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## **Report of Working Group V (Insolvency Law) on the work of its fifty-eighth session (New York (online), 4–7 May 2021)**

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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), fifty-sixth (December 2019) and fifty-seventh (December 2020) sessions on the basis of revised drafts ([A/CN.9/WG.V/WP.166](#), [A/CN.9/WG.V/WP.168](#) and [A/CN.9/WG.V/WP.170/Rev.1](#), respectively) and suggested revisions to those texts ([A/CN.9/972](#), chapter V, [A/CN.9/1006](#) and [A/CN.9/1046](#)).

3. At its fifty-seventh session, the Working Group requested the Secretariat to prepare a revised text for consideration by the Working Group at its fifty-eighth session ([A/CN.9/1046](#), para. 12). At its fifty-eighth session, the Working Group considered the revised text contained in working paper [A/CN.9/WG.V/WP.172](#) and its addendum ([A/CN.9/WG.V/WP.172/Add.1](#)).

## II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fifty-eighth session from 4 to 7 May 2021. In accordance with the decision by the UNCITRAL member States on 19 August 2020 ([A/CN.9/1038](#), annex, I) as extended by their decision of 9 December 2020, arrangements were made to allow delegations to participate remotely and in person.

5. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lebanon, Libya, Malaysia, Mali, Mexico, Nigeria, Pakistan, Peru,

<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.

Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, 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: Albania, Angola, Armenia, Azerbaijan, Burkina Faso, Cambodia, Denmark, Egypt, Guatemala, Kuwait, Madagascar, Malta, Morocco, Namibia, Netherlands, Norway, Portugal, Qatar, Slovakia, Slovenia and Timor-Leste.

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*: European Bank for Reconstruction and Development, Gulf Cooperation Council, Hague Conference on Private International Law, Inter-American Development Bank, International Development Law Organization, Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States, Organisation for Economic Co-operation and Development and Organisation Internationale de la Francophonie;

(c) *Invited international non-governmental organizations*: Allerhand Institute, American Bar Association (ABA), Center for International Legal Studies, China Council for the Promotion of International Trade, European Law Institute, Fondation pour le Droit Continental, Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), INSOL Europe, INSOL International, Instituto Iberoamericano De Derecho Concursal (IIDC), Inter-American Bar Association, International Association of Legal Science, International Bar Association (IBA), International Insolvency Institute (III), International Swaps and Derivatives Association, International Women's Insolvency and Restructuring Confederation (IWIRC), Kozolchyk National Law Center, Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association, Union Internationale des Avocats (UIA) and Union Internationale des Huissiers de Justice (UIHJ).

9. According to the decisions of the UNCITRAL member States (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.171](#)); and

(b) Notes by the Secretariat: draft text on a simplified insolvency regime ([A/CN.9/WG.V/WP.172](#) and [A/CN.9/WG.V/WP.172/Add.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 commenced its work with the discussion of the draft text on a simplified insolvency regime ([A/CN.9/WG.V/WP.172](#) and

[A/CN.9/WG.V/WP.172/Add.1](#)) and suggested revisions to the text (see chapter IV). The draft recommendations not considered at the fifty-seventh session of the Working Group (draft recommendations 84–107 found in [A/CN.9/WG.V/WP.172/Add.1](#)) were taken up first. The Working Group subsequently considered draft recommendations whose consideration was deferred from the fifty-seventh to the fifty-eighth session of the Working Group (draft recommendations 34, 54, 56, 67, 73 and 83 found in document [A/CN.9/WG.V/WP.172](#)). Thereafter, the Working Group considered the remaining draft recommendations and the draft commentary up to and including paragraph 285. For conclusions reached at the session, see chapters IV and V below.

## **IV. Consideration of a draft text on a simplified insolvency regime ([A/CN.9/WG.V/WP.172](#) and [A/CN.9/WG.V/WP.172/Add.1](#))**

### **A. Comments on the draft recommendations**

#### **Draft recommendation 84**

13. No support was expressed for the suggestion to explicitly state in the draft recommendation or the commentary that the draft recommendation applied only to individual entrepreneurs.

#### **Draft recommendation 86**

14. Considering that two distinct issues (i.e., criteria for denying a discharge and criteria for revoking a discharge granted) were addressed in the draft recommendation, support was expressed for splitting it into two in order to clarify the intent of the draft recommendation. It was suggested that criteria for denial of discharge could be broader than criteria for revoking a discharge granted. Support was expressed also for replacing the word “should” by “may” in the last sentence in order to align it with recommendation 194 of the UNCITRAL Legislative Guide on Insolvency Law (the “Guide”).

15. The Working Group requested the secretariat to split the draft recommendation as follows: “The insolvency law providing for a simplified insolvency regime should specify criteria for denying discharge, keeping them to a minimum. The insolvency law providing for a simplified insolvency regime should specify criteria for revoking a discharge granted. It in particular may specify that the discharge is to be revoked where it was obtained fraudulently.”

#### **Draft recommendation 87**

16. While there was some support for option 2 because partial discharge would expedite the procedure and help MSEs (especially individual entrepreneurs) gain access to credit, the prevailing view was in favour of option 3 (i.e., deleting the draft recommendation) because the concept of partial discharge was unfamiliar to many jurisdictions and introducing it might cause confusion and increase litigation risks. It was suggested that issues raised in options 1 and 2 could be addressed in the commentary for consideration by States.

#### **Draft recommendation 88**

17. Support was expressed for replacing the part of the draft recommendation after the word “should” with the phrase “be granted expeditiously” and explaining the term “expeditiously” in the commentary, noting in particular that discharge could take place before the distribution of proceeds.

**Draft recommendation 89**

18. In respect of subparagraph (b), a suggestion to allow the competent authority to extend the duration of the monitoring period on a case-by-case basis did not receive support.

**Draft recommendation 90**

19. Views differed on whether the text should be retained under the heading “Discharge in simplified liquidation proceedings” or placed under the heading “Discharge in simplified reorganization proceedings”.

20. In support of retaining the draft recommendation at its current location, it was pointed out that the draft recommendation accurately reflected that in some jurisdictions, individual entrepreneurs, after liquidation of their business assets, remained liable for repaying business debts in accordance with the debt repayment plan. The Working Group’s decision to remove reference to the debt repayment plan from draft recommendation 58 [43] in the context of the minimum contents of the liquidation schedule (see [A/CN.9/1046](#), paras. 89 and 90) was not considered relevant for draft recommendation 90.

21. The other view, which received some support, was that the draft recommendation should be moved after draft recommendation 91 as an option in simplified reorganization proceedings. To reconcile those different views and reduce confusion, a suggestion was made to remove the headings “Discharge in simplified liquidation proceedings” and “Discharge in simplified reorganization proceedings”.

22. After discussion, the Working Group agreed to: (a) keep the draft recommendation at its current location; (b) retain the text in square brackets without the brackets; and (c) retain the relevant headings. No support was expressed for deleting the word “full” before “discharge” in draft recommendations 90 and 91 and mirroring the content of draft recommendation 90 in draft recommendation 91. The exceptional nature of a debt repayment plan in simplified liquidation proceedings in the light of revised draft recommendation 88 (see para. 17 above) was highlighted.

**Draft recommendation 91**

23. Views differed on whether the word “may” or “should” be retained. In support of retaining the word “may”, it was stated that this would allow more flexibility, in particular to those jurisdictions that envisaged full discharge upon confirmation of the reorganization plan, rather than its successful implementation. The other view was that the content of the draft recommendation necessitated the use of the word “should”.

24. The Working Group approved the draft recommendation retaining the word “may”. A proposal to introduce an expedited discharge mechanism for individual entrepreneurs did not receive support.

**Order of draft recommendations in section M**

25. Support was expressed to start the section with draft recommendations 88–91, which relate to discharge in simplified liquidation proceedings and simplified reorganization proceedings, before addressing more specific situations in the other draft recommendations, such as exclusions from discharge. The Working Group requested the secretariat to implement that change.

**Draft recommendation 92**

26. A suggestion to include the phrase “and reasons for the automatic closure of such proceedings” at the end of the draft recommendation did not receive support.

**Draft recommendation 95**

27. A suggestion to include a time limit for modifying or terminating an order for procedural consolidation or coordination, to avoid complications in the proceeding, did not receive support.

**Draft recommendation 101**

28. A suggestion to include a possibility of denying access to a simplified insolvency regime for a certain time as a type of sanction did not receive support.

**Heading of section R**

29. While some support was expressed for the heading to read “Insolvency prevention aspects” or “Pre-insolvency aspects”, the view prevailed that it should read “Pre-commencement aspects”.

**Draft recommendation 102**

30. Views differed on which of the alternative texts in the first two sets of square brackets in the chapeau to retain. A suggestion, which eventually received support, was to redraft the chapeau as follows: “The law relating to insolvency should specify that, at the point in time when the person exercising control over the business knew or should have known that insolvency was imminent or unavoidable, that person should have due regard to the interests of creditors and other stakeholders and to take reasonable steps at an early stage of financial distress to avoid insolvency, and where it is unavoidable, to minimize the extent of insolvency.” It was further noted that, as a consequence, the heading of the draft recommendation would read “Obligations of persons exercising control over MSEs in the period approaching insolvency” and reference to shareholders would be deleted in subparagraph (e).

31. Another view was that the draft recommendation was unhelpful and could be deleted because it did not address the procedural aspects for determining the liability of individuals exercising control over incorporated MSEs while being inapplicable to individual entrepreneurs.

**Draft recommendation 103**

32. While support was expressed for retaining the text in square brackets, the suitability of the term “ascertainable” was questioned and suggestions were made to replace it with either “available” or “accessible”. After discussion, the Working Group agreed to replace the phrase “easily ascertainable by MSEs” with the phrase “available and easily accessible to MSEs”, noting that the same phrase appeared in other parts of the text.

**Draft recommendation 105**

33. Views differed on whether the text in square brackets should be retained. In support of deleting it, it was explained that the focus of the provisions should be on creditors rather than other stakeholders. The other view was that the text in square brackets should be retained being in line with the proposal on employees’ rights tabled at the fifty-seventh session of the Working Group (A/CN.9/1046, para. 128). To reconcile those different views, support was expressed for inclusion of the words “to consult” before the words “other relevant stakeholders”. Another drafting suggestion was to refer to “employees” before referring to other stakeholders.

34. After discussion, noting that the provision as drafted provided the State with broad discretion in considering this issue, it was agreed to retain the text in square brackets without the brackets. It was also agreed to delete the word “legislative” in the draft recommendation, and as a consequence, to similarly delete the words “legislative and other” in draft recommendation 104.

**Draft recommendation 106**

35. Support was expressed for retaining the second alternative text in subparagraph (a) (i.e., competent public or private body).

36. Views differed on desirability of retaining the text “[where MSE concerned has no means to cover them]” in subparagraph (c). The prevailing view was to delete it.

37. It was suggested to replace the word “covering” with the word “reducing” in subparagraph (c). The prevailing view was to amend that part to read “covering or reducing”.

38. After discussion, the Working Group approved the draft recommendation with: (a) retaining the second alternative text in subparagraph (a); and (b) amending subparagraph (c) to read “Mechanisms for covering or reducing the costs of the services mentioned in subparagraphs (a) and (b) above”.

**Draft recommendation 107**

39. Support was expressed for the heading to read “Pre-commencement business rescue finance” and for replacing the word “ensure” with “provide” in subparagraphs (b) and (c). The Working Group approved the draft recommendation with those changes. No support was expressed for replacing the word “should” with the word “may” in the chapeau.

**Draft recommendation 34**

40. The Working Group recalled the divergent views on the draft recommendation at its fifty-seventh session (A/CN.9/1046, paras. 53–59). Expressing concern over excessive remedies that the draft recommendation provided, a suggestion was made either to delete or redraft it, for example, by stipulating that unnotified creditors would receive no worse off treatment than what such creditors would have received had they been notified.

41. Another suggestion, which eventually received sufficient support, was to replace the text along the following lines: “The insolvency law providing for a simplified insolvency regime should specify consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding.” It was noted that a consequential change would be required in the heading of the draft recommendation. It was suggested that the commentary could elaborate on such consequences with reference to due process rights but also the need to provide for appropriate incentives to avoid abuses, such as deliberate omissions by the debtor of certain creditor claims.

**Draft recommendation 54**

42. A suggestion to delete the recommendation and a subsequent suggestion to include the second sentence of the draft recommendation in the draft commentary did not receive support. Suggestions were also made to replace “applicable law”, which may inadvertently cause confusion with cross-border insolvency issues, with “the law” or “relevant laws”. Support was expressed for replacing that phrase by the words “insolvency law and other laws applicable within insolvency proceedings”. The Working Group requested the secretariat to revise the draft recommendation accordingly and move it to section E.

**Draft recommendation 56**

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

**Draft recommendation 67**

44. With respect to the first sentence, views differed on whether the text in square brackets should be deleted entirely or in part. The prevailing view was to delete it entirely.

45. A suggestion to include the words “ex officio or at the request of the debtor” after the word “appoint” did not receive support. It was considered that the current text already contemplated both options and they could be discussed in the commentary.

46. The Working Group requested the secretariat to relocate the second sentence to section H and put it in square brackets for further consideration. During subsequent deliberations, it was agreed to place the following sentence as a new stand-alone recommendation 42 bis with the title “Undisclosed or concealed assets”:

“The insolvency law providing for a simplified insolvency regime should specify that any undisclosed or concealed assets form part of the insolvency estate.”

**Draft recommendations 73, 75 and 18**

47. With respect to draft recommendation 73, the attention of the Working Group was brought to an inconsistency between the approaches taken in the draft text and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2021) as regards the approval by creditors of a reorganization plan in the MSE insolvency context. It was noted that the World Bank’s text retained a requirement to hold a creditor vote on approval of a reorganization plan, providing also that the failure to vote and an abstention would be treated as a positive vote. In comparison, under the draft text, dissenting creditors were expected to actively oppose or object to the plan, which may potentially encourage creditor apathy. In addition, it was noted that under the deemed approval approach suggested in the draft text, the threshold for approval of a reorganization plan was unclear.

48. Similar concerns were raised in subsequent discussions, in particular in the context of draft recommendations 18 and 75. It was noted in those contexts that silence should not always be treated as a positive response and the deemed approval approach would not necessarily be more cost-efficient than voting. Generally, it was noted that the protection of creditor rights should be of a paramount importance in a simplified insolvency regime, which deemed approval might undermine. (For the suggestion to explain in the commentary the differences between the deemed approval approach and the approach taken as regards approval of a reorganization plan in the MSE insolvency context in the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2021), see para. 94 (g) below).

**Draft recommendation 73**

49. There was general preference for option 2.

50. As regards the first sentence in that option, the view prevailed that the word “modification” instead of “amendment” should be retained.

51. As regards the second sentence, the following suggestions did not receive sufficient support: (a) replacing the words “any abstention” with the phrase “the failure to do so”; and (b) retaining either the word “short” or “sufficient” or using the phrase “reasonably short” instead. The Working Group agreed to revise that sentence along the following lines: “The notice should explain the consequences of any abstention and specify the time period for expressing any objection or opposition to the plan.” The secretariat was requested to reflect in the commentary that the time period should be short but sufficient for creditors to communicate objection or opposition.

**Draft recommendation 83**

52. A proposal was made to delete options 1 to 3 and add at the end of subparagraph (a) the following text: “and may consult the independent professional in making the decision, if one has been appointed.” That suggestion received support.

53. Another view was that the placement of the proposed additional text at the end of subparagraph (a) would limit its application to the time period before submission of the plan. To avoid that, it was proposed placing it instead in a separate subparagraph (b). That suggestion did not receive support.

54. Concern was expressed that the draft recommendation might be granting an excessive discretion to the competent authority as regards conversion of a simplified reorganization proceeding to a liquidation. It was proposed that some safeguards should be added in order to prevent unjustified conversion, and it was explained that one possibility might be to include a requirement for the competent authority to first request the independent professional to make a reasoned recommendation as to whether a simplified reorganization proceeding should be converted to a liquidation, on the understanding that this alternative would address the need to prevent untimely action and unjustified decisions, as proposed in option 2 of the draft text. No support was expressed for that suggestion.

55. The Working Group approved the draft recommendation with revisions proposed in paragraph 52 above.

**Draft recommendation 1**

56. The Working Group agreed to retain the texts in subparagraphs (d) and (g bis) and in the second set of square brackets in subparagraph (e) without square brackets. A suggestion to delete subparagraph (g bis) on the basis that the objective reflected therein had already been covered by the objectives of an effective insolvency law referred to in the subsequent paragraph of the draft recommendation did not receive support.

**Draft recommendation 6 (i)**

57. The Working Group agreed to retain the text without square brackets and replace the term “applicable law” with the phrase agreed to be used in the same context in draft recommendation 54 (see para. 42 above).

**Draft recommendation 18**

58. The Working Group approved the draft recommendation unchanged, noting concerns expressed as regards the deemed approval approach in the draft text (see paras. 47 and 48 above). A suggestion to bring equity holders within the scope of the draft recommendation did not receive support.

**Draft recommendation 19**

59. The Working Group approved the draft recommendation with retention of the text without square brackets.

**Draft recommendation 20**

60. The Working Group approved the draft recommendation without square brackets. The importance of the debtor’s obligation to provide accurate and complete information was emphasized in the context of other draft recommendations as well.

**Draft recommendation 22**

61. The Working Group approved the draft recommendation with the following amendments in subparagraph (c): (a) retention, in each case, of the text in the second set of square brackets without square brackets; and (b) deletion of the alternatives and the word “both”.

**Draft recommendation 23**

62. Noting that under the draft recommendation the debtor was able to apply for commencement of a simplified insolvency proceeding at an early stage of financial distress without the need to prove insolvency, concern was expressed that the debtor could abuse the simplified insolvency regime to evade its obligations and responsibilities. The secretariat was requested to ensure that the commentary made it clear that some information showing financial distress of the debtor would be expected to be provided in the debtor's application to the competent authority for commencement of simplified insolvency proceedings.

**Draft recommendation 26**

63. A view was expressed that a simplified insolvency proceeding should not be allowed to commence on the application of a single creditor. The Working Group approved the draft recommendation unchanged.

**Draft recommendation 27**

64. A suggestion to replace the term "improper use" by the word "abuse" consistent with the change made in draft recommendation 22 (c) (see para. 61 above) did not receive support. The Working Group approved the draft recommendation unchanged.

**Draft recommendation 30**

65. The secretariat was requested to refine the drafting by making it clear that the draft recommendation referred to applications denied under recommendation 27, in line with recommendation 20 of the Guide.

**Draft recommendation 50**

66. With reference to the explanation of the term "related persons" found in footnote 30 and explanations of other terms found in footnotes throughout the text, it was noted that, in order to make the text self-contained, such explanations should all appear in the glossary of the text. The secretariat was requested to incorporate the relevant terms in the glossary of the draft text.

**Draft recommendation 51**

67. Concern was raised about suggesting in the draft recommendation that creditors should be notified of decisions of the competent authority to subject claims of related persons to a special scrutiny. It was explained that, given that special scrutiny would not necessarily lead to special treatment, the draft recommendation should instead refer only to the decision to subject claims to special treatment and reasons for that decision. That concern was not taken up and the Working Group approved the draft recommendation unchanged.

**Draft recommendation 55**

68. In response to the concern that, unlike the accompanying commentary, the draft recommendation was ambiguous as regards discretion given to the competent authority to decide on the sale of disposable assets, it was recalled that the Working Group discussed that same issue at its fifty-seventh session. It was recalled that, at that session, the Working Group had requested the secretariat to clarify in the commentary that no such discretion was intended ([A/CN.9/1046](#), para. 80). The Working Group approved the draft recommendation unchanged.

**Draft recommendation 58**

69. Some support was expressed for the suggestion to replace in subparagraph (c) the phrase "the admitted claims" with "secured claims or liens on the assets to be sold". In response, it was observed that adding reference to secured claims could pose

difficulties for jurisdictions that did not require secured creditors to file secured claims in liquidation proceedings.

70. Some delegations found reference to the admitted claims in the liquidation schedule problematic because a complete review of claims would often happen towards the end of the liquidation process. The proposal to delete such reference did not receive sufficient support.

71. In subsequent discussion (see paras. 74 and 78 below), it was agreed to revise the draft recommendation by including a separate subparagraph that would refer to the list of assets, specifying those that were subject to security interests.

#### **Draft recommendation 59**

72. The suggestion was made to replace the phrase “all known parties in interest” with “the debtor, creditors and other known parties in interest”. It was noted that the suggested phrase appeared in other draft recommendations and was more appropriate in draft recommendation 59. In response, it was noted that the explanation of the term “parties in interest” in footnote 2, which was taken from the Guide, included debtors and creditors. The request to the secretariat to put the relevant terms taken from the glossary of the Guide in the glossary of the draft text was recalled (see para. 66 above).

#### **Draft recommendation 70**

73. Concern was raised that the draft recommendation was possibly inconsistent with draft recommendation 83 as revised at the session (see para. 55 above). That concern was not taken up and the Working Group approved the draft recommendation unchanged.

#### **Draft recommendation 72**

74. The suggestion was made to expand the draft recommendation by including a separate subparagraph that would refer to the list of assets. It was suggested that such a list of assets should also indicate which assets were subject to security interests. Those suggestions received support in particular because such information was considered useful to creditors for ascertaining feasibility of implementing the reorganization plan and also to the debtor and the competent authority. It was agreed that similar changes would be made in draft recommendation 58.

75. In response to the suggestion to include also a reference to the value of assets, complex issues arising from valuation of assets, highlighted in paragraph 204 of the draft commentary, were recalled. Questions arose as to the basis on which the valuation would be made (e.g., going concern value or liquidation value), the cost of valuation, the party that should bear the burden and cost of valuation and how the value of certain assets would be determined. Noting that no reference to valuation appeared in recommendations 143 and 144 of the Guide, it was considered that imposing a valuation requirement would complicate simplified insolvency proceedings.

76. On the understanding that the reason underlying that suggestion was to ensure that the content of the reorganization plan should allow comparison between the treatment of creditors in reorganization as opposed to liquidation, it was suggested that the draft recommendation should include the wording similar to the one contained in recommendation 143 (d) of the Guide. That suggestion received support.

77. Other suggestions to include in the draft recommendation references to cash flow, essential and non-essential assets, existence of pre-insolvency transfers, and sanctions for not disclosing important information did not receive support.

78. The Working Group approved the draft recommendation with the amendments in paragraphs 74 and 76 above.

**Draft recommendation 75**

79. The prevailing view was to retain the text in square brackets without the brackets and replace the last part with a cross reference to draft recommendation 18 to avoid inconsistency between formulations in the two draft recommendations. The Working Group approved the draft recommendation with those amendments.

**Draft recommendation 76**

80. Concern was expressed that the draft recommendation, by allowing modification of the original plan, did not provide incentives to the debtor to propose the best possible reorganization plan from the outset. That concern was not taken up by the Working Group.

81. The Working Group approved the draft recommendation retaining the words “modified” and “modification(s)” without square brackets and deleting the alternatives.

**Draft recommendation 77**

82. The changes agreed to be made in draft recommendation 72 (see paras. 76 and 78 above) were welcomed in the context of the draft recommendation where reference to comparison between the treatment of creditors in reorganization as opposed to liquidation appeared in the context of the confirmation of the plan. It was noted that those changes alleviated concerns of some delegations that the “creditor no worse off” assessment would take place at a stage when it would have the limited value.

83. The suggestion was made to explain in the commentary that many jurisdictions enacted insolvency law provisions allowing courts to impose reorganization plans on dissenting creditors in standard insolvency proceedings. Acknowledging that court imposed plans could complicate simplified proceedings, it was nevertheless suggested that the commentary should convey that the absence of provisions as regards court imposed plans in the text should not be interpreted as discouraging application of such domestic provisions in simplified insolvency proceedings. The Working Group approved the draft recommendation unchanged and requested the secretariat to draft a commentary on that point for future consideration.

**Draft recommendation 79**

84. The Working Group approved the draft recommendation with deletion of the text in square brackets.

**Draft recommendation 80**

85. Some delegations expressed concern that the draft recommendation implied that closing a simplified reorganization proceeding could occur only after confirmation of the full implementation of the plan. It was noted that, in many jurisdictions, standard reorganization proceedings could be closed immediately upon confirmation of the plan. The benefits of early closure of proceedings for small businesses was highlighted as it would help avoid stigma and reduce costs, especially in circumstances where full implementation of the plan could take years.

86. While not objecting to amending recommendation 80 to accommodate different scenarios with respect to the closure of reorganization proceedings, some delegations noted the possible impact of amendments on draft recommendation 81, which envisaged supervision of the implementation of the plan by the competent authority or an independent professional, and on draft recommendation 82, which addressed consequences of failure to implement the plan.

87. In order to accommodate divergent views and to provide for more flexibility, a suggestion was made to insert the phrase “at least” before the word “until” and not to recommend any specific time frame for closure. Another suggestion was made to delete the draft recommendation given that removing references to a specific time

frame for closure would make the recommendation unnecessary and also because no such recommendation was found in the Guide.

88. After discussion and in light of the deliberations on draft recommendation 82 (see paras. 90–92 below), the Working Group agreed to delete the draft recommendation and requested the secretariat to reflect in the commentary that a simplified reorganization proceeding could be closed before confirmation of the full implementation of the plan.

#### **Draft recommendation 81**

89. The Working Group approved the draft recommendation unchanged, noting that it would not be affected by deletion of draft recommendation 80 (see paras. 86 and 88 above).

#### **Draft recommendation 82**

90. In the context of the discussion of the closure of a simplified reorganization proceeding under draft recommendation 80 (see paras. 85–88 above), several suggestions were made to expand the list of options available to the competent authority in case of substantial breach of the plan by the debtor or inability to implement the plan. Noting the differences in various legal systems as to the time of the closure of a simplified reorganization proceeding, the following proposal was put forward for consideration by the Working Group:

“The insolvency law providing for a simplified insolvency regime should specify that, where there is substantial breach by the debtor of the terms of the plan or inability to implement the plan, the competent authority may on its own motion or at the request of any party in interest:

- (a) Convert the simplified reorganization proceeding to a simplified liquidation proceeding or a different type of insolvency proceeding;
- (b) Close the simplified reorganization proceeding and parties in interest may exercise their rights at law (*see recommendations 158 (e) and 159 of the Guide*);
- (c) If closed, reopen the simplified reorganization proceeding;
- (d) Close the simplified reorganization proceeding and open a simplified liquidation proceeding;
- (e) Grant any other appropriate type of relief.”

91. To avoid the overlap between subparagraphs (a) and (d), a suggestion was made to replace the phrase “close the simplified reorganization proceeding and” with “if closed” in subparagraph (d). It was explained that in those jurisdictions where the simplified reorganization proceeding would have been closed upon confirmation of the plan, subparagraph (d) would apply, while in those jurisdictions where the proceeding remained open until the full implementation of the plan, subparagraph (a) would apply.

92. The Working Group approved the draft recommendation as proposed in paragraph 90 above, amending subparagraph (d) to read: “If closed, open a simplified liquidation proceeding.”

#### **Other draft recommendations**

93. The remaining draft recommendations were approved unchanged.

### **B. Comments on the draft commentary**

94. The Working Group requested the secretariat to revise the draft commentary in the light of the deliberations at the current session, including revisions agreed to be

made in the draft recommendations. With respect to the part of the commentary considered at the session (up to and including paragraph 285), the following specific changes were suggested:

- (a) In paragraph 1, to elaborate on peculiar characteristics of incorporated MSEs, in particular that limited liability protection was often illusory for MSE owners because they usually had to issue personal guarantees for business debts of their MSE companies;
- (b) To retain paragraphs 5 and 6 without square brackets;
- (c) In paragraph 25, to remove square brackets and add terms as agreed at the session (see paras. 66 and 72 above);
- (d) To remove square brackets in paragraphs 28–29;
- (e) In paragraph 42, to illustrate with examples means of verification of accuracy of information provided to the competent authority;
- (f) In paragraph 83, to replace the phrase “poor management that caused its financial distress” with the phrase “management so inadequate or incompetent as to be incapable of improvement or correction”;
- (g) In paragraphs 85–91, to explain the differences between the deemed approval approach and the approach taken as regards approval of a reorganization plan in the MSE insolvency context in the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2021);
- (h) In paragraph 106, to add “and means to prove it” at the end of the third sentence, in line with the concern expressed earlier at the session (see para. 62 above);
- (i) In paragraph 220 and other places of the commentary, to replace references to “applicable law” with the phrase agreed to be used for that term in the same context in draft recommendation 54 (see para. 42 above);
- (j) After paragraph 231, to insert new paragraphs along the following lines in square brackets for further consideration:

“While it may appear that the specific recommendation to include a list of claims and priority and assets in the liquidation schedule is inconsistent with the general recommendation to keep the content of that schedule to a minimum, in insolvency proceedings where such information is readily available and undisputed, such information may be helpful to creditors in their participation in the insolvency process. Inclusion of claims information, while helpful, however, should not suggest that resolution of claims disputes is appropriate in approving the procedures of the liquidation process, which is the focus of this recommendation (see section [I] on treatment of creditor claims). Including such information on claims in a public liquidation schedule also should not be read to confer standing on creditors to object to other creditors’ claims.

In insolvency proceedings where acquisition and compilation of such information on claims or assets could unduly delay the dissemination of the liquidation schedule, the schedule’s contents should restrict itself to information about the liquidation procedures sufficient to allow creditors to make an informed decision on their acceptability, and the claims or assets information may follow by separate circulation.”

- (k) In paragraph 255, the first sentence, to insert the phrase “on its own motion or at the request of the debtor”, in line with the suggestion made earlier at the session (see para. 45 above);
- (l) In paragraph 261, to clarify that an alternative plan would be subject to the same treatment;
- (m) In paragraphs 270–273, to elaborate on the meaning of the term “opportunity” as contained in draft recommendation 74, noting that the domestic

insolvency law would address that matter; to delete references to “objections” in the context of draft recommendation 74; and to delete the phrase “which is supplemented by recommendation [34]” in square brackets at the end of paragraph 270;

(n) In paragraph 275, the third sentence, to replace a cross reference to recommendation [18] with a cross reference to recommendation [75]; and

(o) In paragraph 285, the last sentence, to replace the phrase “The plan approved by creditors will take effect automatically” with “In some jurisdictions, the plan approved by creditors may take effect automatically”.

### C. Tables of concordance

95. The Working Group had before it a proposal for tables of concordance between draft recommendations on a simplified insolvency regime and recommendations contained in the Guide. It was noted that the tables could be prepared as an online reference tool allowing readers to compare recommendations of the Guide with recommendations on a simplified insolvency regime. The Working Group considered that the tables, especially if presented in an online form, would be useful for facilitating the reading and understanding of the text on a simplified insolvency regime and the historical background and policy considerations taken into account in its preparation. Generally, the secretariat was requested to explore different options for publishing the final product in a user-friendly format easily accessible to intended users and establishing a proper linkage with the Guide. The tables of concordance were considered useful in that latter respect as well.

### D. Title of the text

96. The Working Group approved the following title for the text: “Legislative Guide on Insolvency Law for Micro and Small Enterprises.”

### V. Other business

97. The Working Group recalled that the Commission, at its fifty-third session, in 2020, was of the view that a text on a simplified insolvency regime might be presented for adoption by the Commission already at its fifty-fourth session, in 2021.<sup>4</sup> The Working Group considered various options for transmitting the text to the Commission this year.

98. While some concerns were expressed about transmitting the text this year, the view prevailed that transmitting the text as a whole or only its draft recommendations for approval in principle would be both timely and appropriate: timely because, while the text as a whole might not be ready for final adoption, the text was considered as sufficiently mature, and also important in response to the economic fallout from the coronavirus disease (COVID-19) pandemic; and appropriate because there was an established precedent of transmitting draft texts to the Commission for approval in principle, including the draft Guide that was transmitted in 2003 for preliminary approval of the scope of work undertaken, as well as key objectives, general features and structure of the insolvency regimes in the draft Guide.<sup>5</sup> Noting that the draft text was already used by some jurisdictions and was found helpful, it was noted that the text should be adopted as soon as possible, with potential revisions to be assessed in the future, following practical experience with use of the text.

99. Views were expressed that the draft recommendations as revised by the Working Group at the session were considered sufficiently mature for transmission to the

<sup>4</sup> *Official Records of the General Assembly, Seventy-fifth Session, Supplement No.17 (A/75/17)*, part two, para. 45.

<sup>5</sup> *Ibid.*, *Fifty-eighth Session, Supplement No.17 (A/58/17)*, paras. 172–197.

Commission in an annex to the report or the summary of the session, as the case may be. It was suggested that, if that could not be done for various reasons (including insufficient time for revision and translation of the draft text following the deliberations of the Working Group at the current session), the Working Group might request the secretariat to revise the draft recommendations reflecting deliberations at the session and transmit them to the Commission for consideration. It was suggested that the Commission should be informed that further refinement of the text, including the draft recommendations, might be necessary. The other view was that ideally the text should be transmitted to the Commission as a whole but doubts were expressed that the Working Group was in a position to do so this year.

100. Acknowledging that the draft commentary would require further development in the light of the amendments agreed to be made in the draft recommendations at the current session, it was noted that the Commission might nevertheless take note of the commentary as contained in the working papers before the Working Group at the current session with revisions agreed to be made thereto and entrust the secretariat to finalize the commentary in consultation with experts or subject to review by the Working Group or request the Working Group to finalize it.

101. In response to a question whether the Working Group had already received the mandate to work on other projects in the area of insolvency law, the Working Group was informed that the current mandate of the Working Group was only to complete the project on MSE insolvency as soon as possible. The Working Group took note that the results of the colloquium on applicable law in insolvency proceedings held in December 2020 together with the results of the colloquium on civil asset tracing and recovery held in December 2019 would inform the decision of the Commission about future work of UNCITRAL in the area of insolvency law.

102. In subsequent discussion, a proposal was made to transmit the draft recommendations for adoption, and the draft commentary for approval in principle, by the Commission this year. That proposal received sufficient support.

103. The other view was that this year, the draft recommendations should be transmitted to the Commission for approval in principle, while the draft commentary could be used by the Commission only as background information. That proposal did not receive support.

104. On the understanding that the Commission would decide itself which action to take with respect to the draft text, the view eventually prevailed that the Working Group should transmit to the Commission the following recommendation:

“1. After discussion, the view prevailed that the draft text, as revised at the current session, should be presented to the Commission at its fifty-fourth session this year, for consideration and assessment of the policies on which the draft text was based, and whether those policies were responsive to the mandate given to the Working Group by the Commission in 2014 as clarified in 2016 (see para. 1 above). The view prevailed that the draft recommendations would be transmitted to the Commission either in an annex to the report or summary of the session, as the case may be, or, failing that, by the secretariat.

2. The view prevailed that the Working Group should recommend that the Commission, after such consideration and assessment, may wish to: (a) adopt the draft recommendations as revised at the session of the Commission; (b) approve in principle the accompanying commentary and request the Secretariat to circulate the commentary together with the recommendations to States and relevant intergovernmental and non-governmental international organizations, for comment; and (c) request the Working Group to refine and complete the commentary, consistent with the policy considerations underlying the draft recommendations, if adopted by the Commission at its fifty-fourth session, for adoption by the Commission at its fifty-fifth session.”

105. One delegation expressed concern about the practice of holding informal consultations by this Working Group, particularly informal consultations before formal meetings during this session, and requested that the Working Group should not hold any additional informal consultations before the fifty-fourth session of the Commission. The Working Group took note of that concern and request.

## Annex

### **Draft recommendations as approved by the Working Group at its fifty-eighth session**

#### **A. Key objectives of a simplified insolvency regime**

1. States should provide for a simplified insolvency regime and for that purpose consider the following key objectives:

(a) Putting in place expeditious, simple, flexible and low-cost insolvency proceedings (henceforth referred to as “simplified insolvency proceedings”);

(b) Making simplified insolvency proceedings available and easily accessible to micro and small-sized enterprises (MSEs);

(c) Promoting the MSE debtor’s fresh start by enabling expedient liquidation of non-viable MSEs and reorganization of viable MSEs through simplified insolvency proceedings;

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

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

(f) Implementing an effective sanctions regime to prevent abuse or improper use of the simplified insolvency regime and to impose appropriate penalties for misconduct;

(g) Addressing concerns over stigmatization because of insolvency; and

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

Those objectives are in addition to the objectives of an effective insolvency law as set out in recommendations 1–5 of the UNCITRAL Legislative Guide on Insolvency Law (the “Guide”), such as the provision of certainty in the market to promote economic stability and growth, maximization of value of assets, preservation of the insolvency estate to allow equitable distribution to creditors, equitable treatment of similarly situated creditors, ensuring transparency and predictability, recognition of existing creditor rights and establishment of clear rules for ranking of priority.

#### **B. Scope of a simplified insolvency regime**

##### **Application to all MSEs**

2. States should ensure that a simplified insolvency regime applies to all MSEs. Aspects of the regime may differ depending on the type of MSE. (*See recommendations 8 and 9 of the Guide.*)

##### **Comprehensive treatment of all debts of individual entrepreneurs**

3. States should ensure that all debts of an individual entrepreneur are addressed in a single simplified insolvency proceeding unless the State decides to subject some debts of individual entrepreneurs to other insolvency regimes, in which case procedural consolidation or coordination of linked insolvency proceedings should be ensured.

### **Types of simplified insolvency proceedings**

4. States should ensure that a simplified insolvency regime provides for simplified liquidation and simplified reorganization. (*See recommendation 2 of the Guide.*)

## **C. Institutional framework**

### **Competent authority and an independent professional**

5. The insolvency law providing for a simplified insolvency regime should:

(a) Clearly indicate the competent authority; (*See recommendation 13 of the Guide.*)

(b) Specify the functions of the competent authority and any independent professional used in the administration of simplified insolvency; and

(c) Specify mechanisms for review and appeal of the decisions of the competent authority and any independent professional used in the administration of simplified insolvency proceedings.

### **Possible functions of the competent authority**

6. The insolvency law providing for a simplified insolvency regime may specify, for example, the following functions of the competent authority:

(a) Verification of eligibility requirements for commencement of a simplified insolvency proceeding;

(b) Verification of accuracy of information provided to the competent authority by the debtor, creditors and other parties in interest, including as regards the debtor's assets, liabilities and recent transactions;

(c) Resolution of disputes concerning the type of proceeding to commence;

(d) Conversion of one proceeding to another;

(e) Exercise of control over the insolvency estate;

(f) Verification and review of the reorganization plan and the liquidation schedule for compliance with law;

(g) Supervision of the implementation of a debt repayment or reorganization plan and verification of the implementation of the plan;

(h) Decisions related to the stay of proceedings, relief from the stay, creditors' objections or opposition, disputes, approval of a liquidation schedule and confirmation of a reorganization plan; and

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

### **Appointment of persons to assist the competent authority in the performance of its functions**

7. The insolvency law providing for a simplified insolvency regime should allow the competent authority to appoint one or more persons, including independent professionals, to assist it in the performance of its functions.

### **Possible functions of an independent professional**

8. If the insolvency law providing for a simplified insolvency regime envisages the use of an independent professional in the administration of simplified insolvency proceedings, it should allocate the functions of the competent authority, such as those illustrated in recommendation 6, between the competent authority and an independent

professional. That law may provide for such allocation to be determined by the competent authority itself.

#### **Support with the use of a simplified insolvency regime**

9. The insolvency law providing for a simplified insolvency regime should specify measures to make assistance and support with the use of a simplified insolvency regime readily available and easily accessible. Such measures may include services of an independent professional; templates, schedules and standard forms; and an enabling framework for the use of electronic means where information and communications technology in the State so permits and in accordance with other applicable law of that State.

#### **Mechanisms for covering costs of administering simplified insolvency proceedings**

10. The insolvency law providing for a simplified insolvency regime should specify mechanisms for covering the costs of administering simplified insolvency proceedings where assets and sources of revenue of the debtor are insufficient to meet those costs. (*See recommendations 26 and 125 of the Guide.*)

### **D. Main features of a simplified insolvency regime**

#### **Default procedures and treatment**

11. The insolvency law providing for a simplified insolvency regime should specify the default procedures and treatment that apply unless any party in interest objects or intervenes with a request for a different procedure or treatment or other circumstances exist that justify a different procedure or treatment.

#### **Short time periods**

12. The insolvency law providing for a simplified insolvency regime should specify short time periods for all procedural steps in simplified insolvency proceedings, narrow grounds for their extension and the maximum number, if any, of permitted extensions.

#### **Reduced formalities**

13. Consistent with the objective of establishing a cost-effective simplified insolvency regime, the insolvency law providing for a simplified insolvency regime should reduce formalities for all procedural steps in simplified insolvency proceedings, including for submission of claims, for obtaining approvals and for giving notices and notifications.

#### **Debtor-in-possession in simplified reorganization proceedings**

##### *Debtor-in-possession as the default approach*

14. The insolvency law providing for a simplified insolvency regime should specify that, in simplified reorganization proceedings, the debtor remains in control of its assets and the day-to-day operation of its business with appropriate supervision and assistance of the competent authority.

##### *Rights and obligations of the debtor-in-possession*

15. The insolvency law providing for a simplified insolvency regime should specify the rights and obligations of the debtor-in-possession, in particular as regards the use

and disposal of assets,<sup>6</sup> post-commencement finance<sup>7</sup> and treatment of contracts,<sup>8</sup> and allow the competent authority to specify them on a case-by-case basis.

*Limited or total displacement of the debtor-in-possession*

16. The insolvency law providing for a simplified insolvency regime should specify:

- (a) Circumstances justifying limited or total displacement of the debtor-in-possession in simplified reorganization proceedings;
- (b) Persons who may displace the debtor-in-possession in simplified reorganization proceedings; and
- (c) That the competent authority should be authorized to decide on displacement and terms of displacement on a case-by-case basis. (*See recommendations 112 and 113 of the Guide.*)

**Possible involvement of the debtor in the liquidation of the insolvency estate**

17. The insolvency law providing for a simplified insolvency regime may specify circumstances under which the competent authority may allow the debtor's involvement in the liquidation of the insolvency estate and the extent of such involvement.

**Deemed approval**

18. The insolvency law providing for a simplified insolvency regime should specify the matters which require approval of creditors and establish the relevant approval requirements. (*See recommendation 127 of the Guide.*) It should also specify that approvals on those matters are deemed to be obtained where:

- (a) Those matters have been notified by the competent authority to relevant creditors in accordance with procedures and time periods established for such purpose in the insolvency law providing for a simplified insolvency regime or by the competent authority; and
- (b) Neither objection nor sufficient opposition as regards those matters is communicated to the competent authority in accordance with procedures and time periods established for such purpose in the insolvency law providing for a simplified insolvency regime or by the competent authority.

## **E. Participants**

**Rights and obligations of parties in interest**

19. 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:

- (a) The right to be heard and request review on any issue in the simplified insolvency proceedings that affects their rights, obligations or interests; (*See recommendations 137 and 138 of the Guide.*)
- (b) The right to participate in the simplified insolvency proceedings and to obtain information relating to the proceeding from the competent authority subject to appropriate protection of information that is commercially sensitive, confidential or private; (*See recommendations 108, 111 and 126 of the Guide.*)

<sup>6</sup> See recommendations 52–62 of the Guide that will be applicable mutatis mutandis in a simplified insolvency regime. References to the insolvency representative in those recommendations should be read as references to the debtor-in-possession unless limited or total displacement of the debtor from the operation of the business takes place.

<sup>7</sup> Idem, but with reference to recommendations 63–68 of the Guide.

<sup>8</sup> Idem, but with reference to recommendations 69–86 and 100–107 of the Guide.

(c) Where the debtor is an individual entrepreneur, the right of the debtor to retain the assets excluded from the insolvency estate by law. (*See recommendation 109 of the Guide.*)

### **Obligations of the debtor**

20. The insolvency law providing for a simplified insolvency regime should specify the obligations of the MSE debtor that should arise on the commencement of, and continue throughout, the proceedings. The obligations should include the following:

(a) To cooperate with and assist the competent authority to perform its functions, including where applicable to take effective control of the estate, wherever located, and of business records, and to facilitate or cooperate in the recovery of the assets;

(b) To provide accurate, reliable and complete information relating to its financial position and business affairs, subject to allowing the debtor the time necessary to collect the relevant information, with the assistance of the competent authority where required including an independent professional where appointed, and subject to appropriate protection of commercially sensitive, confidential and private information;

(c) To provide notice of the change of a habitual place of residence or place of business;

(d) To adhere to the terms of the liquidation schedule or reorganization plan; and

(e) In the day-to-day operation of the business, to have otherwise due regard to the interests of creditors and other parties in interest.

(*See recommendations 110 and 111 of the Guide.*)

### **Protection of employees' rights and interests in simplified insolvency proceedings**

20 bis [54]. The insolvency law providing for a simplified insolvency regime should require the competent authority to ensure that all requirements of insolvency law and other laws applicable within insolvency proceedings relating to the protection of employees' rights and interests in insolvency are complied with in simplified insolvency proceedings. Those requirements may in particular include the requirement to keep the MSE debtor's employees properly informed, either directly or through their representatives, about the commencement of a simplified insolvency proceeding and all matters arising from that proceeding affecting their employment status and entitlements.

## **F. Eligibility, application and commencement**

### **Eligibility**

21. The insolvency law providing for a simplified insolvency regime should establish the criteria that debtors must meet in order to be eligible for simplified insolvency proceedings, minimizing the number of such criteria, and specify under what conditions creditors of the eligible debtors may also apply for commencement of simplified insolvency proceedings with respect to those debtors. (*See recommendations 8, 9 and 14–16 of the Guide.*)

### **Commencement criteria and procedures**

22. The insolvency law providing for a simplified insolvency regime should:

(a) Establish transparent, certain and simple criteria and procedures for commencement of simplified insolvency proceedings;

(b) Enable applications for simplified insolvency proceedings to be made and dealt with in a speedy, efficient and cost-effective manner; and

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

*(See the text preceding recommendation 14 of the Guide.)*

### **Commencement on debtor application**

#### *Application*

23. The insolvency law providing for a simplified insolvency regime should allow eligible debtors to apply for commencement of a simplified insolvency proceeding at an early stage of financial distress without the need to prove insolvency. *(See recommendation 15 of the Guide.)*

#### *Information to be included in the application*

24. The insolvency law providing for a simplified insolvency regime should specify information that the debtor must include in its application for commencement of a simplified insolvency proceeding, keeping the disclosure obligation at the stage of application to the minimum. It should require that information to be accurate, reliable and complete.

#### *Effective date of commencement*

25. The insolvency law providing for a simplified insolvency regime should specify that where the application for commencement is made by the debtor:

(a) The application for commencement will automatically commence a simplified insolvency proceeding; or

(b) The competent authority will promptly determine its jurisdiction and whether the debtor is eligible and, if so, commence a simplified insolvency proceeding.

*(See recommendation 18 of the Guide.)*

### **Commencement on creditor application**

26. The insolvency law providing for a simplified insolvency regime should specify that a simplified insolvency proceeding may be commenced on the application of a creditor of a debtor which is eligible for simplified insolvency proceedings, provided that:

(a) Notice of application is promptly given to the debtor;

(b) The debtor is given the opportunity to respond to the application, by contesting the application, consenting to the application or requesting the commencement of a proceeding different from the one applied for by the creditor; and

(c) A simplified insolvency proceeding of the type to be determined by the competent authority commences without agreement of the debtor only after it is established that the debtor is insolvent.

*(See recommendation 19 of the Guide.)*

### **Denial of application**

#### *Possible grounds for denial of application*

27. The insolvency law providing for a simplified insolvency regime should specify that, where the decision to commence a simplified insolvency proceeding is to be made by the competent authority, the competent authority should deny the application if it finds that:

(a) It does not have jurisdiction;

- (b) The applicant is ineligible; or
- (c) The application is an improper use of the simplified insolvency regime.

*(See recommendation 20 of the Guide.)*

*Prompt notice of denial of application*

28. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly give notice of its decision to deny the application to the applicant, and where the application was made by a creditor, also to the debtor. *(See recommendation 21 of the Guide.)*

*Possible consequences of denial of application*

29. The insolvency law providing for a simplified insolvency regime should set out possible consequences of denial of application, including that a different type of insolvency proceeding may commence if criteria set out in the insolvency law for the commencement of that other type of insolvency proceeding are met.

*Possible imposition of costs and sanctions against the applicant*

30. The insolvency law providing for a simplified insolvency regime should allow the competent authority, where it has denied an application to commence a simplified insolvency proceeding under recommendation 27, to impose costs or sanctions, where appropriate, against the applicant for submitting the application. *(See recommendation 20 of the Guide.)*

**Notice of commencement of proceedings**

31. The insolvency law providing for a simplified insolvency regime should require that:

- (a) The competent authority should give the notice of the commencement of the simplified insolvency proceeding using the means appropriate to ensure that the information is likely to come to the attention of parties in interest; and
- (b) The debtor and all known creditors should be individually notified by the competent authority of the commencement of the simplified insolvency proceeding unless the competent authority considers that, under the circumstances, some other form of notice would be more appropriate.

*(See recommendations 23 and 24 of the Guide.)*

**Content of the notice of commencement of a simplified insolvency proceeding**

32. The insolvency law providing for a simplified insolvency regime should specify that the notice of commencement of a simplified insolvency proceeding is to include:

- (a) The effective date of the commencement of the simplified insolvency proceeding;
- (b) Information concerning the application of the stay and its effects;
- (c) Information concerning submission of claims or that the list of claims prepared by the debtor will be used for verification;
- (d) Where submission of claims by creditors is required, the procedures and time period for submission and proof of claims and the consequences of failure to do so (see recommendation [49] below); and
- (e) Time period for expressing objection to the commencement of a simplified insolvency proceeding (see recommendation [33] below).

*(See recommendation 25 of the Guide.)*

### **Creditor objection to the commencement of a simplified insolvency proceeding**

33. The insolvency law providing for a simplified insolvency regime should specify that creditors may object to the commencement of a simplified insolvency proceeding or a particular type thereof or to the commencement of any insolvency proceeding with respect to the debtor, provided they do so within the time period established in the insolvency law as notified to them by the competent authority in the notice of the commencement of the simplified insolvency proceeding (see recommendations [31–32] above).

### **Possible consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding**

34. The insolvency law providing for a simplified insolvency regime should specify consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding.

### **Dismissal of a simplified insolvency proceeding after its commencement**

#### *Possible grounds for dismissal of the proceeding*

35. The insolvency law providing for a simplified insolvency regime should permit the competent authority to dismiss the proceeding if, after its commencement, the competent authority determines, for example, that:

- (a) The proceeding constitutes an improper use of the simplified insolvency regime; or
- (b) The applicant is ineligible.

*(See recommendation 27 of the Guide.)*

#### *Prompt notice of the dismissal of the proceeding*

36. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly give notice of its decision to dismiss the proceeding using the procedure that was used for giving notice of the commencement of the simplified insolvency proceeding. *(See recommendation 29 of the Guide.)*

#### *Possible consequences of dismissal of the proceeding*

37. The insolvency law providing for a simplified insolvency regime should set out possible consequences of the dismissal of the proceeding, including that a different type of insolvency proceeding may commence if criteria set out in the insolvency law for the commencement of that other type of insolvency proceeding are met.

#### *Possible imposition of costs and sanctions against the applicant*

38. Where the proceeding is dismissed, the insolvency law providing for a simplified insolvency regime should allow the competent authority to impose costs or sanctions, where appropriate, against the applicant for commencement of the proceeding. *(See recommendation 28 of the Guide.)*

## **G. Notices and notifications**

### **Procedures for giving notices**

39. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notices related to simplified insolvency proceedings and use simplified and cost-effective procedures for such purpose. *(See recommendations 22 and 23 of the Guide.)*

**Individual notification**

40. The insolvency law providing for a simplified insolvency regime should require that the debtor and any known creditor should be individually notified by the competent authority of all matters on which their approval is required, unless the competent authority considers that, under the circumstances, some other form of notification would be more appropriate. (*See recommendation 24 of the Guide.*)

**Appropriate means of giving notice**

41. The insolvency law providing for a simplified insolvency regime should specify that the means of giving notice must be appropriate to ensure that the information is likely to come to the attention of the intended party in interest. (*See recommendation 23 of the Guide.*)

**H. Constitution, protection and preservation of the insolvency estate****Constitution of the insolvency estate**

42. The insolvency law providing for a simplified insolvency regime should identify:

(a) Assets that will constitute the insolvency estate, including assets of the debtor, assets acquired after commencement of the simplified insolvency proceeding and assets recovered through avoidance or other actions; (*See recommendation 35 of the Guide.*)

(b) Where the MSE debtor is an individual entrepreneur, assets excluded from the estate that the MSE debtor is entitled to retain (see recommendation [19 (c)] above). (*See recommendations 38 and 109 of the Guide.*)

**Undisclosed or concealed assets**

42 bis. The insolvency law providing for a simplified insolvency regime should specify that any undisclosed or concealed assets form part of the insolvency estate.

**Date from which the insolvency estate is to be constituted**

43. The insolvency law providing for a simplified insolvency regime should specify the effective date of commencement of a simplified insolvency proceeding as the date from which the estate is to be constituted. (*See recommendation 37 of the Guide.*)

**Avoidance in simplified insolvency proceedings**

44. The insolvency law providing for a simplified insolvency regime should ensure that avoidance mechanisms available under the insolvency law<sup>9</sup> can be used in a timely and effective manner to maximize returns in simplified insolvency proceedings. The competent authority should be allowed to convert a simplified insolvency proceeding to a different type of insolvency proceeding where the conduct of avoidance proceedings necessitates doing so.

**Stay of proceedings***Scope and duration of the stay*

45. The insolvency law providing for a simplified insolvency regime should specify that the stay of proceedings applies on commencement and throughout simplified insolvency proceedings unless: (a) it is lifted or suspended by the competent authority on its own motion or upon request of any party in interest; or (b) the relief from the stay is granted by the competent authority upon request of any party in interest. Any

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<sup>9</sup> See recommendations 87–99 of the Guide.

exceptions to the application of the stay should be clearly stated in the law. (*See recommendations 46, 47, 49 and 51 of the Guide.*)

*Rights not affected by the stay*

46. The insolvency law providing for a simplified insolvency regime should specify that the stay does not affect:

(a) The right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor;

(b) The right of a secured creditor, upon application to the competent authority, to protection of the value of the asset(s) in which it has a security interest;

(c) The right of a third party, upon application to the competent authority, to protection of the value of its asset(s) in the possession of the debtor; and

(d) The right of any party in interest to request the competent authority to grant relief from the stay. (*See recommendations 47, 50, 51 and 54 of the Guide.*)

## **I. Treatment of creditor claims**

### **Claims affected by simplified insolvency proceedings**

47. The insolvency law providing for a simplified insolvency regime should specify claims that will be affected by simplified insolvency proceedings, which should include claims of secured creditors, and claims that will not be affected by simplified insolvency proceedings. (*See recommendations 171 and 172 of the Guide.*)

### **Admission of claims on the basis of the list of creditors and claims prepared by the debtor**

48. The insolvency law providing for a simplified insolvency regime may require the debtor to prepare the list of creditors and claims, with the assistance of the competent authority or an independent professional where necessary, unless the circumstances justify that the competent authority prepares the list itself with the assistance of the debtor or entrusts an independent professional with that task. It should specify that:

(a) The list so prepared should be circulated by the competent authority to all listed creditors for verification, indicating the time period for communicating any objection or concern as regards the list to the competent authority;

(b) In the absence of any objection or concern communicated to the competent authority or the independent professional as applicable within the established time period, the claims are deemed to be undisputed and admitted as listed;

(c) In case of objection or concern, the competent authority takes action with respect to disputed claim(s) (see recommendation [52] below).

(*See recommendations 110 (b)(v) and 170 of the Guide.*)

### **Submission of claims by creditors**

49. The insolvency law providing for a simplified insolvency regime should allow the competent authority, when circumstances of the case so justify, to require creditors to submit their claims to the competent authority, specifying the basis and amount of the claim. It should require in such case that:

(a) The procedures and the time period for submission of the claims and consequences of failure to submit a claim in accordance with those procedures and time period should be specified by the competent authority in the notice of commencement of the simplified insolvency proceeding (see recommendations [31 and 32] above) or in a separate notice;

(b) Reasonable time should be given to creditors to submit their claims expeditiously;

(c) Formalities associated with submission of claims should be minimized and the use of electronic means for such purpose should be enabled where information and communication technology in the State so permits and in accordance with other applicable law of that State.

*(See recommendations 169, 170, 174 and 175 of the Guide.)*

#### **Admission or denial of claims**

50. The insolvency law providing for a simplified insolvency regime should allow the competent authority to:

(a) Admit or deny any claim, in full or in part;

(b) Subject claims by related persons to a special scrutiny and treatment, in full or in part; and

(c) Determine the portion of a secured creditor's claim that is secured and the portion that is unsecured by valuing the encumbered asset.

*(See recommendations 177, 179 and 184 of the Guide.)*

#### **Prompt notice of denial of claims or subjecting them to a special scrutiny or treatment**

51. Where the claim is to be denied or subjected to a special scrutiny or treatment, the insolvency law providing for a simplified insolvency regime should require the competent authority to give prompt notice of the decision and the reasons for the decision to the creditor concerned, indicating the time period within which the creditor can request review of that decision. *(See recommendations 177 and 181 of the Guide.)*

#### **Treatment of disputed claims**

52. The insolvency law providing for a simplified insolvency regime should permit a party in interest to dispute any claim, either before or after admission, and request review of that claim. It should authorize the competent authority or another competent State body to review a disputed claim and decide on its treatment, including by allowing the proceeding to continue with respect to undisputed claims. *(See recommendation 180 of the Guide.)*

#### **Effects of admission**

53. The insolvency law providing for a simplified insolvency regime should specify the effects of admission of a claim, including entitling the creditor whose claim has been admitted to participate in the simplified insolvency proceeding, to be heard, to participate in a distribution and to be counted according to the amount and class of the claim for determining sufficient opposition and establishing the priority to which the creditor's claim is entitled. *(See recommendation 183 of the Guide.)*

### **J. [unused; see draft recommendation 20 bis above]**

54. [unused; see draft recommendation 20 bis above]

### **K. Features of simplified liquidation proceedings**

#### **Decision on a procedure to be used**

55. The insolvency law providing for a simplified insolvency regime should require that the competent authority, after commencement of a simplified liquidation

proceeding, should promptly determine whether the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will take place in the proceeding:

(a) Where it is determined that the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will take place, the insolvency law providing for a simplified insolvency regime should require the preparation, notification and approval of the liquidation schedule (see recommendations [56–63] below);

(b) Where it is determined that the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will not take place, the insolvency law providing for a simplified insolvency regime should require the competent authority to close the simplified liquidation proceeding (see recommendations [64–66] below).

### **Procedure involving the sale and disposal of assets and distribution of proceeds**

#### *Preparation of the liquidation schedule*

56. The insolvency law providing for a simplified insolvency regime may require the competent authority to prepare the liquidation schedule unless circumstances of the case justify entrusting the preparation of the liquidation schedule to the debtor, an independent professional or another person.

#### *Time period for preparing a liquidation schedule*

57. The insolvency law providing for a simplified insolvency regime should specify the maximum time period for preparing a liquidation schedule after commencement of a simplified liquidation proceeding, keeping it short, and authorize the competent authority to establish a shorter time period where the circumstances of the case so justify. It should also specify that any time period established by the competent authority must be notified to the person responsible for preparing the liquidation schedule and to (other) known parties in interest.

#### *Minimum contents of the liquidation schedule*

58. The insolvency law providing for a simplified insolvency regime should specify the contents of a liquidation schedule, keeping it to the minimum, including that the liquidation schedule should:

- (a) Identify the party responsible for the realization of the assets of the insolvency estate;
- (b) List assets of the debtor, specifying those that are subject to security interests;
- (c) Specify the means of realization of the assets (public auction or private sale or other means);
- (d) List amounts and priorities of the admitted claims; and
- (e) Indicate the timing and method of distribution of proceeds from the realization of the assets.

#### *Notification of the liquidation schedule to all known parties in interest*

59. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notice of the liquidation schedule to all known parties in interest, specifying a short period for expressing any objection to the liquidation schedule.

*Prior review of the liquidation schedule by the competent authority*

60. Where the liquidation schedule is prepared by a person other than the competent authority, the insolvency law providing for a simplified insolvency regime should require the competent authority, before giving notice of the liquidation schedule, to review the liquidation schedule to ascertain its compliance with the law and when it is not so compliant, to make any required modifications to the liquidation schedule to ensure that it is compliant.

*Approval of the liquidation schedule*

61. The insolvency law providing for a simplified insolvency regime should require the competent authority to approve the liquidation schedule if it receives no objection within the established time period and there are no other grounds for the competent authority to reject the liquidation schedule.

*Treatment of objections*

62. Where there is objection, the insolvency law providing for a simplified insolvency regime should allow the competent authority either to modify the liquidation schedule, approve it unmodified or convert the proceeding to a different type of insolvency proceeding.

*Prompt distribution of proceeds in accordance with the insolvency law*

63. The insolvency law providing for a simplified insolvency regime should require distributions to be made promptly and in accordance with the insolvency law. (*See recommendation 193 of the Guide.*)

**Procedure not involving the sale and disposal of assets and distribution of proceeds***Notice of a decision to proceed with the closure of the proceeding*

64. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly notify the debtor, all known creditors and other known parties in interest about its determination that no sale and disposal of the assets of the insolvency estate and no distribution of proceeds to creditors will take place in the proceeding and its decision therefore to proceed with the closure of the proceeding. It should require the notice: (a) to include reasons for that determination and the list of creditors, assets and liabilities of the debtor; and (b) to specify a short time period for expressing any objection to that decision.

*Decision to close the proceeding in the absence of objection*

65. The insolvency law providing for a simplified insolvency regime should require the competent authority, in the absence of any objection to its decision to proceed with the closure of the proceeding, to close the proceeding.<sup>10</sup>

*Treatment of objections*

66. Where the competent authority receives an objection to its decision to proceed with the closure of the proceeding, the insolvency law providing for a simplified insolvency regime should permit the competent authority to commence verification of reasons for the objection, following which the competent authority may decide:

(a) To revoke its decision and commence a simplified liquidation proceeding involving the sale and disposal of assets and distribution of proceeds;

<sup>10</sup> The competent authority would be expected to take a decision on discharge not later than at the time of the closure of the proceeding even if discharge itself may take effect later, e.g., after expiration of the monitoring period or implementation of a debt repayment plan. See section M of this [text] for related recommendations on discharge.

- (b) To convert a simplified liquidation proceeding to a different type of insolvency proceeding; or
- (c) To close the proceeding.<sup>11</sup>

## **L. Features of simplified reorganization proceedings**

### **Preparation of a reorganization plan**

67. The insolvency law providing for a simplified insolvency regime should allow the competent authority to appoint, where necessary, an independent professional to assist the debtor with the preparation of the reorganization plan or decide that circumstances of the case justify entrusting the preparation of the plan to an independent professional.

### **Time period for the proposal of a reorganization plan**

68. The insolvency law providing for a simplified insolvency regime should fix the maximum time period for the proposal of a reorganization plan after commencement of a simplified reorganization proceeding and authorize the competent authority, where the circumstances of the case so justify, to establish a shorter time period subject to its possible extension up to the maximum period specified in the law. (*See recommendation 139 of the Guide.*)

### **Notice of the time period established for the proposal of a reorganization plan**

69. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notice of the time period that it established for the proposal of a reorganization plan to the person responsible for preparing the reorganization plan and to (other) parties in interest.

### **Consequences of not submitting the reorganization plan within the established time period**

70. The insolvency law providing for a simplified insolvency regime should specify that, if the reorganization plan is not submitted within the established time period, an insolvent debtor is deemed to enter the liquidation proceeding while, for a solvent debtor, the reorganization proceeding will terminate. (*See recommendation 158 (a) of the Guide.*)

### **Alternative plan**

71. The insolvency law providing for a simplified insolvency regime may envisage the possibility for creditors to file an alternative plan. Where it does so, it should specify the conditions and the time period for exercising such an option.

### **Content of the reorganization plan**

72. The insolvency law providing for a simplified insolvency regime should specify the minimum contents of a plan, including:

- (a) The list of assets of the debtor, specifying those that are subject to security interests;
- (b) The terms and conditions of the plan;
- (c) The list of creditors and the treatment provided for each creditor by the plan (e.g., how much they will receive and the timing of payment, if any);
- (d) A comparison of the treatment afforded to creditors by the plan and what they would otherwise receive in liquidation; and

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<sup>11</sup> *Idem.*

- (e) Proposed ways of implementing the plan.

*(See recommendations 143 (d) and 144 of the Guide.)*

#### **Notification of the reorganization plan to all known parties in interest**

73. 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 explain the consequences of any abstention and specify the time period for expressing any objection or opposition to the plan.

#### **Effect of the plan on unnotified creditors**

74. The insolvency law providing for a simplified insolvency regime should specify that a creditor whose rights are modified or affected by the plan should not be bound by the terms of the plan unless that creditor has been given the opportunity to express opposition on the approval of the plan. *(See recommendation 146 of the Guide.)*

#### **Approval of the reorganization plan by creditors**

##### *Undisputed reorganization plan*

75. The insolvency law providing for a simplified insolvency regime should specify that the plan is deemed to be approved by creditors if the requirements under recommendation [18] are fulfilled.

##### *Disputed plan*

76. The insolvency law providing for a simplified insolvency regime should:

- (a) Allow the modification of the plan to address objection or sufficient opposition to the plan;
- (b) Establish a short time period for introducing modifications and transmitting a modified plan to all known parties in interest;
- (c) Require the competent authority to transmit any modified plan to all known parties in interest indicating a short time period for expressing any objection or opposition to the modified plan;
- (d) Require the competent authority to terminate the simplified reorganization proceedings for a solvent debtor or convert the simplified reorganization proceeding to a simplified liquidation proceeding for an insolvent debtor (i) if modification of the original plan to address objection or sufficient opposition is not possible or (ii) if objection or sufficient opposition to the modified plan is communicated to the competent authority within the established time period; and
- (e) Specify that the modified plan is approved by creditors if the competent authority receives no objection and no sufficient opposition to the modified plan within the established time period.

*(See recommendations 155, 156 and 158 of the Guide.)*

#### **Confirmation of the plan by the competent authority**

77. The insolvency law providing for a simplified insolvency regime should require the competent authority to confirm the plan approved by creditors. It should require the competent authority, before confirming the plan, to ascertain that the creditor approval process was properly conducted, creditors will receive at least as much under the plan as they would have received in liquidation, unless they have specifically agreed to receive lesser treatment, and the plan does not contain provisions contrary to law. *(See recommendation 152 of the Guide.)*

**Challenges to the confirmed plan**

78. The insolvency law providing for a simplified insolvency regime should permit the confirmed plan to be challenged on the basis of fraud. It should specify:

- (a) A time period for bringing such a challenge calculated by reference to the time the fraud is discovered;
- (b) The party that may bring such a challenge;
- (c) That the challenge should be heard by the relevant review body; and
- (d) That a simplified reorganization proceeding may be converted to a simplified liquidation proceeding or a different type of insolvency proceeding where the confirmed plan is successfully challenged.

(See recommendations 154 and 158 (d) of the Guide.)

**Amendment of a plan**

79. The insolvency law providing for a simplified insolvency regime should permit the amendment of a plan and specify:

- (a) The parties that may propose amendments;
- (b) The time at which the plan may be amended, including between submission and approval and during implementation, and a mechanism for communicating amendments to the competent authority; and
- (c) The mechanism for approval of amendments of the confirmed plan, which should include a notice by the competent authority of proposed amendments to all parties in interest affected by the amendments, the approval of the amendments by those parties, the confirmation of the amended plan by the competent authority, and consequences of failure to secure approval of proposed amendments. (See recommendations 155 and 156 of the Guide.)

80. [unused]

**Supervision of the implementation of the plan**

81. The insolvency law providing for a simplified insolvency regime may entrust supervision of the implementation of the plan to the competent authority or an independent professional as applicable. (See recommendation 157 of the Guide.)

**Consequences of the failure to implement the plan**

82. The insolvency law providing for a simplified insolvency regime should specify that, where there is substantial breach by the debtor of the terms of the plan or inability to implement the plan, the competent authority may on its own motion or at the request of any party in interest:

- (a) Convert the simplified reorganization proceeding to a simplified liquidation proceeding or a different type of insolvency proceeding;
- (b) Close the simplified reorganization proceeding and parties in interest may exercise their rights at law;
- (c) If closed, reopen the simplified reorganization proceeding;
- (d) If closed, open a simplified liquidation proceeding; or
- (e) Grant any other appropriate type of relief.

(See recommendations 158 (e) and 159 of the Guide)

**Conversion of a simplified reorganization to a liquidation**

83. The insolvency law providing for a simplified insolvency regime should provide that at any point during a simplified reorganization proceeding, the competent

authority may, on its own initiative or at the request of a party in interest or an independent professional, where appointed, decide that the proceeding be discontinued and converted to a liquidation, if the competent authority determines that the debtor is insolvent and there is no prospect for viable reorganization. Where the competent authority considers conversion to liquidation before submission of a reorganization plan, the competent authority should be mindful of the time needed to prepare and submit a reorganization plan (see recommendations [68 and 69] above) and may consult the independent professional in making the decision, if one has been appointed.

## **M. Discharge**

### **Discharge in simplified liquidation proceedings**

#### *Decision on discharge*

84. [88]. The insolvency law providing for a simplified insolvency regime should specify that, in a simplified liquidation proceeding, discharge should be granted expeditiously.

#### *Discharge conditional upon expiration of a monitoring period*

85. [89]. Where the insolvency law provides that discharge may not apply until after the expiration of a specified period of time following commencement of insolvency proceedings during which period the debtor is expected to cooperate with the competent authority (“monitoring period”), the insolvency law providing for a simplified insolvency regime should:

- (a) Fix the maximum duration of the monitoring period, which should be short;
- (b) Allow the competent authority to establish a shorter duration of the monitoring period on a case-by-case basis;
- (c) Specify that, after expiration of the monitoring period, the debtor should be discharged upon decision of the competent authority where the debtor has not acted fraudulently and has cooperated with the competent authority in performing its obligations under the insolvency law. (*See recommendation 194 of the Guide.*)

#### *Discharge conditional upon the implementation of a debt repayment plan*

86. [90]. The insolvency law providing for a simplified insolvency regime may specify that full discharge may be conditional upon the implementation of a debt repayment plan. In such case, it should allow the competent authority to specify the duration of the debt repayment plan (“discharge period”) and require the discharge procedures to include verification by the competent authority:

- (a) Before the debt repayment plan becomes effective, that the debt repayment obligations reflect the situation of the individual entrepreneur and are proportionate to his or her disposable income and assets during the discharge period, taking into account the equitable interest of creditors; and
- (b) On expiry of the discharge period, that the individual entrepreneur has fulfilled his or her repayment obligations under the debt repayment plan, in which case the individual entrepreneur is discharged upon confirmation by the competent authority of the fulfilment of the debt repayment plan by the debtor.

### **Discharge in simplified reorganization proceedings**

87. [91]. The insolvency law providing for a simplified insolvency regime may specify that full discharge in simplified reorganization is conditional upon successful implementation of the reorganization plan and it shall take immediate effect upon confirmation by the competent authority of such implementation.

## **General provisions**

### *Conditions for discharge*

88. [84]. Where the insolvency law providing for a simplified insolvency regime specifies that conditions may be attached to the MSE debtor's discharge, those conditions should be kept to a minimum and clearly set forth in the insolvency law. (*See recommendation 196 of the Guide.*)

### *Exclusions from discharge*

89. [85]. Where the insolvency law providing for a simplified insolvency regime specifies that certain debts are excluded from a discharge, those debts should be kept to a minimum and clearly set forth in the insolvency law. (*See recommendation 195 of the Guide.*)

### *Criteria for denying discharge*

90. [86]. The insolvency law providing for a simplified insolvency regime should specify criteria for denying a discharge, keeping them to a minimum.

### *Criteria for revoking a discharge granted*

91. [86]. The insolvency law providing for a simplified insolvency regime should specify criteria for revoking a discharge granted. In particular, it may specify that the discharge is to be revoked where it was obtained fraudulently. (*See recommendation 194 of the Guide.*)

## **N. Closure of proceedings**

92. The insolvency law providing for a simplified insolvency regime should specify minimal and simple procedures by which simplified insolvency proceedings should be closed. (*See recommendations 197 and 198 of the Guide.*)

## **O. Treatment of personal guarantees. Procedural consolidation and coordination**

### **Treatment of personal guarantees**

93. A simplified insolvency regime should address, including through procedural consolidation or coordination of linked proceedings, the treatment of personal guarantees provided for business needs of the MSE debtor by individual entrepreneurs, owners of limited liability MSEs or their family members.

### **Procedural consolidation or coordination of linked business, consumer and personal insolvency proceedings**

#### *Orders of procedural consolidation and coordination*

94. The insolvency law may require procedural consolidation or coordination of linked business, consumer and personal insolvency proceedings in order to address comprehensively intertwined business, consumer and personal debts of individual entrepreneurs, owners of limited liability MSEs and their family members. The law may specify that, in such cases, the competent authority or another competent State body, as the case may be, may order procedural consolidation or coordination of linked proceedings on its own motion or upon request of any party in interest, which may be made at the time of application for commencement of insolvency proceedings or at any subsequent time.

*Modification or termination of an order for procedural consolidation or coordination*

95. The insolvency law should specify that an order for procedural consolidation or coordination may be modified or terminated, provided that any actions or decisions already taken pursuant to the order are not affected by the modification or termination. Where more than one State body is involved in ordering procedural consolidation or coordination, those State bodies may take appropriate steps to coordinate modification or termination of procedural consolidation or coordination.

*Notice of procedural consolidation and coordination*

96. The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural consolidation or coordination and modification or termination of procedural consolidation or coordination, including the scope and extent of the order, the parties to whom notice should be given, the party responsible for giving notice and the content of the notice.

**P. Conversion****Conditions for conversion**

97. The insolvency law should provide for conversion between different types of proceedings in appropriate circumstances and subject to applicable eligibility and other requirements.

**Procedures for conversion**

98. The insolvency law should address procedures for conversion, including notification to all known parties in interest about the conversion, and mechanisms for addressing objections to that course of action.

**Effect of conversion on post-commencement finance**

99. The insolvency law should specify that where a simplified reorganization proceeding is converted to a liquidation proceeding, any priority accorded to post-commencement finance in the simplified reorganization proceeding should continue to be recognized in the liquidation proceeding. (*See recommendation 68 of the Guide.*)

**Other effects of conversion**

100. The insolvency law should address other effects of conversion, including on deadlines for actions, the stay of proceedings and other steps taken in the proceeding being converted. (*See recommendation 140 of the Guide.*)

**Q. Appropriate safeguards and sanctions**

101. The insolvency law providing for a simplified insolvency regime should build in appropriate safeguards to prevent abuses and improper use of a simplified insolvency regime and permit the imposition of sanctions for abuse or improper use of the simplified insolvency regime, for failure to comply with the obligations under the insolvency law and for non-compliance with other provisions of the insolvency law. (*See recommendations 20, 28 and 114 of the Guide.*)

**R. Pre-commencement aspects****Obligations of persons exercising control over MSEs in the period approaching insolvency**

102. The law relating to insolvency should specify that, at the point in time when the persons exercising control over the business knew or should have known that

insolvency was imminent or unavoidable, they should have due regard to the interests of creditors and other stakeholders and to take reasonable steps at an early stage of financial distress to avoid insolvency and, where it is unavoidable, to minimize the extent of insolvency. Reasonable steps might include:

- (a) Evaluating the current financial situation of the business;
- (b) Seeking professional advice where appropriate;
- (c) Not committing the business to the types of transaction that might be subject to avoidance unless there is an appropriate business justification;
- (d) Protecting the assets so as to maximize value and avoid loss of key assets;
- (e) Ensuring that management practices take into account the interests of creditors and other stakeholders;
- (f) Considering holding informal debt restructuring negotiations with creditors; and
- (g) Applying for commencement of insolvency proceedings if it is required or appropriate to do so.

*(See recommendations 255, 256 and 257 of the Guide.)*

### **Early rescue mechanisms**

103. As a means of encouraging the early rescue of MSEs, a State should consider establishing mechanisms for providing early signals of financial distress to MSEs, increasing financial and business management literacy among MSE managers and owners and promoting their access to professional advice. These mechanisms should be available and easily accessible to MSEs.

### **Informal debt restructuring negotiations**

#### *Removing disincentives for the use of informal debt restructuring negotiations*

104. For the purpose of avoiding MSE insolvency, the State may consider identifying and removing disincentives for the use of informal debt restructuring negotiations.

#### *Providing incentives for participation in informal debt restructuring negotiations*

105. The State may consider providing appropriate incentives for the participation of creditors, including public bodies, and other relevant stakeholders, in particular employees, in informal debt restructuring negotiations.

#### *Institutional support with the use of informal debt restructuring negotiations*

106. The State may consider providing for:

- (a) Involvement of a competent public or private body, where necessary, to facilitate informal debt restructuring negotiations between creditors and debtors and between creditors;
- (b) A neutral forum to facilitate negotiation and resolution of debtor-creditor and inter-creditor issues; and
- (c) Mechanisms for covering or reducing the costs of the services mentioned in subparagraphs (a) and (b) above.

### **Pre-commencement business rescue finance**

107. The law should:

- (a) Facilitate and provide incentives for finance to be obtained by MSEs in financial distress before commencement of insolvency proceedings for the purpose of rescuing business and avoiding insolvency;

(b) Subject to proper verification of appropriateness of that finance and protection of parties whose rights may be affected by the provision of such finance, provide appropriate protection for the providers of such finance, including the payment of such finance provider at least ahead of ordinary unsecured creditors;

(c) Provide appropriate protection for those parties whose rights may be affected by the provision of such finance.

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