



# General Assembly

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**United Nations Commission  
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Working Group V (Insolvency Law)  
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## **Legislative Guide on Insolvency Law**

### **Part three: Treatment of enterprise groups in insolvency**

#### **Proposal by the United States of America on post-application finance\***

1. In preparation for the thirty-sixth session of Working Group V (Insolvency Law), the Government of the United States of America submitted the attached proposal on post-application finance to the Secretariat.
2. The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

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\* This document was submitted in early April 2009, less than the required 10 weeks prior to the start of the thirty-sixth session of the Working Group.



## Annex

The following text is proposed for inclusion in the commentary to Part III, Treatment of enterprise groups in insolvency, of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide):

1. When a company or group of companies become insolvent and make an application for insolvency proceedings to be commenced, that application often results in a breach of the respective loan covenants entitling the lender of the company or the group of companies to discontinue advancing funds under existing loan agreements. Where an insolvency law does not provide for automatic commencement of a proceeding upon application, it can take a period of several months between the making of an application and the commencement of the proceeding. Generally, during this interim period, the courts must make an independent evaluation as to whether the application being made by a company or group of companies meets the statutory criteria to commence a proceeding. In the interim, if the company or group of companies is to continue as a going concern, the company or group of companies must be able to continue to conduct its business, pay its employees, pay its suppliers and generally continue its day-to-day activities. To pay these ongoing expenses, the company or group of companies will generally require new financing during the gap period.
2. The availability of financing or the lack thereof during this interim period can determine whether a reorganization of the company or group of companies will ultimately be a viable option or whether liquidation will be required. If funds are not available for the company or group of companies to pay such expenses during that gap period, then businesses will not be able to reorganize as they will not be able to continue to employ their staff or maintain production of existing products or services and will, most likely, be forced into liquidation.
3. Conversely, the existence of a provision under the insolvency law enabling post-application finance for the period of time between the making of an application and the commencement of the proceeding can preserve the possibility of reorganization of the company or group of companies. Such a provision is often necessary to provide assurance to any existing lender to the company or group of companies to provide additional financing or to any new lender to provide alternative financing during this relatively short period between application and commencement.
4. Although the period between application and commencement may take only several months, the debtor's source of financing may well be cut off during this period because, as mentioned above, the making of the application usually triggers an event of default under existing loan agreements. Thus, in the absence of court authorization to approve post-application financing, some debtors who do not have sufficient cash to survive this interim period will find themselves unable to reorganize before the case is even commenced.
5. Recommendation 39 of the Legislative Guide provides for the court to order provisional measures to preserve the assets of the debtor prior to the commencement of an insolvency proceeding where those measures are needed

to protect the assets of the debtor and the interests of creditors. Those measures could include the provision of finance to cover the period between application and commencement.

6. The authorization for the debtor to obtain finance during the interim period should therefore be regarded as being within the purview of recommendation 39 of the Legislative Guide.

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