United Nations A/CN.9/WG.V/WP.163

General Assembly

Distr.: Limited
28 September 2018

Original: English

United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Fifty-fourth session
Vienna, 10–14 December 2018

Insolvency of micro, small and medium-sized enterprises

Draft text on a simplified insolvency regime

Note by the Secretariat

Contents

I. Introduction

1. The background to the project on MSME's insolvency in the Working Group is provided in the provisional agenda of the fifty-fourth session of the Working Group (A/CN.9/WG.V/WP.160, paras. 11–16). This note sets out a draft commentary and recommendations focusing on features of a simplified insolvency regime that may in particular be suitable to the insolvency of small debtors. It would be left to States to define conditions for access to such a simplified insolvency regime, including eligibility criteria.

2. The note draws on a note by the Secretariat A/CN.9/WG.V/WP.159 considered by the Working Group at its fifty-third session (New York, 7–11 May 2018), and on the comments made at that session with respect to that document (A/CN.9/937, paras. 105–120).

3. The Working Group may wish to consider whether, regardless of the form that the final text on a simplified insolvency regime or MSME's insolvency will take, it will draw on the *UNCITRAL Legislative Guide on Insolvency Law*, including the glossary contained therein. The Working Group is invited to consider the recommendations of the *Guide* in the context of a simplified insolvency regime. The annex to this note lists, in the first table, recommendations of the *Guide* that will be generally applicable to simplified insolvency proceedings and, in the second table, those recommendations of the *Guide* that will not be so applicable. The Working Group is also invited to consider explanations of which additional expressions relevant to a simplified insolvency regime, such as "small debtor", "simplified insolvency proceedings", "out-of-court procedures" and "hybrid procedures", might be needed to supplement the glossary in the *Guide*.

II. Draft commentary and recommendations on a simplified insolvency regime

"Introduction

1. The *UNCITRAL Legislative Guide on Insolvency Law* (the "*Guide*") focuses on insolvency proceedings commenced under the insolvency law and conducted in accordance with that law, against a debtor, whether a legal or natural person, that is engaged in economic activity. Informal insolvency processes, which are not regulated by the insolvency law and will generally involve voluntary negotiations between the debtor and some or all of its creditors, briefly introduced in part one, and discussed in more detail in the context of expedited reorganization proceedings in part two, of the *Guide*, are outside the scope of the legislative chapters of the *Guide*.

2. "Insolvency proceedings" covered by the *Guide* are collective proceedings, subject to court supervision. The term "court" is explained in the glossary of the *Guide* as a judicial or other authority competent to control or supervise insolvency proceedings. The *Guide* notes that alternatives to court supervision may be considered in designing the insolvency law, in particular where the capacity of the courts is limited (whether for reasons of lack of resources or lack of requisite experience). It invites States to consider whether the role of the courts can be limited with respect to different parts of the proceedings or balanced by the role of other participants, such as the creditors and the insolvency representative.[1]

3. The *Guide* also presupposes, as a general rule, reliance on an insolvency representative throughout the insolvency proceedings. Unlike other UNCITRAL texts in the area of insolvency law, the term an "insolvency representative" in the *Guide* is construed narrowly and does not encompass a debtor in possession. The

[1] The *UNCITRAL Legislative Guide on Insolvency Law*, Introduction, para.7, and part one, chap. III, Institutional framework.

debtor-in-possession approach is not addressed in detail in the *Guide*. The *Guide* notes that the debtor-in-possession approach depends upon strong corporate governance rules and institutional capacity and affects the design of a number of provisions of an insolvency regime, including preparation of the reorganization plan, exercise of avoidance powers, treatment of contracts and obtaining post-commencement finance.[2]

4. This document was prepared in recognition of the fact that in some cases the application of elements of the formal insolvency processes described above, in particular the central role of the court and extensive involvement of an insolvency professional who replaces the debtor in the management of the insolvent business, may be less appropriate. That may in particular be the case in insolvency of individual entrepreneurs and micro and small businesses of an essentially individual or family nature with intermingled business and personal debts (collectively referred to in this document as "small debtors"). Such debtors may be discouraged by formal insolvency processes because of their length, procedural inflexibility and costs, as well as the inherent risks of loss of control over the business. Small debtors might prefer less costly, faster and simpler proceedings, especially if they facilitate a fresh start through discharge and provide for confidentiality that would alleviate concerns over the social stigma of insolvency.

5. Efforts are being made at the international, regional and national levels to find solutions tailored to the needs of small debtors in insolvency, recognizing the impact of their insolvency on job preservation, the supply chain, entrepreneurship and the economic and social welfare of society. In particular, there is a growing recognition of the negative consequences of unresolved financial difficulties for small debtors that, burdened by old debt, may be discouraged from taking new risks or become trapped in a cycle of debt or driven to the black economy. Solutions are being sought to allow small debtors to remain in the labour market by preserving their know-how and skills and restarting entrepreneurial activity, drawing on lessons from the past.

Purpose

6. This document focuses on the features of a simplified insolvency regime, such as out-of-court and hybrid procedures and fast-track in-court insolvency proceedings, so as to develop workable alternatives to formal insolvency processes. The key insolvency principles and the general guidance provided in the *Guide* remain relevant in the context of simplified insolvency regimes. The substance of the *Guide* is therefore applicable to simplified insolvency regimes unless indicated otherwise in this document.

7. This document recognises that the positions of States with respect to both the desirability of developing a simplified insolvency regime and the conditions for access to that regime and its features vary greatly. For example, in some States a simplified insolvency regime may focus on reorganization, while in others on liquidation. Constitutional, cultural, social and economic norms of the State will dictate policy choices on these matters.

8. In addition, approaches to developing a simplified insolvency regime may be different. In some jurisdictions, certain requirements of the general insolvency law applicable to business enterprises have been eliminated for small debtor insolvency. In other jurisdictions, the insolvency framework for small debtors differs from the general insolvency framework applicable to business enterprises. Some countries in that latter group have adopted comprehensive laws specifically designed to apply to small debtors that are significantly different to the regimes applicable to larger enterprises. Some States have enacted laws to deal with the insolvency of small debtors that include both consumers and small enterprises. In addition, a modular approach is proposed by some practitioners, according to which a core process (with

[2] Ibid., part two, chapter III.A, para. 18.

debtor-led and debtor-in-possession approaches) is provided, which is supplemented by a range of options deployed only when considered cost-effective and responsive to specific needs of the debtor and other parties in interest.[3] Those options may include mediation, a stay, involvement of an insolvency professional and conversion from one type of procedure to another.

9. This document does not suggest a preference for any particular approach. It offers a range of tools for use by States that may decide to include a simplified insolvency regime in their legal framework, either by adjusting some features of the general insolvency law or establishing a separate simplified insolvency regime. Some tools may be more appropriate for the treatment of viable as opposed to non-viable businesses or for dealing with uncooperative as opposed to cooperative debtors, while other tools may be more relevant for mitigating risks of fraud and other wrongful or criminal acts or possible misuse of the simplified insolvency regime. Some tools might be relevant to handle requests for conversion of one type of proceeding to another type. Recommendations that accompany each cluster of issues include cross-references to the corresponding recommendations of the *Guide* and are supplemented by additional recommendations, where necessary.

Glossary

10. The following terms relate specifically to a simplified insolvency regime and should be read in conjunction with the terms and explanations included in the glossary of the *Guide*:

(a) [*to be considered by the Working Group (see para.3 of the introduction to this note above)*];

I. Background

A. Reasons for establishing a simplified insolvency regime

11. Many jurisdictions do not have a specific insolvency regime that could be tailored to the needs of small debtors. Tailoring formal insolvency proceedings to the needs of those debtors may be justified because of (a) the specific characteristics of small debtors, and (b) features of the existing insolvency regimes (corporate and personal) that are not suitable to accommodate those characteristics.

1. Specific characteristics of debtors intended to be covered by a simplified insolvency regime

12. Small debtors tend to be relatively undiversified as regards creditor, supply and client base. As a result, they often face the cash flow problems and higher default risks that follow from the loss of a significant business partner or from late payments by their clients. They also face scarcity of working capital, higher interest rates and larger collateral requirements, which make raising finance, especially in situations of financial distress, difficult, if not impossible.

13. Access to credit by small debtors is often made subject to the granting of personal guarantees by the owners or their relatives and friends whose personal assets could be of equal or greater value than that of the small debtor. A personal guarantee will typically extend liability for the debts of the small debtor company to those individuals, affecting both personal effects (such as the family home) and business assets. Owners thus frequently provide not just equity, but also debt funding.

[3] The *Guide* explains the term "party in interest" as referring, in addition to a debtor and a creditor, to the insolvency representative, an equity holder, a creditor committee, a government authority or any other person affected by insolvency proceedings, excluding persons with remote or diffuse interests affected by those proceedings. (See Introduction, Glossary, (dd)).

14. Any physical assets of small debtors, which may be the main or the only assets of the value to creditors, may already be encumbered to one or a very limited number of secured creditors, e.g., a bank holding a mortgage on the residential property or other physical assets of the debtor. Those secured creditors are usually able and willing to use enforcement methods available to them under law; hold-outs by such secured creditors in a position of influence are thus common in the context of negotiating a solution to financial difficulties of the small debtor.

15. Unencumbered assets are usually of little or no value for distribution to unsecured creditors. Because the costs of participating in the insolvency proceedings may outweigh the return, those creditors stay disengaged. This may jeopardise reorganization of small debtors, leaving liquidation as the only option.

16. Small debtors often have poor or non-existent records in respect of transactions and relationships between owners, family members, friends and other individuals involved in the operation and financing of the business. There may be no clearly established ownership of key commercial assets (such as tools or other essential equipment), work for the debtor may not be documented or remunerated in accordance with typical commercial practices and the owner may use their own finances to fund or support the business without necessarily documenting that expenditure.

17. Small debtors are also characterized by a centralized governance model in which ownership, control and management overlap (often within a family). An owner may hide a financial crisis out of fear of damaging a good commercial name, relationships with employees, suppliers and the market and disrupting existing lines of credit. The management may be unwilling to request the commencement of insolvency proceedings at the risk of losing control over the business. Small debtors may also be prone to adopt more high-risk strategies, attempting to save business, which may be their only source of income, at all costs. These factors may contribute to the financial crisis and lead to the debtor addressing financial difficulties too late.

2. Unsuitability of the existing insolvency regimes (corporate and personal) for small debtors

18. In most cases, small debtors would be looking for fast and simple debt forgiveness, debt restructuring and debt repayment options or liquidation and discharge, which existing insolvency regimes (both corporate and personal) may not provide.

19. Formal insolvency regimes for businesses are typically designed with the complexity and sophistication of large companies in mind. They assume that the business liabilities and debts of a company debtor are clearly separated from the personal liabilities of the company's owners and managers. They may also assume the presence of an extensive estate of significant value and the active engagement of interested stakeholders, particularly creditors. They usually presuppose the active involvement of courts and the engagement of an insolvency representative for administration of the insolvency estate. In addition, they may impose various filing requirements, including to file audited balance sheets, and rigid procedural steps for liquidation or reorganization.

20. Formal insolvency regimes for businesses are thus complex, lengthy and expensive for small debtors, which are characterized by low value, low sophistication and low complexity and often have insufficient or no assets to cover the costs of formal insolvency proceedings. They may fail to meet commencement standards under those insolvency laws that would require the court to refuse commencement of proceedings, or terminate proceedings that may have commenced, in insufficient or no-asset cases. Even where sufficient assets exist, the involvement of professionals and the automatic separation of owners and management from the ordinary administration of business may operate as a disincentive to apply for insolvency. Many small debtors may also have difficulties collecting and distributing relevant information because of inefficient or non-existent record keeping systems, whether

due to a lack of resources, of formal obligations to maintain such records or of an understanding of any need for them. The uncertainty of costs generated by the insolvency process may also deter small debtors from applying for insolvency. Where a single disputed or unpaid claim is involved, most provisions of insolvency law devised to ensure protection of different categories of creditors and different classes of claims would be inapplicable.

21. Small debtors that do not have a corporate form or are sole proprietorships may not enjoy legal personality or limited liability protection in most jurisdictions. They may be treated as individual defaulters and as such be subject to personal insolvency frameworks, where such frameworks exist. The latter may not provide temporary protection from creditors, nor allow for debt restructuring procedures and discharge. Where a discharge is available, a long waiting period before discharge may apply, leaving full personal liability for many years after liquidation of the business. Heavy penalties, including limitations on freedom of movement and other personal restrictions, may also apply.

22. It may not be feasible to apply different rules to business debts as opposed to personal or consumer debts in the context of small debtors for reasons explained in paragraphs 13 and 16 above. In particular, the entire small debtor household may be involved in the small debtor’s business: family members may guarantee business loans with personal assets and use consumer credits to buy business assets. Separate procedures with different access conditions and discharge periods for discharge of different types of debts involved in small debtor’s insolvency may not be an optimal solution. Linked procedures necessary to address the cross-over of commercial and personal insolvency, consumer over-indebtedness and intertwined debts of related persons[4] may however be absent. The requirement often found in insolvency laws that an applicant to a simplified insolvency proceeding must not be subject to any procedure under the law relating to the restructuring of debts of natural persons, must be active in business and not subject to any formal insolvency procedure, could work against the goal of linking the related procedures.

B. Key objectives of a simplified insolvency regime

23. In addition to the key objectives identified in recommendation 1 of the *Guide*, the following core objectives of a simplified insolvency regime are often cited: (a) lowering the barriers of access to insolvency proceedings by small debtors; (b) encouraging, facilitating and incentivizing early access; (c) reducing the social stigma and personal risks of individuals who create businesses; (d) putting in place expeditious, simple and low cost procedures tailored to the needs of small debtors; and (e) promoting entrepreneurial activities.

24. Those objectives are pursued in particular by minimizing the complexity of insolvency procedures and the associated costs and creating favourable conditions for a discharge and a fresh start, as further discussed below. Special measures are devised to safeguard the interests of creditors and to mitigate risks of abuse, in particular by implementing an appropriate sanctions regime and a range of tools that creditors can employ to protect their interests, as explained in section D below.

C. Relationship with other law and institutional framework

25. Not all measures aimed at mitigating the challenges facing small debtors in insolvency will fall under the insolvency law. Other law may also be relevant, in particular in the context of a broad range of restructuring activities that may be considered in out-of-court procedures (e.g., asset sales, discounted debt sales, debt

[4] The *Guide* explains the term “related person” for a debtor that is a legal entity as (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, the *Guide* considers a related person as persons who are related to the debtor by consanguinity or affinity (see Introduction, Glossary, (jj)).

write-offs, debt rescheduling, debt-to-debt and other exchange offerings and in-kind payments). In addition, as a preventive step, tax and accounting regulations may impose accounting and monitoring duties on debtors and provide incentives or obligations for accountants, tax and social security authorities to flag warning signals of financial problems for small debtors. Debtors' reporting duties may also arise under loan agreements and banking law. The latter may be relevant for credit histories, treatment of guarantees and incentivising responsible lending and value-maximizing participation by creditors in a simplified insolvency regime. Regulations applicable to micro and small enterprises, consumer protection law and regulations, family and matrimonial law, company law and data protection law may also be relevant. In particular, in some jurisdictions, provisions on discharge may be found not in insolvency law but in consumer protection law. Furthermore, data protection regulations may address the terms of collection and retention of personal information, by credit providers or bureaux, including information about informal and formal insolvency proceedings used to address indebtedness of individuals.

26. In order to address small debtor insolvency comprehensively, the legislative framework must be supported by appropriate institutional capacity and measures. They may include provision of financial and other assistance to small debtors in relation to insolvency proceedings, effective dispute resolution mechanisms and enforcement of settlement agreements. Introducing automated and standardized processes and documentation, for example model reorganization plans, and enabling electronic means of communications for certain procedural steps in insolvency proceedings, such as filing claims or serving notifications, may help to reduce the costs and the length of procedures.

27. Awareness raising is another element in successfully addressing the challenges facing small debtors in insolvency. Small debtor owners looking for informal solutions frequently lack the experience necessary to find an appropriate solution. Seeking the necessary specialized professional assistance may be too expensive for them. There may be limited availability of appropriate and useful information about the insolvency process. Providing training specific to small debtor insolvencies may help to build the capacity in the public and private sectors necessary to handle small debtor insolvencies. An educational tool focusing on pre-insolvency may in particular be helpful to small debtors. It can explain the proper means for addressing the situation of financial distress, including through informal workouts, obligations of debtors in the period approaching insolvency and possible negative consequences of not taking appropriate actions at an early stage. Increased awareness about those matters may deter irresponsible behaviour at times of financial distress when debtors may be inclined to collaborate with related persons or powerful creditors and hide or dispose of assets.

D. Safeguards against abuse of simplified insolvency regimes

28. Simplified insolvency regimes usually include safeguards against abuse of those regimes. One of the commonly found safeguards is to restrict the frequency of access by either preventing multiple applications by the same debtor within a certain time period or subjecting a repeated applicant to more intense scrutiny, with commencement permitted only in exceptional circumstances. Some jurisdictions may explicitly require that, to be eligible, the applicant should have no record of having obtained a discharge within a defined number of years in the past (e.g., five years).

29. Other safeguards include permitting creditors and other parties in interest to raise objections with the court as regards the small debtor's conduct and to establish arrangements alternative to the default settings specified in law. Refusing debt forgiveness or discharge, imposing a longer period for discharge of personal liabilities and including adverse entries in the credit history register with respect to the debtor are usual sanctions that can be adopted with respect to a small debtor for acting dishonestly or in bad faith or for failing to comply with the agreed terms.

30. Since the involvement of related persons tends to be more common among small businesses than in larger enterprises, risks of inappropriate dealings with related persons, especially in the period approaching insolvency and during insolvency, might be higher. Many systems build a number of safeguards to mitigate those risks. Those safeguards are similar to the measures suggested in the *Guide.*[5] They may include requirements that any proposed disposal of an asset to a related person should be carefully scrutinized before being allowed to proceed (rec. 61), that the suspect period for avoidable transactions involving related persons may be longer (rec. 90) and that claims by related persons should be subject to scrutiny, the voting rights of related persons may be restricted, the amount of their claims may be reduced or their claims may be subordinated (rec. 184).

Recommendations

The Working Group may wish to consider whether recommendation 1 might be supplemented along the following lines:

1 bis. In addition to the key objectives in recommendation 1, the following key objectives of a simplified insolvency regime should be considered:

(a) Establish expeditious, simple and low cost procedures to address financial difficulties of small debtors;

(b) Encourage, facilitate and incentivize early access by small debtors to those procedures;

(c) Establish appropriate criteria for access by small debtors to those procedures;

(d) Reduce the social stigma associated with business failure and the personal risk of individuals who create businesses;

(e) Establish favourable conditions for early discharge and a fresh start;

(f) Provide for appropriate safeguards, including sanctions, against abuse of a simplified insolvency regime.

In addition, the Working Group may wish to consider whether recommendation 2 would need to be supplemented by provisions that would refer, in addition to reorganization and liquidation of a debtor, to out-of-court and hybrid proceedings.

It may also wish to consider the relevance of recommendation 5 in a simplified insolvency context.

Furthermore, the Working Group may also wish to consider whether recommendation 7 would need to be supplemented by provisions that would reflect specifics of a simplified insolvency regime.

The Working Group may also wish to consider whether supplementary recommendations would be needed to address the desirability of close coordination among related insolvency proceedings to deal with intertwined business and personal debts of the debtor and related persons, including those providing personal guarantees, for reasons explained in para. 22 above. If so, the Working Group may wish to consider whether recommendations from part three of the Guide (e.g., recs. 202–210) may provide the basis for formulating supplementary

[5] The *Guide* discusses transactions directly with a related person or via a third party to a related person in some detail in the context of avoidable transactions and treatment of creditor claims, listing them among types of transaction where a bad faith is deemed or may be presumed to exist (i.e., transactions with the intention to defeat, hinder or delay creditors, transactions at undervalue and transactions with certain creditors that could be regarded as preferential). At the same time, the *Guide* acknowledges that the mere fact of a special relationship with the debtor may not be sufficient in all cases to justify special treatment of related persons. In some cases, their claims for example will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons. In other cases, they may give rise to suspicion and will deserve special attention (see e.g., part two, chapter II, paras. 170–184, and chapter V, para. 48).

recommendations on coordination of proceedings in the simplified insolvency context.

In addition, with reference to paragraph 27 above, the Working Group may wish to consider applicability of recommendations related to directors' obligations (recommendations 255–266) as drafted in a simplified insolvency context.

II Mechanisms for resolving small debtors' financial difficulties

A. Out-of-court procedures

31. Out-of-court procedures focus primarily on contractual preventive debt restructuring with a limited number of main creditors, e.g., banks holding a mortgage of immovable property of the small debtor. They are thus unlike collective proceedings covered by the insolvency law that involve all creditors. Because a limited number of creditors is targeted by such procedures, an agreement could be easier to achieve.

32. As an alternative to formal reorganization proceedings by the court, out-of-court procedures may introduce flexibility into an insolvency regime by reducing the burden on judicial infrastructure. They are usually kept confidential, which helps to avoid the social stigma attached to insolvency. In addition, they may provide debtors with the benefits of resolving their financial difficulties without affecting their personal credit scores, which is important for obtaining new finance and a fresh start.

33. Some out-of-court procedures may be based or reliant upon the provisions of the insolvency law. Insolvency regimes in some jurisdictions may require small debtors and their creditors to exhaust out-of-court procedures before initiating formal insolvency proceedings (see para. 75 below). Requirements for creditor's participation in out-of-court procedures may be built in insolvency or other law, for example monthly targets may be imposed on banks to successfully restructure small debtors' debts, and tax and social security authorities may be required to participate in the negotiations. Sanctions may be imposed on parties acting in bad faith during those procedures.

34. In other jurisdictions, recourse to out-of-court procedures may be optional with or without incentives to use them. Incentives might include tax incentives for banks to hold voluntary restructuring negotiations with small debtors in financial difficulties (e.g., tax write-offs for bad or renegotiated debts). Without incentives for their use, out-of-court procedures may be unsuccessful if creditors' self-interest in finding a consensual solution with the small debtor is low or absent.

35. In yet other jurisdictions, the insolvency law may not provide for out-of-court procedures leaving voluntary negotiations to contract law, company or commercial law or civil procedure law, or in some cases relevant banking regulations. Some jurisdictions may not allow debt restructuring agreements or arrangements to occur outside the court system or the insolvency law. Some laws would regard the steps associated with any voluntary debt restructuring negotiations as sufficient for the courts to make a declaration of insolvency.

1. Eligibility

36. Either the small debtor or its creditor(s) may start an out-of-court procedure. Since out-of-court procedures are outside of the formal court system and not structured by formal rules and modes of participation, no particular eligibility criteria may apply. Either party may initiate the process at any time without expecting that the other party will necessarily agree to participate. Out-of-court procedures are largely driven by parties that are persuaded that participation in out-of-court procedures is in their best interests.

2. Consequences of starting an out-of-court procedure

37. Starting an out-of-court procedure typically does not trigger a general stay. Such stay may be considered counter-productive, in particular if confidentiality of the procedure is to be preserved. The debtor remains in possession and control of its business and is expected to pay its debts when they become due to all creditors that are not participating in the procedure.

38. Conclusion of a standstill agreement between the small debtor and the creditors participating in the procedure is common and often essential for a successful out-of-court workout. Under that agreement, the participating creditors usually undertake not to enforce their rights against the small debtor for any default during a specified period. The agreement may also oblige the creditors to keep open any existing lines of credit or temporarily suspend interest payments. The debtor in turn usually agrees to use the standstill period to draft a restructuring plan and provide creditors with relevant information so that they could assess viability of the plan. In the absence of court involvement, terms of the agreement, including the duration of the standstill period and conditions for its possible extension, are negotiated by parties under contract law.

3. Types of out-of-court procedures

39. A wide range of out-of-court procedures may be grouped into debtor-driven and creditor-driven amicable settlement procedures.

40. The debtor-driven amicable settlement framework allows debtors to negotiate an agreement on debt restructuring with its main creditor(s) on an informal and confidential basis. For example, a request may be made to a lender (e.g., a bank) to write down the debtor's financial obligations. The lender can accept or reject the proposed write-down or offer it under different terms. Applicable laws and regulations may specify minimum and maximum thresholds of permissible write-down and various schemes for debt restructuring. The law may also impose minimum requirements for the debtor's proposal to creditors, e.g., that it has to promise a sliding scale of minimum dividend payment to creditors. Typically, there is no obligation for the creditors to participate in negotiations but if they participate, they are expected to do so in good faith.

41. In the creditor-driven amicable settlement framework, creditors play an active role in evaluating small debtor's assets to ascertain whether the business is worth preserving. A third party may be appointed for such purpose. Where a majority of participating creditors agree on the restructuring arrangement, a representative of creditors may be appointed to guide the debtor through the implementation of the compromise arrangement.

42. In some jurisdictions, there may be a State authority in charge of administering negotiations between the debtor and its creditors or authorized to appoint a mediator or conciliator for the process. There may also be an arbitration committee to resolve disputes among the negotiating parties. The involvement of a persuasive intermediary may be vital to reaching an agreement on the small debtor's debt restructuring in out-of-court procedures.

4. Enforcement of a settlement agreement

43. The enforcement of the arrangement agreed upon by affected parties in out-of-court procedures is left to contract law. Where arbitration, meditation or conciliation was involved, the enforcement of awards or settlement agreements would be subject to the rules applicable to those commercial dispute resolution mechanisms.

44. Since it is usual in this type of procedure that unaffected creditors continue to be paid in the ordinary course of business, they do not have a say in the arrangement. Where, however, the rights of those creditors are to be modified by the arrangement, their agreement to the proposed modifications would be required.

45. In the out-of-court procedure, creditors may agree to alter priority or subordination of their claims in order to facilitate a restructuring plan. They may also agree to provide new funding to a small debtor to help save it. That is usually done on the condition that priority status will be accorded to the new funding or additional security over the small debtor's assets will be given. Provisions of insolvency law on "super priority" for a debtor's post-commencement financing may not necessarily extend to those arrangements. It would depend on provisions of insolvency law whether agreements related to creditor priority reached in the out-of-court procedures will be valid and apply in the event of a subsequent conversion of the out-of-court procedures to the formal insolvency proceedings (e.g., to liquidation if the out-of-court workout attempts fail) (see further chapter V below).

B. Hybrid procedures

46. Some jurisdictions provide for court-supervised amicable settlement procedures, which combine features of out-of-court procedures with features of formal insolvency proceedings. Features of out-of-court procedures include a debtor- or creditor-driven negotiation phase allowing the small debtor and its main creditor(s) to come to an amicable settlement agreement on a confidential basis (or with limited publicity). Participation in negotiations is largely on a consensual basis. Some jurisdictions may however allow the debtor to petition the court for imposing an obligation to participate in negotiation on a particular creditor or group of creditors. Features of formal insolvency proceedings include commencement of the procedure by the court, court approval or confirmation of the amicable settlement agreement and possibility of making that agreement binding on abstaining and dissenting creditors. Those procedures are referred to in this document as "hybrid procedures" although that term may be used in some jurisdictions to describe different types of procedure or proceeding.

1. Eligibility

47. Hybrid procedures are usually opened by the court upon application of the debtor. Some jurisdictions may allow also interested creditors to apply, usually with the agreement of the debtor.

48. Jurisdictions that allow hybrid procedures may make them available for any debtor facing financial difficulties that it is unable to overcome and hence there is a likelihood of insolvency. Some jurisdictions may limit access to debtors meeting certain criteria, e.g., small debtors with no secured debt and no immovable property. Some jurisdictions, because they impose on the debtor an obligation to commence formal insolvency proceedings within a certain time after a defined event of insolvency, may restrict access to hybrid procedures to debtors that do not meet the criteria for commencement of formal insolvency proceedings (on the criteria for commencement of formal insolvency proceedings, see chapter III below).

2. Consequences of opening a hybrid procedure

49. In some jurisdictions, the opening of a hybrid procedure may trigger an automatic stay of some actions but not a general stay. For example, the obligation to apply for insolvency may be suspended for the period of the procedure and during the same period, creditors cannot request the commencement of insolvency proceedings or enforce ipso facto clauses. For a stay of other actions, for example payment obligations of the small debtor to a particular creditor or a group of creditors, a separate petition to the court for a grace period (may also be called a "standstill" or "moratorium") may be required.

50. In jurisdictions where no automatic stay, general or partial, is envisaged, the small debtor may be allowed to apply to the court for a temporary stay of individual enforcement actions, e.g., if a creditor applies to the court for commencement of insolvency proceedings against the small debtor, initiates a civil law procedure for

recovery of debt from the small debtor or gives the small debtor a formal notice to pay. The small debtor may be required to demonstrate to the court that the individual enforcement action in question may adversely affect ongoing restructuring efforts and hamper the prospects of a successful outcome.

51. The duration of a stay is usually short but extensions by the court are possible upon submission by the small debtor of evidence that restructuring negotiations are progressing and there is a strong likelihood that the restructuring arrangement will be adopted and creditors will not be unfairly prejudiced. The permissible maximum duration of such a stay may be established in law.

3. Limited procedural formalities

52. The court may appoint a representative to assist with negotiations, supervise the procedure and report to the court about the progress of negotiations. Some features of full insolvency proceedings may be disabled or adjusted, e.g., there is no provision for holding creditor meetings or formal voting. Decisions may be taken online. The negotiated arrangement may be deemed to be accepted unless rejected by a required majority of creditors participating in the procedure. Some jurisdictions may however be more formalistic and require for example formal meetings with the appointed supervisor and the affirmative acceptance of the arrangement by more than a simple majority of affected creditors.

4. Enforcement of a settlement agreement

53. The law may waive the requirement for the court to approve or confirm the arrangement approved by the creditors, allowing it to take effect automatically if no dissenting creditors' interests are involved. The parties may nevertheless prefer obtaining court acknowledgement, confirmation, approval or other form of validation of the arrangement even in those cases. In other jurisdictions, the formal court approval or confirmation of the plan may be required in all cases before the plan becomes effective and binding upon all parties in interest.

54. The small debtor may be required to demonstrate to the court that the plan has received the requisite support by providing the written consent of the affected creditors or, where a creditor meeting has been held, a report of the creditors' votes. Provided the plan contains sufficient information to enable its viability to be assessed, the small debtor may not be required to submit a disclosure statement or financial information or audited documents.

55. The court may acknowledge the existence of the arrangement and that sufficient support among creditors exists for that arrangement, without judging its economic and financial merits, or the court may need to ascertain the fairness of the arrangement and that the arrangement prevents insolvency of the debtor and ensures the survival of the business as a going concern. Requirement of a formal judgement of the court on approval or enforcement of the arrangement may mean the loss of confidentiality of the procedure, at least as regards the fact that the procedure took place. Essential terms of the arrangement, such as new guarantees, new finance and priority ranking, may also need to be disclosed.

56. Minority holdouts and non-participating creditors are prevented from interfering with a generally acceptable compromise unless they are affected by it. Affected creditors unhappy with the arrangement may challenge it in the court on the grounds of abuse, unfairness or violation of due process. They would be expected to bear the burden of bringing the challenge to the court, including the costs. If they do not bring such a challenge, they are deemed to accept the compromise reached by other creditors as acknowledged, approved or confirmed by the court.

Recommendations

The Guide addresses neither out-of-court procedures, nor hybrid procedures other than voluntary restructuring negotiations (VRN), which are discussed briefly in part one and in more detail in the context of expedited reorganization proceedings in *part two. The Guide refers to a specific type of VRNs, led and influenced by internationally active banks and financiers for cases where there is a significant amount of debt owed to them, which would not be the case of small debtors.*

The Working Group may wish to consider which recommendations would be needed with respect to out-of-court and hybrid procedures in the simplified insolvency context, drawing as appropriate on the discussion of expedited reorganization proceedings in the Guide* (see part two, chapter IV, section B, and recommendations 160–168). *The Working Group may also wish to consider whether the glossary should include an explanation of the term "out-of-court procedures" and "hybrid procedures" (see para. 10 above).

C. In-court simplified insolvency proceedings

57. Simplified insolvency proceedings, described in more detail in part III below, are a variation of the formal insolvency proceedings (as that latter term is described in paragraph 2 above). They may be made mandatory or optional for use by eligible debtors. Unlike out-of-court and hybrid procedures discussed above, they are collective proceedings and would trigger more formalities, such as requirements for publicity, notifications and protection of dissenting creditors. Nevertheless, they are characterized by fewer and simpler procedural formalities than those existing in standard insolvency proceedings. In particular, elaborate rules on public notices, creditors' committees and meetings and claims verification are disabled or adjusted, especially where little or no value is available for distribution, and creditors may therefore be expected to be disengaged.

58. Creditors may not be required to file their claims with the court. Instead, the small debtor submits a list of claims to the court at the time of commencement; any claims not included are not subject to the proceeding. The law may include a presumption of accuracy of the claims in the small debtor's list. That approach puts the burden on creditors to verify correct reflection of their claims and to raise objections within a stipulated time period. In the absence of timely objection, creditors are deemed to have waived their right to object, and the claims listed by the debtor will be confirmed with final and conclusive effect. There could be sanctions for misuse of the system: e.g., excluding from a discharge the claims of creditors who have been intentionally omitted from the debtor's list. Where the law requires creditors to submit claims, it may dispense with the requirement to submit supporting evidence, unless specifically requested by the debtor, the insolvency representative (if appointed) or the court. The law may limit the claims that need to be verified to those that are likely to be paid and reduce evidentiary requirements for proof of claims.

59. Simplified voting requirements may be adopted, including by using electronic means and considering a no vote as a positive vote. Alternatively, it may be assumed that the creditors will contribute to decision-making through objections.

60. In addition, recognizing that small debtors tend to have less complicated operations and financial arrangements and their creditors might themselves be small businesses that cannot withstand long periods without payment during an insolvency process, simplified insolvency proceedings tend to be fast track proceedings. Decisions may be taken by court in summary rather than plenary proceedings and court hearings may be held only when necessary (e.g., upon request of dissenting creditors). Shorter statutory timelines than those applicable in standard insolvency proceedings may apply and only narrow grounds may be specified in law for possible extensions of the default timelines within the maximum permissible number of requests for extensions (usually once or twice). Non-compliance with the established statutory deadlines may trigger deviations from default procedures and certain legal consequences, for example treating the failure to take action within the prescribed time limit as an expression of consent and treating the failure to take certain

procedural steps as a waiver of the right to object to the part of the process to which those steps relate.

61. To save costs and time, in many simplified insolvency proceedings, the involvement of insolvency professionals is envisaged only in exceptional cases. A third party (an experienced court clerk, an accounting firm or an insolvency professional) may be involved by the court for limited procedural steps, such as for examination of the debtor’s business and property and supervision of notification, proper valuation and distribution of claims and compliance with other legal requirements. That person may operate pro bono or be reimbursed from public monies.

62. Finally, many jurisdictions that provide for simplified insolvency proceedings do not impose an automatic general stay but envisage temporary stays of individual enforcement actions upon application to a court, as in hybrid proceedings discussed above. Some laws may provide for the automatic stay of all creditor actions, but not for the entire period of proceedings, rather for a short period that may be extended in exceptional cases up to the maximum limit defined by law (e.g., a stay may be limited to four months, but is extendable up to twelve months). That approach aims to provide small debtors with incentives to use an insolvency regime in countries where individual enforcement mechanisms are effective.

Recommendations

Fast track

A number of recommendations in the Guide address time limits for different procedural steps, such as commencement of avoidance proceedings (rec. 96), convening a first meeting of creditors (rec. 128), proposal of a reorganization plan (rec. 139) and submission of claims (rec. 174), without fixing a particular time limit. Those recommendations will thus be generally applicable to simplified insolvency proceedings.

The Working Group may wish to consider whether, nevertheless, a supplementary recommendation on the general application of time limits would be needed. That recommendation could state e.g., that for simplified insolvency proceedings the insolvency law is to provide: (a) shorter timelines; (b) narrow grounds for possible extension of those timelines; and (c) a limited number of permitted extensions, which ideally should be limited to one.

Exceptions to an automatic stay

Recommendations 46 and 49 provide for an automatic stay on commencement of insolvency proceedings and throughout the proceedings.

The Working Group may wish to consider whether recommendation 47 that provides for exceptions to the automatic general stay would be sufficient in a simplified insolvency context or a different default rule on application of a stay should be formulated in that context.

Submission, verification and admission of creditor claims

A number of recommendations of the Guide addressing creditors’ claims are based on the understanding that the creditors are to submit claims within the specified time limits (see e.g., recs. 169 and 174). The Guide presupposes an active role of the insolvency representative in the verification and admission of claims (see for example recs. 177, 179 and 182).

The Working Group may wish to consider whether supplementary recommendations to those recommendations would be needed to accommodate simplified submission, verification and admission of creditor claims that do not presuppose the active involvement of creditors and the insolvency representative.

Other recommendations on submission, verification and admission of creditor claims are worded more broadly, e.g., recommendations 25, 170–173, 175, 176 and 178 and *would thus be generally applicable in a simplified insolvency context. Recommendations on disputed claims and the effect of admission (recs. 180, 181, 183 and 184) will also be generally applicable in a simplified insolvency context.*

III. Core provisions for simplified insolvency proceedings

A. Application and commencement

1. Eligibility criteria

63. Many jurisdictions permit small debtors, but not their creditors, to apply for simplified insolvency proceedings, with or without the right of creditors and other parties in interest to raise objections with the court. Creditor application is usually permitted only in exceptional cases, e.g., as a safeguard against the debtor's incompetence or perverse incentives. In particular, an unviable debtor may misuse a simplified reorganization to delay inevitable liquidation; they may also withhold information and exploit the discharge; or viable debtors may avoid taking action, impeding rescues.

64. Practices with regard to determination of small debtors eligible for access to simplified insolvency proceedings vary. It is common for States to use quantifiable criteria, such as thresholds, for such determination. The most common thresholds are the amount of total debt or liabilities, both secured and unsecured, which should be equal to or less than a specified maximum, and the maximum number of employees (e.g., less than or equal to 20 people). Other quantifiable eligibility criteria may include the turnover not exceeding a certain threshold in a defined period (e.g., 12 months before the commencement of the proceedings), assets and income below a level prescribed by law or a maximum number of unsecured creditors (e.g., 20 creditors).

65. In addition to quantifiable criteria, an insolvency law may also establish qualitative eligibility criteria. In some jurisdictions, a simplified insolvency proceeding may only be available to individual small debtors engaged in self-employed activity (business income earners as opposed to wage earners), while in other jurisdictions, such a procedure is available only to proprietorships, partnerships and other entities without limited liability protection. The law may specify certain types of activity that may be covered by the procedure, excluding others (such as real estate). The list may be open-ended, with a competent State authority being responsible for amending the list as required. Under other laws, applicants may also be required to demonstrate that there are no claims against them arising from employment contracts and that the person in charge of the business has not been convicted of tax evasion, trafficking or racketeering or any form of fraud. Additional conditions may apply depending on the type of simplified insolvency proceeding for which a small debtor applies, e.g., to be eligible for simplified liquidation proceedings, the applicant must not own any immovable property.

2. Presumption of good faith

66. In some jurisdictions, the fact of financial difficulty or bad record keeping does not give rise to a presumption of bad faith: any qualified small business can apply to commence simplified insolvency proceedings before they become insolvent and irrespective of whether a plan or arrangement is provided.

67. There is an emerging trend to waive the requirement for the small debtor to demonstrate at the entry point "good faith", reasonableness, that the debts were caused by events beyond a small debtor's control or that they were not caused intentionally or through gross negligence. Rather, good faith is considered relevant to the progress and conduct of the proceeding and, in particular, to the availability of discharge and the conditions upon which it might be provided. That approach is based on the understanding that the requirement for the debtor to prove good faith and for

verification by third parties might be time and record-consuming; the administrative efficiency of simplified insolvency proceedings would not be achieved if demonstrating good faith is made a condition of access.

68. Good faith is also presumed during the proceedings and at the exit point in the absence of substantiated assertions to the contrary. Investigation into the small debtor's affairs may nevertheless be warranted where there is a reasonable basis to suspect fraud, tax evasion or other abuses. In such cases, creditors and other parties in interest should be allowed to oppose some default features of simplified insolvency proceedings, such as debtor in possession and the full discharge (see the relevant sections below).

3. Commencement standards

69. Recommendation 15 of the *Guide* presents two alternative standards for commencement of insolvency proceedings: the debtor is or will be generally unable to pay its debts as they mature (the cessation of payments test); or the debtor's liabilities exceed the value of its assets (the balance sheet test). Where a single test is adopted, the *Guide* recommends that the cessation of payments test and not the balance sheet test should be used.

70. For reasons explained in section I.A.1 above, the balance sheet test may be impractical for small debtors. In particular, small debtors often do not maintain proper records. Moreover, personal assets and liabilities are likely to be mingled with business assets and liabilities, particularly where the small debtor is a natural person. Where the business is doing poorly but the individual debtor is asset-rich, a balance sheet analysis could preclude access to liquidation. Given the prevalence of personal guarantees used for borrowing by small debtors, the balance sheet analysis could be under-inclusive if it failed to reflect the liabilities of the individuals behind the small debtor.

71. The cessation of payments test may be more workable in comparison. As discussed in the *Guide*, the law may accept a declaration from the debtor that it is unable or does not intend to pay its debts; specify the indicators of the debtor's inability to pay its debts; or establish a presumption to that effect when the debtor suspends payment of its debts.[6] However, the cessation of payments test may face the same problem with accurately assessing a small debtor's state of solvency if it fails to capture personal debts that may be intertwined with business debts. In addition, focusing on the small debtor's current inability to meet present debts may not take into account the small debtor's future financial situation, while the forward-looking approach introduces uncertainty, especially in the rapidly fluctuating business environment.

72. Recognizing the shortcomings of both of these tests in the context of small debtors, an insolvency law may adopt a different approach. There may be no requirement in the law for small debtors to declare or demonstrate insolvency, an approach that may be seen as an incentive to use the regime by removing the social stigma associated with insolvency. Some laws may require the small debtor to attest that it is unable to pay debts that fall due without significantly hindering the continuation of its business.

73. Simplified filing requirements may apply, thus removing another commonly cited disincentive for small debtors to seek timely commencement of insolvency — the inconvenience of filing extensive financial documents. To mitigate risks of abuse of the system, some jurisdictions require a small debtor seeking to access a simplified insolvency regime to provide, as a minimum, a statement of the assets they own, without having to provide details such as the value of those assets. They might also be required to disclose information relating to any transfers they might have made to related persons within a prescribed time period before the application and include a sworn statement indicating that the conditions for simplified insolvency proceedings

[6] Part two, chapter I, paras. 23–24 and 33.

are met. Balance sheet records, where they exist, may be used to determine the appropriate process for the small debtor, for distribution of assets or, in no-asset cases, for discharge. In some jurisdictions, they may be relevant to considerations of good faith. In other jurisdictions, although documents relating to the small debtor's financial situation may have to be submitted (e.g., the small debtor's most recently prepared balance sheet, statement of operations, cash flow statement and tax returns), those documents do not need to be audited and there is no requirement for comprehensive financial or cash flow disclosure statements, unlike in the standard insolvency proceedings.

74. Proving viability may be a precondition for small debtors to seek reorganization, as in standard insolvency proceedings. Various ratios, e.g., debt to capital or the projected liquidation value to the value of the going concern, may apply. Small debtors may face difficulties to prove viability of their business in practice. Some laws may leave the assessment of viability to be made by creditors or the court. To provide the court with an independent assessment of viability, the law may require the appointment of a competent person to investigate the small debtor's affairs. As this could be costly and detrimental to the assets of the small debtor, pro bono services or public monies could be used for such purpose. As the small debtor may not be in a position to draw up a feasible reorganization plan at an early stage, to facilitate early access to reorganization, some laws allow proposal of such a plan after commencement.

4. Other requirements for commencement

75. Under some laws, other formal requirements might be applicable for commencement of simplified insolvency proceedings. Some laws may require an attempt of an out-of-court procedure before applying for the commencement of formal insolvency proceedings. In such cases, a small debtor may be required to submit a certificate issued by a competent person or authority attesting that an unsuccessful attempt has been made to settle out of court with creditors and explaining the reasons for failure.

5. Fees

76. In practice, small debtors are more likely than other debtors to have insufficient or no assets to fund the administration of proceedings. While these "no-asset cases" are a regular phenomenon, responses to address it have differed among States. Some laws require the court to refuse commencement or terminate the proceedings, while others provide specific mechanisms for the administration of the proceedings coupled with measures to reduce the costs of proceedings for small debtors.

77. In some jurisdictions, access to simplified insolvency proceedings does not depend on the small debtor's ability to cover the administrative costs of the proceedings. Small debtors that do not have sufficient assets to fund a proceeding in those jurisdictions can nevertheless commence a proceeding or process to address their financial difficulties and obtain a discharge. The level of assets available might be relevant to determining the type of proceedings available. Some jurisdictions provide for various types of insolvency proceedings and establish a scale of fees that depends on the complexity of proceedings. If the small debtor can pay the prescribed minimum, then a small administration proceeding may be initiated. If it can pay within a higher threshold range, then standard bankruptcy proceedings are followed. If the small debtor cannot pay even the minimum to allow access to insolvency proceedings, alternative mechanisms for financing simple insolvency proceedings are found. The *Guide* discusses some of them, such as levying a surcharge on creditors to fund administration; using public funds, establishing a public office or using an existing office; establishing a fund out of which the costs may be met; or appointing a listed insolvency professional on the basis of a roster or rotation system.[7] In some jurisdictions, following verification, the court or another competent authority may

[7] Part two, chapter I.B, para. 75.

decide to reduce or waive the amount to be prepaid by the debtor to cover the costs of the proceeding.

78. In at least one jurisdiction, an individual debtor's application for liquidation is deemed to be an application for discharge, and even if the debtor is unable to cover the costs of the proceeding, the termination of the liquidation proceeding leads to the immediate commencement of the discharge proceeding, thereby providing a speedy exit option for the debtor. Risks of abuse are mitigated by verification procedures.

Recommendations

Recommendations 14 and 16 envisage commencement of the proceedings by creditors. As noted in para. 63 above, it is usually the debtor that has the exclusive right to commence simplified insolvency proceedings. Creditors are usually only given such a right in exceptional situations specified in the law.

The Working Group may thus wish to consider whether supplementary provisions to recommendations 14 and 16 would be needed that would invite States to specify conditions for commencement of the simplified insolvency proceedings on the application of a party in interest other than the debtor.

In addition, the Working Group may wish to consider whether provisions supplementary to recommendation 15 would be needed, taking into account that both the cessation of payment and balance sheet tests may not be optimal for the simplified insolvency regime, as explained in paras. 69–74 above.

The Working Group may also wish to consider whether provisions supplementary to recommendation 26 would be needed, taking into account that, in a simplified insolvency regime, small debtors will often not be able to cover costs of the proceedings as explained in paras. 76–78 above, and an insolvency representative may not necessarily always be appointed (on the latter point, see also the recommendations after the simplified reorganization section below).

B. Types of proceedings

1. Zero-plan proceedings

79. Some laws provide for a "zero-plan" proceeding, where a small debtor has no income and no assets and makes no payments to creditors. Such a debtor can propose a "zero-plan", effectively a proposal to be discharged from all debts. The court may decide to suspend the insolvency proceedings for a certain period, which tends to be short (e.g., three months; the law may specify the maximum), and communicate the plan to the creditors identified by the debtor, by this opening the settlement plan proceeding. If creditors do not object to the plan, it will be deemed approved and binding upon the parties. If the majority of the creditors object to the plan, the settlement plan proceeding ends and the insolvency proceeding restarts. Upon acceptance of a "zero-plan" by the court, the debtor can be freed from debts.

2. Simplified liquidation

80. Some jurisdictions that provide for simplified liquidation require the appointed liquidator, within thirty days after commencement, to prepare and file a report with the competent court, on the basis of which the court can commence a simplified liquidation procedure, after having heard or summoned the debtor. In other jurisdictions, once insolvency proceedings commence, the court appoints a trustee who liquidates the debtor's estate and distributes the proceeds among the creditors. Where a single disputed or unpaid claim is the main asset of the small debtor, which is typically the case in insolvency of small debtors, some jurisdictions allow the court, another institution or an insolvency representative to perform a summary determination of the disputed claim, with the possibility of a full review on appeal to the court.

81. Sale of the debtor's property can proceed by way of private agreement or public auction. Some jurisdictions allow the sale of the disputed claim at a discount or assignment of the claim to the insolvency representative or a public office, which will then be responsible for litigating and collecting the claim.

82. A simplified distribution of proceeds is common in a simplified liquidation, particularly where the assets available are below a certain statutory limit. The law may reduce notice requirements; permit the court to make a final decision in lieu of the creditors; or establish one-time distribution as the norm, provided that additional dividends may be distributed on a discretionary basis. In the event that all creditors agree on the amounts and priorities of claims, together with the timing and method of distribution, the court may order distribution on a consensual basis.

83. After the distribution, an attachable part of the debtor's wages may be collected and distributed to creditors for a period of five to six years.

84. In some jurisdictions, simplified liquidation proceedings could be completed after the small debtor has handed over its assets for liquidation.

3. Simplified reorganization

85. Reorganization in small debtor cases will likely translate into debt forgiveness or debt rescheduling for which complex reorganization steps usually envisaged in the full reorganization proceedings will not be necessary. For those reasons, some jurisdictions provide simplified reorganization proceedings for small debtors.

86. The documentary requirements for commencement of those proceedings differ from those applicable to full reorganization proceedings. As noted in paragraph 74 above, the law may not require the small debtor to declare a state of insolvency when applying for reorganization and may allow the submission of a reorganization plan after the commencement of proceedings within a specified deadline, which is in line with recommendation 139 of the *Guide*.

87. The small debtor may be given an exclusive opportunity to propose a reorganization plan without the involvement of creditors within that deadline, failing which other parties in interest may get involved. The pool of other parties in interest will largely depend on the size and structure of the small debtor. Secured creditors holding a significant portion of the debt or that are entitled to satisfy their claims from encumbered assets that are critical to the reorganization of the business would have an important role to play as would related persons who have given personal guarantees or provided their personal assets as security for the small debtor's debts. They, as well as other parties in interest, may be allowed to propose a standalone plan or appoint a professional to support the small debtor in preparing the plan. The law may impose a duty on all parties in interest to cooperate in negotiating and proposing a plan.

(a) Debtor in possession

88. Use of the debtor-in-possession model as the default in simplified reorganization proceedings pursues the goal of rehabilitation of small debtors. Such model is usually justified by reference to the characteristics of small debtors discussed in section I.A.1 above. They include that small debtor owners and managers often have private knowledge about the business, as well as ongoing relationships with creditors, suppliers and customers. In addition, the insolvency estate can be insufficient to fund the appointment of an insolvency representative. Furthermore, the risk of being displaced from the helm can create a powerful disincentive for small debtors to seek timely intervention.

89. Debtor-in-possession may not be appropriate in some cases, for example where debtor or the debtor's representative(s) was responsible for misappropriation or concealment of property or poor management that caused the small debtor's financial distress. It may also be inappropriate in involuntary commencement where the debtor may be hostile to creditors or where the plan was imposed on creditors. In such cases,

the court may appoint an insolvency representative or a custodian to take on a supervisory role or even displace the debtor or make an interim stay order preventing the debtor from taking certain actions (such as disposing of assets or incurring liabilities capped by a specific value) for a limited period of time. In considering these options, a balance may be needed between the incentives provided for the debtor to act in good faith while in control of the business and potential for abuse by creditors, as well as the potential cost of remedial action relative to the size of the small debtor's estate.

(b) Approval of the plan by creditors

90. Requirements for creditor approval are usually lower in simplified reorganization proceedings than in full reorganization proceedings. The establishment of a creditor committee may in particular be unnecessary as also the creation of classes of creditors if the creditor base is limited, which is usually the small debtor case. Convening a creditor meeting may also be unnecessary if the small debtor keeps all creditors informed and they raise no objections. When such meetings are convened, the quorum, voting and other requirements for adopting decisions that otherwise apply under the insolvency law may be reduced.

91. To overcome problems with obtaining the requisite majority of creditor votes for approval of the plan due to creditor passivity, a few systems rely on deemed approval, which interprets a lack of creditor opposition as implicit acceptance of the plan, rather than excluding those creditors from the quorum. In some jurisdictions, creditor approval may not be required: the court may be authorized directly to approve the plan submitted by the debtor. Any objecting party in interest would be able to challenge the approval in the court.

(c) Approval or confirmation of the plan by the court

92. Generally, the plan is confirmed or approved by the court when a number of conditions are satisfied, including that creditors will receive at least as much under the plan as they would have received in liquidation, unless specifically agreeing to lesser treatment. In small debtor cases, the court should be able to determine the outcome of an alternative liquidation scenario without the involvement of expert opinion. Alternatively, a more general test of fairness may apply, e.g., the ascertainment that the interests of all creditors are sufficiently protected under the plan, the minority creditors were fairly represented at the meeting, the majority creditors acted in good faith, and the plan would be approved by a reasonable and honest party in interest. That would alleviate the need for the court to compare alternative scenarios and to examine the substance of the commercial terms to which the majority of creditors has agreed.

93. To discourage frivolous complaints and minimize delays in simplified reorganization, some laws have narrowed the scope for objections to be made on procedural grounds and the court can authorize a plan that does not strictly satisfy those grounds. For instance, the court may approve or confirm a plan, notwithstanding an objection that the approval process was not properly conducted or that the plan contains a provision contrary to law, by taking into account the extent of the irregularity in the process or the plan, the state of the small debtor, or other relevant circumstances.

94. The law may envisage mechanisms for the court to bind dissenting parties. In some jurisdictions, the court may modify the plan submitted for approval or confirmation to protect the rights of dissenting parties. Once the plan is confirmed by the court, affected creditors would be bound in the same manner as in full reorganization proceedings.

(d) Challenges to an approved or confirmed plan

95. Some jurisdictions do not provide a right of appeal against a court decision (e.g., on the confirmation or approval of a plan), whereas other jurisdictions permit an

appeal, but that appeal would not necessarily have the effect of suspending implementation of the plan. The latter can be crucial for small debtors, since the success of the plan will often depend greatly on prompt implementation. Any risk of irrecoverable loss caused by the continued implementation of the plan may be balanced by the provision of security or other provisional measures. Should the appeal succeed while the plan is being implemented, the interests of all parties involved may need to be taken into account in deciding whether the plan should be suspended or annulled. As an alternative, the court may order the payment of compensation.

(e) Duration of the reorganization plan and its amendment

96. Some laws may set no limit on the duration of the reorganization plan, which may be favourable for small debtors that need additional time to restructure their mortgage or equipment loans. Laws that establish the limit may provide for extensions under certain conditions (e.g., if the creditor is to receive a payment more than specified number of times in a certain period and the extension does not exceed the maximum number of years specified by law from the date of confirmation of the plan).

97. In simplified reorganization, the need to make amendments to the plan would rarely arise. Nevertheless, the law should not exclude the possibility of any party in interest proposing an amendment. It may allow them to be made only in truly exceptional circumstances, subject to the general conditions that the amendment will be in the best interest of all parties in interest and will need to be approved in the same way as the original version of the plan.

(f) Repayment of debt obligation and subordination of claims

98. To make reorganization of a small debtor possible, exceptions to the standard rules of ranking and subordination of claims, including the principle of pari passu, may be needed. In particular, the successful reorganization of the small debtor may depend on the survival of some transaction partners of the small debtor. The law may grant priority, in limited circumstances, to those partners' claims, for instance, for goods supplied to the debtor within a specified time period before commencement of the reorganization proceeding. At the same time, the law may require the plan to include minimum protections for higher ranked creditors, e.g., a minimum level of payment over a certain time period within the debtor's disposable income. A predictable and consistent method of assessing disposable income may need to be provided in the plan

99. The law may ensure the repayment obligation is not overly onerous by requiring, for example, that it is based on the small debtor's situation, is proportionate to its disposable income and takes into account the need to provide incentives for maximizing productive activity. Setting arbitrary minimum payments may be counterproductive in the light of the fluctuating needs of the small debtor and its business. Under general rules, the plan would not allow payments to small debtor owners as long as there are payments outstanding to creditors, thus respecting the priority of creditors ahead of owners. In a simplified insolvency context, there may be a need for an exception to that rule if the small debtor's business is the only means of earning a living available for the small debtor and his/her family.

Recommendations

Debtor in possession

Recommendations 112 and 113 envisage a debtor-in-possession model and invite the insolvency law to specify those functions of the insolvency representative that may be performed by the debtor in possession. Generally, however, the Guide envisages a limited role of the debtor in the continued operation of its business and active cooperation of the debtor with the insolvency representative (see e.g., recommendations 108–114 of the Guide that address the role of the debtor in insolvency proceedings).

Most recommendations of the Guide presuppose the active involvement of the insolvency representative in the insolvency proceedings, for example, recommendations 54, 58, 59 and 62 that address the use and disposal of assets, recommendations 72–86 that address the treatment of contracts, recommendation 93 that allocates the principal responsibility to commence avoidance proceedings on the insolvency representative and recommendations 115–125 describing the terms of participation of the insolvency representative in the insolvency proceedings.

The Working Group may wish to consider whether supplementary recommendations to those recommendations would be needed to reflect the debtor-in-possession regime that is often present in reorganization of small debtors and a limited role of the insolvency representative in simplified insolvency proceedings generally.

Some recommendations on the use and disposal of assets and a recommendation on a mechanism for supervising implementation of the reorganization plan are drafted more broadly and would thus be generally applicable in situations when the insolvency representative is not appointed, e.g., recommendations 52, 53, 55–57, 60, 61 and 157.

Procedural requirements in the context of simplified reorganization

Recommendations 139–168 address reorganization, including expedited reorganization proceedings.

The Working Group may wish to consider whether supplementary recommendations addressing simplified reorganization would be needed, in particular those to recommendations 141 to 143 that require the disclosure statement to accompany the reorganization plan and specify the contents of a disclosure statement, to recommendation 144 on the content of a plan and to recommendations 145–151 on the approval of the plan by creditors.

Priorities and distribution of proceeds

Recommendations 185–193 address priorities and distribution of proceeds.

The Working Group may wish to consider whether supplementary recommendations to those recommendations would be needed in the light of considerations raised in paras. 98–99 above.

C. Conversion of proceedings

100. Some jurisdictions allow a creditor to request conversion of a simplified reorganization proceeding to a simplified liquidation, on the ground that the debtor's plan is doomed to fail. There may be a need for conversion of one type of proceedings to another, including from a simplified insolvency proceeding to a full insolvency proceeding or vice versa, on other grounds.

101. In particular, a simplified reorganization proceeding may fail if the small debtor is unable to implement the reorganization plan. As a default, the law may, in such cases, permit automatic conversion to simplified liquidation proceedings, avoiding the delay and expense of a separate application by either the small debtor or creditors. The law may also allow parties in interest to challenge such automatic conversion. It may for example be preferable to leave creditors to pursue their rights at law, without necessarily liquidating the small debtor, in particular where the small debtor commenced a simplified reorganization proceeding to address financial difficulties at an early stage and was not necessarily eligible for liquidation proceedings.

102. There could also be cases when a simplified insolvency proceeding may need to be converted to full insolvency proceedings, for example at the request of creditors where they can demonstrate the complexity of an individual case and the need for more scrutiny that cannot be ensured through simplified insolvency proceedings. Such a need, in the context of small debtor insolvency, may arise in particular because

of allegations of fraudulent transfers of assets of the debtor to related persons or other fraudulent behaviour by the debtor. A request for such conversion would require an assessment by the court.

103. In some cases, failure to abide by the fast track deadlines imposed by law for simplified insolvency proceedings may lead to conversion to a full insolvency proceeding.

104. Some jurisdictions envisage the conversion of a full insolvency proceeding to a simplified insolvency proceeding at the decision of the court, usually upon advice of the insolvency representative. In at least one jurisdiction, such conversion is possible when a committee of unsecured creditors appointed by a competent government body during a full insolvency proceeding is not sufficiently active and representative to provide effective oversight of the debtor. A simplified reorganization proceeding with simplified voting requirements, shorter deadlines and more stringent oversight by a competent government body and reporting obligations of the debtor to the court may follow.

Recommendations

Recommendation 158 states that the law should permit the court to convert reorganization to liquidation proceedings on five grounds: (a) a plan is not proposed within any applicable time limit; (b) a proposed plan is not approved; (c) an approved plan is not confirmed (where confirmation is required); (d) an approved or confirmed plan is successfully challenged; or (e) the debtor substantially breaches the terms of the plan or is unable to implement the plan.

Recommendation 159 states that the insolvency law may specify that where there is a substantial breach by the debtor of the terms of the plan or an inability to implement the plan, the court may close the judicial proceedings and parties in interest may exercise their rights at law.

The Working Group may wish to consider that those recommendations will be generally applicable in the context of simplified insolvency proceedings. It may also wish to consider whether supplementary recommendations addressing the conversion between other types of proceedings would be necessary.

IV. Assets constituting the insolvency estate of a small debtor

105. Historically, when insolvency law was considered to be more penal in nature, most systems adopted very restrictive exclusions, leaving debtors with the bare minimum. Over time, however, limits on the scope of excluded assets have been liberalized to align with modern standards and the goal of giving debtors a fresh start. The exclusion of two particular categories of assets, the family home and tools of the trade, is especially relevant to the prospects of a fresh start for small debtors.

106. Three approaches to asset exclusion can be found in legislation providing for simplified insolvency regimes.

107. First, the law may set aside a range of assets with a total value up to a specified limit, which the small debtor may seek to have excluded from the estate. That approach would mean that all of the small debtor's qualified assets automatically become part of the estate, and the burden is on the small debtor to apply to the court for exclusion. The range of assets available for exclusion may include, for example, furniture, household equipment, bedding, clothing and tools of trade. The limits on the range and value of assets that the small debtor may retain will reflect the policy choice made in each jurisdiction.

108. Second, the law may establish different categories of excluded assets, respectively capped at certain values, an approach that may be more flexible than the first. The categories of assets that are relevant may differ according to the individual situation of the small debtor. In some systems, if the small debtor does not use up to

the exclusion limit in one category of assets (e.g., the family home), the law may allow application of the unused amount to other categories of assets. Other systems allow the small debtor to sell off some assets to buy excluded assets.

109. Third, the law may exclude the small debtor's assets from the estate by default and place the burden on the creditors to object to the exclusion of particular assets. The court may order those assets to be reclaimed for the estate. Because the creditors would intervene if the debtor had particular assets that could be of value to creditors, this approach may be more efficient in cases where there are few assets available for distribution. In other cases, however, it may require the creditors to investigate the small debtor's assets, especially where personal and business assets are mingled or assets have been hidden or transferred in close proximity to insolvency.

110. Where the law places emphasis on rehabilitating the small debtor, it might grant the court discretion to increase the scope of excluded assets beyond the default limits to meet the needs of small debtors. Where there is evidence of bad faith or unfair conduct by the small debtor, however, the law may allow the court to claw back assets that would otherwise be excluded.

111. The law may permit business assets to be sold before personal assets. Private sales, in addition to public auctions, may be permitted to provide a choice for best realizing the value of the small debtor's assets.

Recommendations

Recommendations 35–38 and 109 of the Guide address assets constituting the insolvency estate.

The Working Group may wish to consider the need for expanding the application of recommendations 38 and 109 to small debtors that are not natural persons in light of the frequency of intertwined business and personal assets, as explained in section I.A.1 above.

V. Treatment of interim and new finance

112. The success of out-of-court, hybrid or reorganization plan or arrangement very often depend on whether there are financial resources in place to support first the operation of the business during negotiation of the plan or arrangement (interim finance) and second the implementation of the plan or arrangement after its approval or confirmation (new finance).

113. As opposed to new financing which is approved or confirmed as part of a reorganization plan or arrangement, when interim financing is extended the parties do not know whether the plan will be eventually approved or confirmed. Limiting the protection of finance to cases where the plan or arrangement is adopted by creditors or confirmed by a court would discourage the provision of interim finance. An avoidance regime may protect transactions concluded in good faith with a view to a small debtor's preventive restructuring. To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the small debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan may be protected.

114. Protection from avoidance actions and protection from personal liability for extending credit to debtors in financial difficulties are guarantees that the insolvency law may grant to interim financing and new financing. Encouraging new lenders to take the enhanced risk of investing in a viable small debtor in financial difficulties may require further incentives, such as giving such financing priority at least over unsecured claims.

Recommendations

Recommendation 63–68 address post-commencement finance. Recommendation 53 will also be relevant in this context. Some of those recommendations envisage the active role of the insolvency representative in that context.

The Working Group may wish to consider whether supplementary provisions to those recommendations would be needed to address interim and new finance in the context of out-of-court and hybrid procedures and simplified reorganization proceedings.

VI. Discharge

115. The *Guide,* in the context of discharge following liquidation, explains that "when the debtor is a limited liability company, the question of discharge following liquidation does not arise; generally the law provides for the disappearance of the legal entity or, alternatively, that it will continue to exist as a shell with no assets. The equity holders will not be liable for the residual claims and the issue of their discharge does not arise. If the debtor's business takes a different form, such as a sole proprietorship, a group of individuals (a partnership) or an entity whose owners have unlimited liability, the question arises as to whether those debtors as individuals will still be personally liable for unsatisfied claims following liquidation"[8]

116. In the context of discharge of debts and claims in reorganization, the *Guide* states that "[t]o ensure that the reorganized debtor has the best chance of succeeding, an insolvency law can provide for a discharge or alteration of debts and claims that have been discharged or otherwise altered under the plan. This approach supports the goal of commercial certainty by giving binding effect to the forgiveness, cancellation or alteration of debts in accordance with the approved plan. The principle is particularly important to ensure that the provisions of the plan will be complied with by creditors that rejected the plan and by creditors that did not participate in the proceedings. It also gives certainty to other lenders and investors that they will not be involved in unanticipated liquidation or have to compete with hidden or undisclosed claims. Thus the discharge establishes unequivocally that the plan fully addresses the legal rights of creditors."[9]

117. The *Guide* thus addresses both discharge of the debtor that is a natural person, and debt forgiveness, cancellation or alteration for debtors that are legal entities. Considerations raised in that part of the *Guide* are generally applicable to small debtors.

118. As noted in the *Guide*, there are various approaches to debt discharge or debt forgiveness: in some jurisdictions, a debtor cannot be discharged until all its debts are paid; in other jurisdictions, a debtor remains liable for debts subject to a limitation period during which the debtor is expected to make a good faith effort to repay its debts, after which a discharge may be given; yet in other jurisdictions, a complete discharge of an honest, non-fraudulent debtor may be available immediately following distribution in liquidation.[10]

119. In simplified liquidation, an immediate discharge of a small debtor following a brief evaluation of the small debtor's assets would be the most expeditious if the court determines that the small debtor's circumstances make it clear that no distribution to creditors can reasonably be expected. In simplified reorganization, the availability of the discharge is usually conditional on partial repayment (e.g., 75 per cent of debt) with the possibility of a discharge for debt that cannot be repaid over a defined period (e.g., three years). The length of that period may vary from jurisdiction to jurisdiction and even within the same jurisdiction it may vary depending on circumstances. As

[8] Part two, chapter VI, para. 3.
[9] Ibid., para. 14.
[10] Ibid., paras. 4 and 5.

noted in the *Guide*, under some laws, that period might be quite long, e.g. 10 years.[11] The emerging trend is to shorten that period to encourage a fresh start and entrepreneurial activities and to reduce stigma. Another approach is to establish a sliding scale which calibrates the length of the discharge period according to the rate of return to creditors: the more the small debtor is able to pay, the sooner they will obtain a discharge. It is observed that a shorter discharge period may incentivize the small debtor to seek timely commencement of the insolvency proceeding and to comply with obligations to creditors as far as possible in order to obtain an early discharge.

120. The *Guide* notes that a discharge can be given at an early stage of the proceedings but be suspended if for example fraud was involved; discharge in reorganization might be effective from the time the plan becomes effective under the insolvency law or from the time it is fully implemented. In the event that the plan is not fully implemented or implementation fails, many insolvency laws provide that the discharge can be set aside. Following discharge, claims that have not been satisfied would be rendered unenforceable.[12]

121. The *Guide* also notes that all laws restrict the availability of a discharge for the debtor that for example has acted fraudulently; engaged in criminal activity; failed to provide or actively withheld or concealed information; and concealed or destroyed assets or records after the application for commencement.[13]

122. The effectiveness of a discharge regime in achieving the small debtor's rehabilitation depends on the scope of debts covered by the discharge. As noted in the *Guide*, certain types of debt, such as debts based on tort claims, family support obligations, fraud, criminal penalties, and taxes, tend to be excluded from discharge.[14] Some countries, however, have eliminated special treatment for taxes and other public revenue claims, which are often among the largest debts of small debtors. This is in line with recommendation 195 of the *Guide*, which states that the exclusion of debts from a discharge should be kept to a minimum in order to facilitate a fresh start. Egregious cases of tax evasion and fraud would justify however denying small debtors discharge entirely upon the request by a creditor or other party in interest.

123. The *Guide* further notes that a discharge of debt may be accompanied by conditions and restrictions relating to professional, commercial and personal activities, for example to start a new business or carry on the old business, to obtain new credit, to leave a country, to practise in a profession, to hold public office or to act as a company director or manager. The period of effectiveness of those conditions and restrictions may be long or even indefinite or may be linked to the discharge period and may be extended. They may take effect automatically or upon a court order.[15] For sole traders or entrepreneurs who manage their own businesses or who entered into insolvency after giving personal guarantees, some of those restrictions and conditions may be devastating, effectively prohibiting them from being involved in future business and defeating the concept of a fresh start. An emerging trend is to assess carefully the impact of those restrictions on the objectives of simplified insolvency regime (see paras. 23–24 above).

[11] Ibid., para. 4.
[12] Ibid., paras. 11 and 15.
[13] Ibid., para. 6.
[14] Ibid., para. 7.
[15] Ibid., paras. 4 and 8.

Recommendations

Recommendations 194 to 196 of the Guide concern discharge where the debtor is a natural person. Those recommendations are generally applicable to small debtor businesses conducted through natural persons, whether as sole proprietors or in a group, such as a partnership, association or other unincorporated entity, which exposes them to personal liability for unpaid debts.

As for small debtor's businesses conducted through companies and other legal entities with limited liability, the owners and managers of those businesses will not be personally liable for unsatisfied claims. Nonetheless, they may have taken personal loans to start and run the business or may have guaranteed business loans with personal assets (see paras. 13 and 22 above). In such cases, the question of discharge arises as a result of the mixing of business and personal debts.

The Working Group may wish to consider whether recommendations 194 to 196 should be extended to small debtors."

Annex

A. Recommendations of the *Guide* applicable in the context of a simplified insolvency regime

Key objectives and general features of an insolvency law (recommendations 1–7). ***The Working Group may wish to consider supplementary recommendations to recommendations 1, 2 and 7 and the relevance of recommendation 5 in a simplified insolvency context (see the box following para. 30 above).***
Eligibility and jurisdiction (recommendations 8 to 13).
Commencement of proceedings (recommendations 14–29). ***The Working Group may wish to consider whether supplementary provisions would be needed to the following recommendations:*** • ***recommendations 14 and 16. The supplementary recommendations may invite States to specify conditions for commencement of the simplified insolvency proceedings on the application of a party in interest other than the debtor;*** • ***to recommendation 15, taking into account that both the cessation of payment and balance sheet tests may not be optimal for the simplified insolvency regime;*** • ***to recommendation 26, taking into account that, in a simplified insolvency regime, small debtors will often not be able to cover costs of the proceedings, and an insolvency representative may not necessarily always be appointed;*** ***(see the box following para. 78).***
Applicable law (recommendations 30 to 34).
Treatment of assets (recommendations 35–38). ***The Working Group may wish to consider the need for expanding the application of recommendation 38 to small debtors that are not natural persons (together with recommendation 109) (see the box after para. 111 above).***
Protection and preservation of the insolvency estate (recommendations 46–51 (recommendations 39–45 are listed as not applicable in table B below)). ***The Working Group may wish to consider whether recommendation 47 that provides for exceptions to the automatic general stay would be sufficient in a simplified insolvency context or a different default rule on application of a stay should be formulated in that context (see the box following para. 62 above).***
Use and disposal of assets (recommendations 52–62). ***The Working Group may wish to consider whether supplementary recommendations to recommendations 54, 58, 59 and 62 would be needed to reflect the debtor-in-possession regime that is often present in reorganization of small debtors and a limited role of the insolvency representative in simplified insolvency proceedings generally (see the box following para. 99 above).*** ***The Working Group may wish to consider whether supplementary provisions to recommendation 53 together with recommendations 63–68 (see below) would be needed to address interim and new finance in the context of out-of-court and hybrid procedures and simplified reorganization proceedings (see the box after para. 114 above).***
Post-commencement finance (recommendations 63–68). ***The Working Group may wish to consider whether supplementary provisions to those recommendations and to recommendation 53 (see above) would be needed to address interim and new finance in the context of out-of-court and hybrid procedures and simplified reorganization proceedings (see the box after para. 114).***

Treatment of contracts (recommendations 69–86). ***The Working Group may wish to consider whether supplementary recommendations to those recommendations would be needed to reflect the debtor-in-possession regime that is often present in reorganization of small debtors and a limited role of the insolvency representative in simplified insolvency proceedings generally (see the box following para. 99 above).***
Avoidance proceedings (recommendations 87–99). ***The Working Group may wish to consider whether supplementary recommendation to recommendation 93 would be needed to reflect the debtor-in-possession regime that is often present in reorganization of small debtors and a limited role of the insolvency representative in simplified insolvency proceedings generally (see the box following para. 99 above).***
Rights of set-off and financial contracts and netting (recommendations 100–107).
Participants (the debtor (recommendations 108–114); the insolvency representative (recommendations 115–125); creditors (recommendations 126–129; recommendations 130–136 on creditor committee are listed as not applicable in table B below); and parties in interest (recommendations 137–138)). ***The Working Group may wish to consider whether supplementary recommendations to recommendations 108–129 would be needed to reflect the debtor-in-possession regime that is often present in reorganization of small debtors and a limited role of the insolvency representative in simplified insolvency proceedings generally (see the box following para. 99 above).*** ***The Working Group may also wish to consider the need for expanding the application of recommendation 109 to small debtors that are not natural persons (together with recommendation 38) (see the box after para. 111 above).***
Reorganization, including expedited reorganization proceedings (recommendations 139–168). ***The Working Group may wish to consider which supplementary recommendations would be needed to accommodate simplified reorganization, in particular those to:*** • ***recommendations 141 to 143 that require the disclosure statement to accompany the reorganization plan and specify the contents of a disclosure statement;*** • ***recommendation 144 on the content of a plan;*** • ***recommendations 145–151 on the approval of the plan by creditors, to provide for less formal requirements.*** ***(see the box following para. 99 above).*** ***The Working Group may also wish to consider which additional recommendations related to out-of-court and hybrid procedures in the simplified insolvency context would be needed that could draw as appropriate on the discussion of expedited reorganization proceedings in the Guide and recommendations 160–168 (see the box after para. 56 above).***
Treatment of creditor claims (recommendations 169–184, except for recommendations 178 and 182 on provisional measures listed as not applicable in table B below). ***The Working Group may wish to consider whether supplementary recommendations to recommendations 169, 174, 177, 179 and 182 would be needed to accommodate simplified submission, verification and admission of creditor claims that do not presuppose the active involvement of creditors and the insolvency representative (see the box following para. 62 above).***
Priorities and distribution of proceeds (recommendations 185–193). ***The Working Group may wish to consider whether supplementary recommendations to those recommendations would be needed (see the box following para. 99 above).***

Discharge (recommendations 194–196). ***The Working Group may wish to consider whether recommendations 194 to 196 should be extended to small debtors (see the box after para. 123 above).***
Closure of proceedings (recommendations 197–198).
Directors' obligations (recommendations 255–266). ***The Working Group may wish to consider that some relaxation may be appropriate in the simplified insolvency context (see the box following para. 30 above).***

B. Recommendations of the *Guide* not applicable in the context of a simplified insolvency regime

Relief of provisional nature (recommendations 39–45).
Creditor committee (recommendations 130–136).
Other provisional measures (recommendations 178 (provisional admittance of unliquidated claims); and 182 (provisional admittance of disputed claims)).
Treatment of enterprise groups in insolvency (recommendations 199–254). ***The Working Group may wish to consider that some of the recommendations on enterprise group insolvency (e.g., recommendations 202–210) may serve the basis for formulating supplementary recommendations on linking related proceedings in a simplified insolvency context (see the box following para. 30 above).***