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Report of Working Group V (Insolvency Law) on the work of its fifty-sixth session (Vienna, 2–5 December 2019)

Contents

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I. Introduction

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

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

3. The Working Group continued its deliberations at its fifty-fifth (May 2019) session on the basis of a revised draft (A/CN.9/WG.V/WP.166) and suggested revisions to that text (A/CN.9/972, chapter V). The Working Group requested the Secretariat to prepare a revised text for consideration by the Working Group at its fifty-sixth session (A/CN.9/972, para. 11). Pursuant to the view of the Working Group (A/CN.9/972, para. 59), two rounds of inter-sessional consultations took place in preparation for the fifty-sixth session of the Working Group, on 14 July and 2–3 September 2019. The results of those consultations were reflected in a revised draft (A/CN.9/WG.V/WP.168) that was considered by the Working Group at its fifty-sixth session.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fifty-sixth session in Vienna from 2 to 5 December 2019. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Nigeria, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka,

[1] *Official Records of the General Assembly*, *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.
[2] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.
[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

Switzerland, Thailand, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Viet Nam.

5. The session was attended by observers from the following States: Bulgaria, Burkina Faso, Denmark, Greece, Kuwait, Lithuania, Malta, Netherlands, Qatar, Saudi Arabia, Slovakia and Uruguay.

6. The session was also attended by observers from the European Union, including the European Investment Bank.

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

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

(b) *Invited international governmental organizations*: Asian-African Legal Consultative Organization (AALCO), Gulf Cooperation Council (GCC) and International Association of Insolvency Regulators (IAIR);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Center for International Legal Studies (CILS), Fondation pour le Droit Continental, Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), Ibero-American Institute of International Economic Law, INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), International Bar Association (IBA), International Insolvency Institute (III), International Law Institute (ILI), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), Union Internationale des Avocats (UIA), and Union Internationale des Huissiers de Justice (UIHJ).

8. The Working Group elected the following officers:

Chairman: Mr. Xian Yong Harold Foo (Singapore)

Rapporteur: Ms. Jasnica Garašič (Croatia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.167); and

(b) A note by the Secretariat: draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.168).

10. The Working Group adopted the following agenda:

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

III. Deliberations and decisions

11. The Working Group considered the draft text on a simplified insolvency regime contained in a note by the Secretariat (A/CN.9/WG.V/WP.168) and suggested revisions to the text (see chapter IV of this report). The Working Group requested the Secretariat to prepare a revised text for consideration by the Working Group at its fifty-seventh session.

IV. Consideration of a draft text on a simplified insolvency regime (A/CN.9/WG.V/WP.168)

A. Comments on the draft recommendations

Recommendation 1

12. There was not sufficient support for a suggestion to delete the last part of the draft recommendation that referred to different treatment of individual entrepreneurs, unlimited liability MSEs and limited liability MSEs. Another suggestion, which was not taken up by the Working Group, was to expand the application of draft recommendation 1 to primary equity holders of limited liability MSEs who extended personal guarantees for business debts of such entities.

Recommendation 2

13. A suggestion to delete the second part of the draft recommendation starting with the word "unless" did not receive support.

Recommendation 3

14. The Working Group considered a suggestion to replace the word "should" with the word "may" or the words "may consider" so as to give States more flexibility to implement the recommendation and avoid abuse of the possibility of reorganization in the MSE insolvency context. The prevailing view was that, consistent with the UNCITRAL Legislative Guide on Insolvency Law (the Guide), the word "should" should be used on issues of fundamental importance such as recommending to States that their simplified insolvency regime should provide for both simplified liquidation and simplified reorganization.

15. Different views were expressed as regards the text in square brackets. One view was that the text should be retained but without the words "within simplified liquidation", recognizing that discharge with a debt repayment plan might be a separate procedure outside of the simplified liquidation or simplified reorganization. Another view was that the text should not refer to a debt repayment option at all.

16. Yet another view, which eventually prevailed, was to delete the entire text in square brackets and address issues of discharge later in the text. It was considered that that approach would leave maximum flexibility to States on issues of discharge.

17. Concern was expressed that simplified preventive procedures aimed at avoiding insolvency were not captured in the recommendation.

Recommendation 4

18. No comments were made with respect to subparagraphs (a) to (d).

Subparagraph (e)

19. Views differed as to which text in the two pairs of square brackets should be retained in that subparagraph. One view was to retain focus only on creditor disengagement rather than facilitation of creditor participation, on the assumption that creditors would usually not be interested in taking part in simplified insolvency procedures. In that light, it was argued, any message conveying that creditors' active participation would be required should be avoided since otherwise the procedures would become cumbersome. Another view was that reference to creditor disengagement was unhelpful and should be deleted, and that the provision should instead emphasize the need for effective measures to encourage and facilitate creditor participation in simplified insolvency proceedings. The importance of active creditor participation for successful reorganization and rescuing business was emphasized in that context. Yet another view was that the two texts were not mutually exclusive and should be retained because the facilitation of creditor participation could effectively

address the roots of their disengagement. A proposal was made to redraft the subparagraph in the relevant part as follows: "(e) Put in place effective measures to facilitate creditor participation and address creditor disengagement". Building on that proposal, addition of the words "encourage and" before the word "facilitate" was proposed.

20. Another concern regarding that subparagraph related to the term "social stigma". Some support was expressed for the deletion of the reference to social stigma in the text on the ground that social stigma, while being a reality in the context of MSE insolvency, was not a legal concept. It was emphasized that achieving trust and confidence in the simplified insolvency regime would effectively fight stigmatization. The other view was that reference to stigmatization in a broader sense, not limiting it to social stigma, should be retained in view of the importance of addressing concerns over stigma in the context of MSE insolvency (in particular for individual entrepreneurs). Noting a possible disconnect between the reference to stigma and the preceding part addressing creditor participation, it was suggested that reference to effective measures to address concerns over stigmatization might be moved from that subparagraph to a more appropriate place.

21. After discussion, it was agreed to redraft the subparagraph as follows: "(e) Put in place effective measures to facilitate creditor participation and address creditor disengagement" and to refer elsewhere to effective measures to address concerns over stigmatization. A point was made about the relevance in that context of early debt restructuring negotiations and other early rescue measures.

Subparagraph (f)

22. Noting that a similar provision was not found among the objectives in the Guide, the reasons for its inclusion among the objectives of the simplified insolvency regime were questioned. No support was expressed for deleting the subparagraph.

Recommendation 5

23. The prevailing view was that, throughout the text, any wording suggesting preference of administrative over judicial simplified insolvency proceedings should be removed. Specifically, it was suggested that the word "administrative" in the heading of section III.1 should be deleted and subparagraph (a) of draft recommendation 5 and the description of the term "competent authority" in the draft glossary (para. 20(a)) should be redrafted to avoid that bias. It was also suggested that the commentary should explain clearer which changes in the judicial proceedings might be required to ensure swift, low-cost and simple insolvency proceedings.

24. It was agreed that the recommendation should be restructured by grouping closely related provisions in separate sections (e.g., those on simplification of procedures in subparagraphs (b) to (h) could be listed separately from those on more substantive and generally applicable issues, such as avoidance, assets or discharge).

25. No comments were made with respect to subparagraphs (d), (f), (i), (j), (k) and (m). With respect to subparagraph (n), it was suggested that the commentary should elaborate on actions that would trigger imposition of sanctions on the debtor.

Subparagraph (a)

26. The suggestion was made that the texts in square brackets should be replaced with the phrase "judicial review or other mechanism that includes due process and procedural fairness" (the phrase was subsequently amended to read "judicial review or other mechanism that ensures due process and procedural fairness"). Concern was expressed that reference to judicial review in that phrase might nevertheless indicate that simplified insolvency proceedings were primarily to be handled by non-judicial bodies.

27. The need for the introduction of the new term "competent authority" instead of the term "court" used in the Guide and other UNCITRAL insolvency texts and

encompassing both a judicial or other authority competent to control or supervise insolvency proceedings (see para. 12(i) of the Glossary in the Introduction to the Guide) was questioned. It was suggested that, if that term were to be introduced, the commentary should explain the rationale for choosing it. (See further paras. 102–108 below.)

Subparagraph (b)

28. It was agreed that the word "including" should be inserted before the words "for notification" and that the words "submission and proof of claims" should be replaced with the words "submission of claims".

Subparagraph (c)

29. No support was expressed for adding the words "to the extent possible" at the end of that subparagraph.

Subparagraph (e)

30. The suggestion was made to replace the term "the independent party" with the term "an independent party". The alternative view, which eventually prevailed, was that the subparagraph should be redrafted by deleting the part starting with the word "including".

31. Concerns were expressed regarding uncertainties about the function of an "independent party". It was noted that the term was undefined and more than one function was envisaged for such "independent party", including those usually performed by an insolvency representative (the term defined in para. 12(v) of the Glossary in the Introduction to the Guide). It was questioned whether introduction of a new role in addition to or instead of an insolvency representative would be justifiable, citing, among other things, concerns over costs.

32. Noting that a similar issue arose in the context of subparagraph (i), the Working Group deferred consideration of the function of an independent party to a later stage (see further paras. 109–111 below). Views were expressed that the text might need to include a separate section and separate recommendations on the function of an independent party since that role would be new for many jurisdictions if it were to be introduced as distinct from the court, the competent authority or the insolvency representative. The view was expressed that paragraph 32 of the draft commentary contained in working paper A/CN.9/WG.V/WP.168 (the draft commentary) would need to be expanded with explanations of the functions of the independent party (including as regards assistance to the debtor before the commencement of insolvency proceedings), an illustrative list of persons that could be entrusted with the functions of the independent party and requirements for qualifications, appointment and conduct, including the absence of conflicts of interest.

Subparagraph (g)

33. Concerns were expressed about the vagueness of that subparagraph, but there was no sufficient support for deleting it. It was decided instead to replace the term "default solutions" with the term "default procedures and treatment".

34. The importance of the provisions for achieving the goals of simple and expedited proceedings and addressing creditor disengagement was emphasized. It was agreed to include in the commentary an explanation of a safeguard in the form of an advance notice of default procedures and treatment to all affected parties and the opportunity for such parties to oppose or object to those default rules.

Subparagraph (h)

35. It was agreed to replace the word "[s]tipulate" with "[e]stablish" and add the words "if any" after the words "the maximum number".

Subparagraph (l)

36. It was suggested that subparagraph (l) should be defined in more positive terms in line with the Guide. The following alternative wording was proposed: “Discharge should be attainable at an affordable cost and with limited formalities. The law may establish stricter requirements to subsequent discharges.”

37. While support was expressed for redrafting the subparagraph in positive terms, it was also recognized that the resulting text should achieve the right balance by conveying that, under certain conditions, discharge could be denied or set aside, in particular in case of uncooperative debtors. The view was expressed that the lack of debtor’s cooperation as the ground for denial of discharge might be addressed elsewhere in the text.

Subparagraph (o)

38. Views differed on whether the subparagraph should be retained. It was agreed that it should be retained with the text in the second set of square brackets.

Subparagraph (p)

39. It was agreed to delete the subparagraph.

Recommendation 6

40. While there was support for envisaging the ability of a creditor of an eligible debtor to initiate simplified insolvency proceedings, concerns were raised as to the unconditioned ability of a creditor to initiate reorganization proceedings. Doubts were expressed as to the feasibility of “simplified” proceedings being initiated by creditors over objection of the MSE debtor. In response it was suggested that there might be limited instances in which it would be useful to permit creditors to initiate such proceedings, but that those circumstances should be specifically identified. The Working Group therefore agreed to modify the words “and specify that creditors of the eligible debtors may also apply” with the words “and specify under what conditions creditors of the eligible debtors may also apply”.

Recommendation 7

41. No comments were made with respect to subparagraphs (a) and (e).

Subparagraph (b)

42. There was broad agreement for enabling an eligible debtor to access simplified insolvency proceedings at an early stage of financial distress, and it was agreed to retain the text contained in square brackets without the brackets. A suggestion to require such a debtor to provide some information of the risk of insolvency was not taken up by the Working Group.

Subparagraph (c)

43. A suggestion was made to delete the words “and business affairs” on the grounds that the words were vague and might impose unrealistic requirements on MSE debtors. In response, concerns were raised about information relating only to the MSE’s financial position being too narrow and not providing the context in which the financial position should be considered. An alternative proposal favoured linking the words specifically to reorganization proceedings, as such information would be helpful for, at a minimum, identifying the business’s prospects. While there was some support for that suggestion, the view was also expressed that there could be instances in which such information would be useful in the context of liquidation proceedings as well (e.g., to organize a sale of assets). After discussion, the Working Group agreed to retain the words “and business affairs” but to clarify their meaning in the commentary.

Subparagraph (d)

44. Views differed on whether the text should provide only for the automatic commencement of simplified insolvency proceedings upon application of the debtor. Advantages of such an approach were cited, in particular in jurisdictions where intervention by the competent authority was expected to be slow, with the result that an MSE debtor would not benefit from an early automatic stay on individual enforcement actions by creditors (such stay being envisaged in the draft text upon commencement of simplified insolvency proceedings (see draft recs. 8(a) and 9(a))).

45. The other view was that the subparagraph should incorporate the other option found in recommendation 18(b) of the Guide that would cater to jurisdictions that required court decision for commencement of insolvency proceedings. The view was expressed that assessment by the court that e.g., eligibility requirements had been met would be an essential precondition for the commencement of any insolvency proceedings, including simplified insolvency proceedings, in some jurisdictions. In response, it was observed that, taking into account implications of each additional procedural requirement, deviations from the regular approaches could be justified in the context of the simplified insolvency regime, which aimed at efficient procedures.

46. Agreeing that simplified insolvency proceedings should commence immediately or promptly upon application of the debtor, the Working Group agreed to amend the subparagraph by incorporating the two options from recommendation 18 of the Guide and discussing possible mechanisms for ensuring quick commencement of simplified insolvency proceedings, including rebuttable presumptions (e.g., of insolvency or financial distress), lower standards of proof of insolvency or financial distress, ex parte procedures and preliminary determinations on the basis of examination of documents. The other view, which did not receive sufficient support, was to retain subparagraph as drafted with the discussion of the alternative option (i.e., commencement upon decision of the competent authority) in the commentary or a footnote to the subparagraph.

47. Possible abuse by a debtor of the automatic commencement was another concern raised. It was proposed to add the following text to the end of that subparagraph: “provided creditors have the ability to challenge the opening of the proceeding within a reasonable time period”. The prevailing view was that the addition of those words was unnecessary in the light of the amendments to the subparagraph agreed upon above. It was agreed that different safeguards and mechanisms for preventing abuse would instead be discussed in the commentary.

Subparagraph (f)

48. The Working Group requested the Secretariat to redraft the subparagraph in line with recommendation 24 of the Guide.

Recommendation 8

49. No comments were made specifically with respect to subparagraph (c) (see however para. 52 below for comments on subparagraph (d) affecting the drafting of subparagraph (c)). For comments on subparagraph (i), see paragraph 73 below.

Subparagraph (a)

50. Concern was expressed that the subparagraph as drafted did not incorporate recommendation 49(c) of the Guide and its accompanying footnote. The Working Group was of the view that the subparagraph was broadly consistent with the Guide and there was no need to repeat all recommendations from the Guide, and it would be appropriate to make deviations from the recommendations of the Guide when the context of the simplified insolvency regime required. It was suggested that the commentary might discuss protection of secured creditors, including the duration of the stay, in the context of simplified liquidation in more detail, with cross-references to recommendations 46 to 51 of the Guide. The Working Group agreed to retain the

subparagraph as drafted, including the text contained in square brackets without the brackets.

Subparagraph (b)

51. While agreeing to delete the word “reaffirmation”, the Working Group noted that the concept of reaffirmation of debts would need to be discussed in the text.

Subparagraph (d)

52. Questions were raised about the notion of the “liquidation plan” unknown in many jurisdictions. Concern was expressed that introduction of a requirement to prepare such a plan might complicate simplified liquidation proceedings. In response, it was explained that the “liquidation plan” was an essential tool to ensure transparency, accountability and protection in particular against fraudulent transfers of assets, taking into account that the debtor-in-possession regime was the default regime in the text. The value of such plan for conversion of one type of proceeding to another was also stressed. To alleviate concerns about the term, the use of the term “liquidation schedule” was suggested, and that suggestion received support. Draft recommendation 5(c) referring to templates, schedules and standard forms, which might also encompass templates and standard forms for liquidation schedules, was recalled in that context and the Secretariat was requested to add that point in the commentary in connection with the discussion of the “liquidation schedule”.

53. Questions were also raised about the reference to the “debt repayment plan” in the subparagraph but the Working Group retained the subparagraph unchanged in that respect.

Subparagraph (e)

54. It was agreed to delete the word “[i]ndividual”.

Subparagraph (f)

55. While confirming the understanding that tacit approval of the liquidation schedule would be sufficient and no formal vote would be required, concerns were expressed about the use of the term “objection” in the subparagraph. The view was expressed that that term would not encompass all possible grounds for rejection of the liquidation schedule by the competent authority. Doubts were expressed that the term “opposition”, suggested as the alternative to the term “objection”, would encompass also objections. Preference was expressed for using both terms: the term “objection” when referring to objections on legal grounds; and the term “opposition” when referring to rejection of aspects of the liquidation schedule or reorganization plan. It was explained that an objection by one creditor might be sufficient to trigger review while one creditor opposition would not block the approval when the threshold for creditor approval would otherwise be met. In addition, it was stated that an objecting party might be expected to provide legal arguments for objection while a simple dissatisfaction with the content of the liquidation schedule or the reorganization plan might be sufficient to convey opposition. It was noted that those issues would be more relevant in the context of the approval of the reorganization plan (see further para. 69 below).

56. The Working Group agreed that the recommendation should be expanded to reflect that the competent authority might reject the liquidation schedule on its own motion, for example if the schedule was incomplete or contrary to law. It was also suggested that requirement of short time limits should be included consistent with subparagraph (c).

Subparagraph (g)

57. The Working Group agreed to modify the opening part to read: “Possibility for modification of the …”

Subparagraph (h)

58. The Working Group agreed to add the words “by creditors and other parties in interest” after the words “contested plan”. A suggestion to delete the words “which may trigger the commencement of standard insolvency proceedings” did not receive sufficient support. The Secretariat was requested to consider placing that phrase in a different recommendation.

Subparagraph (j)

59. The Secretariat was requested to consider shortening the phrase starting with the words “without the need”, e.g., by using the phrase “without the need to take further steps”.

Subparagraph (k)

60. A suggestion was made to provide creditors with an explicit right to request the closure of proceedings, noting that simplified proceedings can be opened ex parte. In response, it was stated that the point raised was more relevant to recommendation 5(m) and could be addressed in the commentary accompanying that recommendation. The Working Group agreed to leave the subparagraph as drafted.

Subparagraph (l)

61. Noting that zero-asset cases constituted the vast majority of MSE insolvencies across jurisdictions and zero-asset proceedings raised distinct issues and necessitated further streamlining procedures contained in draft recommendation 8, the Working Group agreed to include a separate recommendation and a separate section on zero-asset proceedings. It was suggested to clarify in particular eligibility criteria and the meaning of zero assets and to refer to specific safeguards, including investigation of pre-insolvency transactions. The Working Group deferred the consideration of elements for such an additional recommendation and section to a later stage (See further paras. 100–101 below).

Recommendation 9

62. No comments were made with respect to subparagraphs (d), (e), (f), (i), (j), (m) and (o). For comments on subparagraph (n), see paragraph 73 below.

Subparagraph (a)

63. The Working Group considered differences in the operation of a stay in the context of simplified liquidation and simplified reorganization and reasons that might justify not providing for an automatic stay in simplified reorganization (e.g., reputational damage).

64. After discussion, consistent with the decision taken with respect to draft recommendation 8, subparagraph (a) (see para. 50 above), the Working Group agreed to retain the subparagraph as drafted including the text in square brackets without the brackets and requested the Secretariat to reflect the substance of recommendations 46 to 51 of the Guide in the accompanying commentary.

Subparagraph (b)

65. No support was expressed for the suggestion to delete reference to automatic conversion and envisage instead in that subparagraph that such conversion would take place upon application of the debtor or creditors. A similar concern was raised with respect to subparagraph (h).

Subparagraph (c)

66. No support was expressed for deletion of the phrase starting with the word “unless”. The Secretariat was requested to make it clearer that different consequences

would arise for a solvent and insolvent debtor from the failure to present the plan within the established time limit: for a solvent debtor, such failure would result in the termination of the proceedings while for an insolvent debtor, such failure would lead to conversion of the proceedings to liquidation. The Secretariat was also requested to replace the words "In other cases" with text along the following lines: "When the competent authority determines that there is a possibility of reorganization".

67. It was also suggested that the phrase "sufficient time" should be replaced with the phrase "short time" and that the provisions of the subparagraph should make it clear who was expected to prepare the plan (the debtor, creditors or the independent party). The Working Group did not take up those suggestions.

Subparagraph (g)

68. To address concerns over a possible erosion of creditors' rights, a suggestion was made to redraft the subparagraph as follows: "Deemed approval of the plan in the absence of sufficient opposition and in the case of opposition, possible modification of the plan with the aim of achieving any required approval." It was noted that the terms "opposition" and "required approval" could be explained in the commentary.

69. In the light of the discussion of similar issues in the context of draft recommendation 8 (see para. 55 above), the Secretariat was requested to ensure consistency in the use of the terms "opposition" and "objection" in the draft recommendations and the accompanying commentary.

70. A suggestion to repeat protections envisaged in subparagraph (j) in subparagraph (g) did not receive support. It was explained that the failure to ensure those protections might be the basis for raising objections or opposition to the plan. The Secretariat was requested to clarify in the commentary whether the competent authority would always be required to approve the plan.

Subparagraph (h)

71. No support was expressed for the suggestion to modify the subparagraph as follows: "In the absence of sufficient agreement on the modified plan, termination or conversion of the simplified reorganization proceedings …". Concern was expressed that the proposed redraft did not set out clearly consequences of the absence of the agreement on the modified plan for a solvent as opposed to an insolvent debtor.

Subparagraphs (k) and (l)

72. The Working Group decided to include references to both the competent authority and independent party in those subparagraphs for further consideration and not to include the word "exceptional" before the word "circumstances" in subparagraph (l).

Recommendations 8(i) and 9(n)

73. The Working Group took note of the suggestion to move the parts of draft recommendations 8(i) and 9(n) that referred to debts omitted from procedures intentionally or by mistake to the commentary. It was suggested that the commentary could list those debts as examples of debts excluded from discharge and explain that the intentional omission of debts from procedures would typically trigger imposition of additional sanctions, including criminal ones. The view was expressed that draft recommendations 8(i) and 9(n) should also address a possibility of setting aside the discharge granted and that the accompanying commentary should refer to other actions by the debtor that would justify rejection of, or setting aside, the discharge.

Recommendations 10–13

74. No comments were made with respect to those draft recommendations.

Recommendation 14

75. The Working Group requested the Secretariat to reflect the content of the draft recommendation in another place, e.g., in draft recommendation 5 or 7.

Recommendation 15

76. There was broad support for envisaging the procedural consolidation and coordination of linked proceedings and for not providing for the substantive consolidation of proceedings in the context of the treatment of personal guarantees. After discussion, the Working Group agreed to insert the word "procedural" before "consolidation". It was also agreed to explain in the commentary the difference between "procedural consolidation" and "coordination". A request to reverse the order of the two terms "procedural consolidation" and "coordination" was not taken up by the Working Group.

Recommendations 16, 17 and 18

77. The following proposals as regards draft recommendation 16 did not receive support: (a) to add after the words "personal insolvency proceedings" in the first sentence the following text "and procedures to allow family members with legal or beneficial rights to participate in such proceedings"; (b) to add "and cooperation" after the word "coordination"; and (c) provide for substantive consolidation of linked proceedings in case of intertwined business, consumer and personal debts by inserting the following sentence at the end of the draft recommendation "[i]f the competent authority finds it necessary, substantive consolidation may take place."

78. With respect to proposal (a) above, it was noted that that concept had already been included and sufficiently taken account of in the existing draft text so that no further clarification was required. With respect to proposal (c) above, although it was agreed that substantive consolidation might indeed be necessary in situations addressed in the draft recommendation and also in case of fraud, and that such consolidation could simplify handling interlinked proceedings, it was considered that the substantive consolidation would not raise distinct issues in the context of MSE insolvency and would in any event trigger commencement of, or conversion to, standard insolvency proceedings. It was suggested that those points could be explained in the commentary accompanying the chapter on conversion of proceedings with a cross-reference to the relevant section and recommendations of part three of the Guide.

79. It was agreed that draft recommendations 16 to 18 should be aligned with draft recommendation 15 as regards the use of the term "procedural consolidation and coordination".

Recommendation 19

80. The Working Group agreed to change the words in the chapeau "[t]hey in particular should" to "[r]easonable steps might include", to align the text with recommendation 256 of the Guide, and to indicate that the subparagraphs that followed the chapeau were neither exhaustive nor applicable to every case.

81. There was some support for adding an obligation on the debtor to closely monitor its financial situation, particularly upon signs of financial distress. It was noted that recommendation 256 of the Guide contained a similar provision that could be tailored to the situation of MSE debtors. After discussion, the Working Group agreed not to amend the chapeau in that respect but to include a new subparagraph along the following lines: "[e]valuate the current financial situation of the business".

82. Putting in place a system of alerting MSEs about financial distress at an early stage was considered important, and reference was made to the relevant discussion in part two of the text. No support was expressed for the proposal to include provisions in the text that would allow penalizing the MSE debtor for the failure to fulfil the

obligations listed in the draft recommendation by rejecting its access to simplified insolvency proceedings.

83. No comments were made with respect to subparagraphs (d), (f), and (g).

Subparagraph (a)

84. It was stated that the words "confer a preference to any particular creditor" was overly broad, as it would encompass a legitimate payment of debt. While a suggestion to confine the scope of preference to an interest of the entrepreneur, owner or manager was not taken up by the Working Group, it was agreed to align the wording with the relevant wording in recommendation 256(a) that referred in that context to an appropriate business justification.

Subparagraph (b)

85. The Working Group considered including an element of knowledge. After discussion, it was agreed to delete the subparagraph in its entirety. It was considered that its content had already been captured by other provisions in the text.

Subparagraph (c)

86. A suggestion to redraft the subparagraph to state "[a]void the loss of key assets and maintain the value of assets" was not taken up by the Working Group, which expressed preference for retaining the word "maximize". It was agreed to delete the word "their" to align the text with the corresponding wording in recommendation 256(a) of the Guide.

Subparagraph (e)

87. Noting that professional advice may be cost prohibitive for MSEs, a suggestion was made to specify that advice could be sought from the independent party or a mediator. It was noted that the proposal may need to be revisited after the Working Group had considered draft recommendation 24 and agreed upon the role of the independent party.

Recommendation 20

88. It was considered that the draft recommendation was applicable to owners and managers of limited liability MSEs but not to individual entrepreneurs. A suggestion was made to include an additional sentence along the lines of "[t]he law may specify additional remedies for breach of those obligations by individual entrepreneurs". Another suggestion was to delete the draft recommendation or, if it were to be retained, to replace the word "should" with the word "might". Noting that remedies for the breach of obligations listed in draft recommendation 19 would be provided by States, it was agreed to delete the draft recommendation.

Recommendation 21

89. Inconsistencies with recommendation 110 of the Guide as well as the broader scope of draft recommendation 21 as compared to draft recommendation 7(c) were highlighted. While it was agreed that the obligation to provide accurate, reliable and complete information relating to the debtor's financial position and business affairs should be included in draft recommendation 21 and made applicable throughout the proceedings, views differed on whether the draft recommendation should reproduce the entire list from recommendation 110(b) of the Guide.

90. It was agreed that the continuing obligation to provide accurate, reliable and complete information should be drafted broadly to cater to different situations within the MSE insolvency context. The view was expressed that not only information requested by the competent authority, independent party and creditors but also all information that the debtor considered relevant for the case should be captured in draft recommendation 21 with the addition of a new subparagraph drawn from recommendation 110(b) of the Guide. It was noted that imposing excessive disclosure

requirements in the draft recommendation might inadvertently interfere with draft recommendation 7(c) and hinder access to simplified insolvency regime.

91. In response to the suggestion to include provisions on sanctions for violation of the obligations listed in the draft recommendation, the Working Group noted that sanctions were already addressed in several draft recommendations and the commentary accompanying recommendation 21 might cross-refer to them.

92. No comments were made with respect to other subparagraphs of that draft recommendation.

Recommendation 22

93. The Working Group agreed that the draft recommendation should be redrafted not to convey that early signal systems would be applicable only in the context of informal debt restructuring negotiations.

Recommendation 23

94. The proposal to replace the word “may” with the word “should” did not receive support. Queries were raised as regards a specific reference to public authorities in the draft recommendation and the use of the word “incentives”. No specific drafting suggestions were made, and the Working Group decided to retain the draft recommendation as drafted.

Recommendation 24

95. Proposals to delete the word “State” or “competent” from the draft recommendation did not receive support.

96. In response to a proposal to expand subparagraph (b), the Working Group agreed to replace the current wording with the following text: “A neutral forum to facilitate negotiations and resolve debtor-creditor and inter-creditor disputes.”

97. In response to a query as regards a reference to interim finance in subparagraph (c), it was stated that paragraph 175 of the draft commentary explained that term as distinct from post-commencement finance dealt with in the Guide. The proposal to replace the current wording with the following text “priority status to any new financing that facilitates the restructuring” received broad support. In the light of alternative terms suggested for the term “new financing”, e.g., to use instead the term “new financial assistance”, the Working Group asked the Secretariat to find the most appropriate term.

98. It was agreed that the focus of the subparagraph would remain on pre-commencement finance and that the accompanying commentary, building on paragraph 175 of the draft commentary, would elaborate on additional points related to such finance, including on safeguards and priority. It was understood that in doing so, MSEs specifics would be kept in mind and cross-references to the relevant discussion in paragraphs 160 and 167–169 of the draft commentary would be included.

99. Concerns were expressed about a suggestion that creditors might be treated differently depending on whether they extended pre-commencement finance under the approved debt restructuring plan or otherwise. Importance of verification of the pre-commencement finance to ascertain that it was indeed new and useful for debt restructuring negotiations and restoring viability of business was emphasized. It was also considered important to elaborate in the commentary on protection of creditors.

Additional recommendations on zero-asset proceedings

100. It was explained that zero-asset proceedings might fall under the existing draft recommendation 8 or 9 or be subject to a separate recommendation depending on the situation. It was considered that further simplification and inclusion of a separate recommendation building on draft recommendation 8(l) would be justifiable for “no

income no asset no fraud" cases. Speed and funding were cited as two main issues to be addressed in that context and different ways of addressing them were proposed. It was noted that more complex cases, e.g., those raising the need for investigation and possible avoidance, might be subject to draft recommendation 8 or 9 or standard insolvency proceedings. The role of the competent authority or the independent party for screening which zero-asset cases should be subject to which proceedings was emphasized.

101. The Secretariat was requested, in preparing the commentary on that topic, to draw on the discussion in the Guide of insufficient asset cases and ensure the balance in discussion of safeguards against possible risks of abuse of zero-asset proceedings, for example through their repetitive use. The impact of the effective discharge mechanisms on the speed and costs of zero-asset proceedings was explained. Concerns were expressed about creating perverse incentives for the use of zero-asset proceedings, for example if faster discharge mechanisms for zero-asset proceedings would be envisaged.

B. Comments on the terms in the draft glossary

"Competent authority"

102. A proposal was made to replace the current draft definition of that term with the following text, which aimed at focusing on functions that need to be performed by the competent authority in the context of a simplified insolvency regime and providing more flexibility to States, recognizing that they had different systems for administration of insolvency proceedings:

> "'Competent authority' is the authority in which the State has vested conduct or oversight of simplified insolvency proceedings; it can be a standing body, an administrative office or agency, or a court or court-based official. The competent authority is responsible for the independent oversight and integrity of simplified liquidation and simplified reorganization proceedings.
>
> (i) The functions of the competent authority include: performing oversight of commencement, continuation and termination of the proceeding; verifying the accuracy of information in the MSE's application to commence the proceeding and disclosure of its assets, liabilities and recent transactions; developing the liquidation schedule [plan] or simplified reorganization plan or providing assistance to the MSE to do so; ensuring effective notice has been given to creditors and other parties with an interest in the proceeding; impartial evaluation of creditors' claims; receiving and investigating creditors' objections; making decisions in respect of deemed approval of the proposed liquidation or reorganization; and, where necessary, liquidating the assets and distributing any value to creditors.
>
> (ii) States may choose to authorize the competent authority to perform all these functions, and may assign different tasks to different offices or individuals within the authority. States may also opt to assign some of these functions to insolvency professionals or other qualified independent individuals where the insolvency estate has assets to pay for such services or the competent authority has funds available to pay for such assistance; however, the competent authority would remain responsible for the oversight and integrity of the simplified proceeding."

103. Broad support was expressed for the proposed definition as ensuring a functional and neutral approach to defining the term. Several amendments were proposed to the text and the Working Group was invited to consider additional issues related to that definition.

104. In particular, it was suggested that subparagraph (i) should be made illustrative by using such words as "typically include" or "inter alia include". Possible additional

functions of the competent authority, such as those related to the recovery of assets, adjudication and relief, were suggested for consideration. Concern was expressed that some functions listed, such as those related to oversight and liquidation, might give rise to conflicts of interest.

105. With respect to subparagraph (ii), it was proposed to add the words "an independent party, who may also be an insolvency professional" in the second sentence after the words "to assign some of these functions to". Another suggestion was to shorten subparagraph (ii) by replacing the part starting with the words "insolvency professionals" in the second sentence with the words "independent party" and defining that term separately (see para. 109 below).

106. Concern was expressed that subparagraph (ii) implied that sources of funding to pay for services of third parties would be limited to the insolvency estate and public funds. Reference in that respect was made to paragraph 32 of the draft commentary that also referred to pro bono services. Generally, it was considered that the issue of funding should be left to States and should be treated with caution so as not to inadvertently discourage States to adopt a simplified insolvency regime because of concerns over additional public expenses.

107. The view was expressed that only the chapeau from the proposed definition should be kept in the draft glossary, expanded with the provision envisaging delegation of competent authority's powers to the independent party or insolvency representative, while the rest of the proposed text could be used for formulating specific recommendations and commentary on the role and functions of the competent authority and independent party. The other view was that subparagraphs (i) and (ii) should be retained in the definition.

108. The Working Group requested the Secretariat to amend the proposed definition reflecting views expressed.

"Independent party"

109. It was suggested that the term "independent party" should be defined alongside the term "competent authority" and the definition of that term could build on some elements contained in subparagraph (ii) of the proposed definition of the "competent authority" (see para. 102 above). It was considered important to delineate functions of the independent party as distinct from those of the competent authority and the insolvency representative and to ensure its functional independence and impartiality vis-à-vis the debtor, creditors and the competent authority as well as absence of conflicts of interest. It was also considered that such party might be expected to exercise its discretion in performing functions entrusted to it by law or the competent authority, and should therefore not be treated as a simple representative of the competent authority. It was proposed to clarify in the text those issues as well as who can serve as an independent party and remuneration for its services.

110. The other view was that no definition of "independent party" was required. It was considered unnecessary to use that term in the text in the light of the newly introduced definition of "competent authority". Unless distinct functions not covered by that definition were envisaged for the independent party, such as mediation, it was broadly considered that the independent party would be treated as an arm of the competent authority. An additional consideration was raised that introduction of that concept, which was new to most jurisdictions, would cause confusion and uncertainties, including as regards means of ensuring independent party's remuneration, independence and impartiality. Those complexities were considered unnecessary in the context of simplified insolvency regime in particular taking into account that the competent authority would in any event be in the position to engage third-party services when they were required.

111. The Working Group deferred its decision on desirability of including a separate definition of the "independent party" in the light of different views expressed on that point in the Working Group.

C. Comments on the draft commentary

112. A suggestion was made that the section of the draft commentary entitled "Scope" should reiterate that the text did not attempt to define MSEs eligible for access to simplified insolvency regime leaving that issue to States.

V. Other business

113. The Working Group was informed that the World Bank Group intended to finalize its work on a new standard related to MSE insolvency in May 2020.

114. The Working Group recalled its request at its fifty-fourth session to the Secretariat to prepare materials that would explain to enacting States how three UNCITRAL model laws in the area of insolvency law could be enacted alongside each other (A/CN.9/966, para. 109). The Working Group noted that the Commission endorsed that request at its fifty-second session, in 2019.[4] Several delegations informed the Working Group about their efforts to draft a text that would consolidate those three UNCITRAL model laws. Reference was also made to the technical assistance work being undertaken in the area of insolvency law at a regional level in one region. It was suggested that the relevant information might be shared with the Secretariat, if necessary, to assist it with the implementation of the project.

[4] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 222(b).