “notify”, and (c) to insert the phrase “within a short time period”.

110. A proposal was made to combine the following elements from both options: (a) non-mandatory review of the plan; (b) the possibility for an independent professional to review the plan; (c) the scope of review limited to the procedural requirements; and (d) explanation of the consequences of any abstention. The text proposed to replace both options read as follows: “The insolvency law providing for a simplified insolvency regime could require the competent authority or an independent professional to ascertain compliance of the reorganization plan with the procedural requirements as provided in the law, and upon making any required modification to ensure that it is so compliant, to notify the plan to all known parties in interest to enable them to object or express opposition to the proposed plan. The notice should specify a [short] [sufficient] time period for expressing any objection or opposition to the plan and explain the consequences of any abstention.”

111. Support was expressed for that proposal. The importance of allowing the competent authority to review the plan and ascertain that the required minimum contents were included was emphasized. Reference to the time period in the draft recommendation was considered unnecessary in the light of draft recommendation 9.

112. The Working Group agreed to delete option 1 and to retain option 2 and the newly proposed wording for consideration at its next session.

#### **Draft recommendation 56**

113. Views differed on whether the text in square brackets should be retained in the light of draft recommendations 12, 26 and 55. In response to a point that individual notification of the plan to creditors was not contemplated in the Legislative Guide, delegations preferring retaining that text noted that deemed approval was not contemplated in the Legislative Guide either; retaining that text was considered important for protection of creditors. The alternative view was that the text in square brackets could be deleted with the commentary cross-referring to the draft recommendations that required individual notification of creditors on matters that required their approval.

114. Several delegations considered the use of both terms “objection” and “opposition” in the draft recommendation confusing and potentially redundant. Explanations of those terms in paragraph 61 of the commentary were recalled. Concerns regarding those terms were nevertheless reiterated. In particular, the term “opposition” was considered by some delegations as not carrying any precise legal meaning and requiring more explanation in the text. The same point was made in the context of draft recommendations 57 and 58.

115. While some support was expressed for deletion of the word “objection” in the draft recommendation, some other delegations preferred keeping it. A suggestion to

replace the words “objection or opposition” by “express opposition on the approval of the plan” received support as it limited the scope of opposition to the approval of the plan and thus ensured the same level of protection to creditors as provided in recommendation 146 of the Legislative Guide (e.g., the opportunity to vote on the approval of the plan).

116. The Working Group approved the draft recommendation with the following amendments: (a) deletion of the words in square brackets; and (b) substitution of the words “objection or opposition” with “express opposition on the approval of the plan”. The Working Group requested the Secretariat to adjust the heading of the recommendation in the light of those amendments and amend the commentary as suggested in paragraph 113 above.

#### **Draft recommendation 57**

117. Concern was reiterated that the text was ambiguous and inconsistent as regards a possibility of holding voting by creditors. Preserving such possibility was considered important, including for due process. It was also considered that simplified voting procedure with adjustments in the rules on quorum and vote-counting would be easier to implement and might achieve the same result as deemed approval. The latter, it was noted, was unknown to many jurisdictions and presupposed strong institutional capacity, which might be absent in many countries. If deemed approval were to be retained as the recommended approach, the text should explain its advantages and be consistent on that point.

118. In response, several delegations recalled the extensive discussion of the same issues at the earlier sessions of the Working Group. It was in particular recalled that the Legislative Guide was prepared primarily for larger enterprises that faced complex issues in insolvency, which were expected to be resolved with the involvement of interested creditors, the factors that were absent in MSE insolvency. Deviations from the Guide to accommodate features of MSE insolvency were therefore justified. It was further recalled that, in the light of the high prevalence of indifferent creditors in MSE insolvency, deemed approval was designed to overcome obstacles that the absence of creditors’ involvement might cause to holding simplified insolvency proceedings expeditiously. It was emphasized in that context that the approval thresholds and requirements under general domestic insolvency law remained, with deemed approval being a different means of implementing those thresholds and requirements. Bearing in mind the broad impetus of providing a simplified and efficient process, while at the same time ensuring protection of all parties in interest, those delegations considered that the text achieved the right balance between those competing goals through: (a) deemed approval, which aimed to address the issue of indifferent creditors, and (b) individual notification and other safeguards for creditors.

119. As regards two options for the draft recommendation, the prevailing view was to retain option 1. Some delegations were flexible, indicating that there was not much difference between them. Delegations preferring option 2 proposed amendments, including deletion of the words “otherwise” and “deemed to”. Views differed among them on whether the first or second square bracketed text should be retained in that option.

120. The Working Group approved the draft recommendation as contained in option 1 and requested the Secretariat to amend the commentary along the lines of paragraph 118 above.

#### **Draft recommendation 58**

121. The Working Group approved the draft recommendation without the text in square brackets in subparagraphs (a), (d) and (e).

122. Concerns were expressed that the competent authority would not be able to modify the plan if the opposition to the plan by creditors was not accompanied by any

justification. It was considered that the text should address the concept of “opposition” in more detail since that concept would be new to many insolvency systems.

123. A suggestion to add a separate recommendation on court-imposed plans did not receive sufficient support. A view was expressed that providing for court-imposed solutions in the text would be undesirable as that would be against the principle of the autonomy of creditors. Another view was that the Working Group should consider that point at a later stage.

#### **Draft recommendation 59**

124. The Working Group approved the draft recommendation with deletion of the words in square brackets.

#### **Draft recommendation 63**

125. Some support was expressed for retention of option 1 (with the words in square brackets retained) and option 3. The prevailing view was that option 2 should be retained as providing more flexibility and simplicity. In response to a suggestion to make it optional in the light of costs involved if supervision of the implementation of the plan was made compulsory in all cases, it was agreed to change the word “should” in that option to “may”.

126. The Working Group approved the draft recommendation as contained in option 2 with that amendment.

#### **Draft recommendations 4, 6–9, 13, 15–20, 21 ter, 22, 27, 29–30, 34, 39, 53, 54, 60–62 and 64**

127. The Working Group approved those draft recommendations unchanged, noted that number 28 was unused and deferred the consideration of draft recommendations 65–88 to its next session. The Secretariat was requested to ensure consistency between provisions in recommendation 60 (d) and the commentary.

#### **Recommendations with references to employees**

128. The Working Group had before it the following proposal:

##### **“General remark:**

Commentary should mention that the inclusion of employees in the circle of parties in interest is intended to reflect the fact that employees can be affected beyond their role as creditors (which is captured by the recommendations dealing with creditors’ rights and position) and that they might benefit additional protections in national laws.

##### **Recommendation 1:**

For **subparagraphs (d) and (e)**, defining “parties in interest” in the key objectives to include employees might streamline the need for multiple references to employees throughout the text, therefore the following amendment of the current text is suggested:

*(d) Fostering protection of persons affected by simplified insolvency proceedings, including creditors, **employees and other stakeholders** (henceforth referred to as “parties in interest”);*

*(e) Providing effective measures to facilitate participation by creditors and other parties in interest in simplified insolvency proceedings, and to address creditor disengagement.*

For **subparagraph (g)** the revised version below is inspired by the preamble to the Model Law on Cross-Border Insolvency, which focuses on preserving employment and investment for reorganization:

*(g) Where reorganization is feasible, preserving employment and investment.*

The remaining edits emphasize the obligations owed to employees under applicable law:

**Recommendation 5 bis:**

Amend current **subparagraph (i)** as follows:

*(i) Oversight of compliance by the parties with their obligations under the simplified insolvency regime, including any obligations owed to employees under the applicable law.*

**Recommendation J (new, to be inserted after Recommendation I):**

**J. Employees**

The insolvency law providing for a simplified insolvency regime should provide that:

*(a) Employees and/or their representatives are provided timely notice about the simplified insolvency proceedings and all information they are entitled to receive under other laws to be observed within insolvency proceedings; and*

*(b) Any obligations to employees under such laws are met.*

**Addition to commentary for Recommendation J:**

The advice in the Guide on creating simplified procedures for MSEs should not be read as advising that this is at the cost of existing rights or duties to consult, that workers may have under national law, or appear to advise States against having such arrangements. The appropriate level of national protection is for States to determine, taking into account the nature of the simplified proceedings and their national law.

**Recommendation 13:**

Chapeau:

*The insolvency law providing for a simplified insolvency regime should specify rights and obligations of the MSE debtor, of the creditors and of other parties in interest, including **employees where applicable under national law, such as:***

**Recommendation 16:**

*(c) Establish safeguards to protect debtors, creditors **and other parties in interest, including employees, from abuse of the application procedure.***

129. Appreciation and support were expressed for the proposal, which was considered as sending an important and timely message to States about the need to protect employees' rights in insolvency proceedings. It was noted that proposed provisions preserved necessary flexibility for States on those matters and could be accommodated in the existing text.

130. The need for inclusion of some of the proposed provisions in insolvency law rather than labour law was questioned. It was also queried whether the timing of the proposal was explained by any recent changes specific to MSEs made in the labour law in a particular region. With respect to proposed recommendation J, it was queried why labour unions were not mentioned in subparagraph (a). The scope of the provision contained in subparagraph (b) of that recommendation was considered too

broad and the Secretariat was requested to narrow it down taking into account the proposed commentary for recommendation J.

131. The Working Group requested the Secretariat to include the proposal with necessary amendments in the text for consideration by the Working Group at its next session.

## **V. Other business**

132. The Working Group was informed about progress made in the preparatory work by the Secretariat on the topic of civil asset tracing and recovery and other projects in the area of insolvency law. It took note that the Colloquium on Applicable Law in Insolvency Proceedings would take place after the session, on 11 December 2020. The Working Group was also informed about arrangements put in place for the fifty-eighth session of the Working Group scheduled to take place in New York, from 3 to 7 May 2021.

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