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Draft legislative guide on insolvency law

Note by the Secretariat

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* The submission of this document was late because of the need to accommodate the completion of consultations

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Background remarks

1. The Commission, at its thirty-second session (1999), had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law. That proposal had recommended that, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that have expertise and interest in the law of insolvency, the Commission was an appropriate forum for the discussion of insolvency law issues. The proposal urged that the Commission consider entrusting a working group with the development of a model laws on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

2. Recognition was expressed in the Commission for the importance to all countries of strong insolvency regimes. The view was expressed that the type of insolvency regime that a country had adopted had become a "front-line" factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work on an international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, the fear was expressed that the work might not be brought to a successful conclusion. It was said that a universally acceptable model law was in all likelihood not feasible and that any work needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

3. To facilitate that further study, the Commission decided to convene an exploratory session of a working group to prepare a feasibility proposal for consideration by the Commission at its thirty-third session. That session of the Working Group was held in Vienna from 6 to 17 December 1999.

4. At its thirty-third session in 2000 the Commission noted the recommendation that the Working Group had made in its report (A/CN.9/469, para. 140) and gave the Group the mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.

5. It was agreed that in carrying out its task the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), INSOL International (INSOL) (the International Federation of Insolvency Professionals) and Committee J of the Section on Business Law of the International Bar Association (IBA). In order to obtain the views and benefit from the expertise of those organizations, the Secretariat, in cooperation with INSOL and the IBA organized the UNCITRAL/INSOL/IBA Global Insolvency Colloquium in Vienna, from 4-6 December 2000.

6. At its thirty-fourth session in 2001, the Commission had before it the report of the Colloquium (A/CN.9/495).

7. The Commission took note of the report with satisfaction and commended the work accomplished so far, in particular the holding of the Global Insolvency Colloquium and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, in particular with respect to the form that the future work might take and interpretation of the mandate given to the Working Group by the Commission at its thirty-third session. The Commission confirmed that the mandate should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide. In order to avoid the legislative guide being too general or too abstract to provide the required guidance, the Commission suggested that the Working Group should bear in mind the need to be as specific as possible in developing its work. To that end, model legislative provisions, even if only addressing some of the issues to be included in the guide, should be included as far as possible.

8. The twenty-fourth session of the Working Group on Insolvency Law, which was held in New York from 23 July to 3 August 2001, commenced consideration of that work with the first draft of the legislative guide on insolvency law. The report of that meeting is contained in document A/CN.9/504. Work continued at the twenty-fifth session in Vienna from 3-14 December 2001, the report of which is contained in document A/CN.9/507.

9. This note sets forth the draft recommendations that will form a part of the Legislative Guide. Both the text and the order of the recommendations have been revised in light of the discussion of the Working Group at its twenty-fifth session. The order of the recommendations follows document A/CN.9/WG.V/WP.61/Add.2 which sets forth a revised structure for chapter and section headings according to which the commentary contained in documents A/CN.9/WG.V/WP.57 and 58 will be revised.

10. Recommendations in this Note have been numbered sequentially from (1) to (139) for ease of discussion. References to relevant paragraphs from the commentary contained in documents A/CN.9/WG.V/WP.57 and 58 are indicated in the chapter and section headings of the recommendations. New sections are also indicated in that manner.

11. The version of the glossary and commentary of the draft Guide that will be available to the Working Group is that contained in documents A/CN.9/WG.V/WP.57 and 58. A revised version of the complete draft Legislative Guide on insolvency law (including glossary, commentary and recommendations) will be prepared for consideration by the Working Group at its twenty-seventh session in Vienna, December 2002.

Draft legislative guide on insolvency law

Effective and efficient insolvency regimes

Part one. Key objectives [A/CN.9/WG/V/WP.57, pp11-12]

Recommendations

(1) The insolvency law[1] should provide both for reorganization of viable businesses and for efficient liquidation of nonviable businesses and those businesses where liquidation is likely to produce a greater return to creditors.

(2) The insolvency law should be transparent and predictable and facilitate easy access to insolvency processes by reference to clear and objective criteria.

(3) The insolvency regime should treat similarly situated creditors [equitably][equally].

(4) The insolvency law should be orderly and prevent premature dismemberment of the debtor's assets by individual creditor actions to collect individual debts.

(5) The insolvency law should require that adequate information be made available in respect of the debtor's situation to enable those supervising the process to assess its financial situation and determine the most appropriate solution.

(6) The insolvency law should recognize and respect existing creditor rights and establish clear and predictable rules for ranking the priorities of both existing and post-commencement creditor claims.

(7) The insolvency law should provide rules on cross-border insolvency, including recognition of foreign proceedings, by adopting the UNCITRAL Model Law on Cross-Border Insolvency.

Part two. Core provisions

I. Introduction

A. Types of insolvency procedures

B. Structure [organization] of the insolvency regime

Relationship between different types of proceedings

(8) The insolvency regime should address the balance to be struck between liquidation and reorganization, and the relationship between these different processes in

[1] The term "law" is intended to refer to a legislative regime for insolvency. All recommendations are directed towards provisions to be included in that insolvency legislation.

the insolvency regime. Where that structure includes liquidation and reorganization as distinct procedures which may be separately [initiated] [commenced], the insolvency regime should provide for conversion between these proceedings.

Conversion of proceedings [New section: see A/CN.9/WG.V/WP.57, paras. 50-57]

Purpose

The purpose of provisions on conversion between reorganization and liquidation procedures is:

(a) to provide easy access to the procedure most suited to resolution of the financial situation of the debtor;
(b) to facilitate the avoidance of abuse of the insolvency process;
(c) to ensure that the protections of the insolvency law continue to apply to the debtor until its financial difficulties are resolved.

Recommendations

(9) A debtor may convert a liquidation proceeding to a reorganization proceeding unless the proceeding was previously converted from a reorganization proceeding.

(10) Provisions should be included to enable conversion between reorganization, and liquidation and the law should establish the circumstances in which conversion may be appropriate, including:

(a) where reorganization proceedings are commenced by the debtor in order to avoid or delay liquidation [where the debtor is found to have no honest intention in commencing reorganization];
(b) where the debtor fails to cooperate with the insolvency representative in the conduct of reorganization proceedings or otherwise fails to observe its obligations under the insolvency law;[2]
(c) where there is a continuing loss of assets and value and no prospect of reorganization;
(d) where the reorganization plan has been rejected by the creditors or denied confirmation by the court; or
(e) where the debtor is unable to implement the plan.

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[2] This would include failure to prepare a plan within the specified time period where this is an obligation of the debtor under the insolvency law.

II. Application for and commencement of insolvency proceedings

A. Eligibility and jurisdiction [A/CN.9/WG.V/WP.58, paras. 1-9]

Purpose

The purpose of provisions on eligibility and jurisdiction is to establish:

(a) which types of debtors can be subject to the [general] insolvency law;
(b) which types of debtors may be excluded from the [general] insolvency law;
(c) which debtors have sufficient connection to a State to be subject to its insolvency laws.

Recommendations

Eligibility

(11) The insolvency law should govern insolvency proceedings of all debtors, including State-owned enterprises, which engage in commercial activities.

(12) Exclusions from the application of the [general] insolvency law should be limited and clearly identified in the law.[3]

Jurisdiction

(13) The insolvency law should specify that a debtor can be subject to an insolvency proceeding if:

(a) the debtor has its centre of main interests in the State; or

(b) the debtor has [its] [an] establishment[4] in the State.

(14) In interpreting the phrase "centre of main interests", the insolvency law should provide a presumption that, in the absence of proof to the contrary, a legal person's centre of main interests is in the State in which it has its registered office, and a natural person's centre of main interests is in the State in which it has its habitual residence.

(15) The insolvency law should clearly indicate which court has jurisdiction over insolvency proceedings and over matters arising in the conduct of insolvency proceedings.

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[3] Highly regulated entities such as banks and insurance companies may require specialized treatment which can appropriately be provided in a separate insolvency regime or through special provisions in the general insolvency law. Where a special regime or special provisions have been developed, those entities may be excluded from the provisions of the general insolvency regime.

[4] "Establishment" should be defined to mean any place of operations where the debtor carries out non-transitory economic activity with human means and goods or services: UNCITRAL Model Law on Cross-Border Insolvency art. 2(f).

B. Application and commencement criteria [A/CN.9/WG.V/WP.58, paras. 10-39]

Purpose

The purpose of provisions on application and commencement criteria is to:

(a) facilitate access for debtors and creditors to the remedies provided by the insolvency law;
(b) establish application and commencement criteria that are transparent and certain;
(c) enable applications for insolvency proceedings to be made and dealt with in a speedy, efficient and inexpensive manner;
(d) establish effective requirements for notification of commencement of proceedings;
(e) establish basic safeguards to protect both debtors and creditors from improper use of the [insolvency law] [the application procedure].

Recommendations

Eligibility for application

(16) The insolvency law should provide that an application to commence insolvency proceedings is to be made to the [appropriate] [specified] court and clearly state who may make an application. This should include the debtor and creditors.

Commencement criteria

(17) The criteria for commencement of insolvency proceedings should be:

(a) in the case of a debtor application, that the debtor is or will be unable to pay its mature debts [or alternatively, that its liabilities exceed the value of its assets];
(b) in the case of a creditor application, that the debtor is unable to pay its mature debts [or alternatively, that its liabilities exceed the value of its assets].

(18) The insolvency law should provide that if the debtor fails to pay one or more of its mature debts, the debtor is presumed to be unable to pay its debts.[5]

Commencement on debtor application

(19) Where the application for commencement is made by the debtor, proceedings should be commenced by either:

(a) the application functioning as automatic commencement of proceedings; or

[5] Where the debtor has not paid a mature debt and the creditor has obtained a judgement against the debtor in respect of that debt, there would be no need for a presumption to establish that the debtor was unable to pay its debts.

(b) the court, which should be required to promptly determine whether the insolvency proceeding should be commenced.

Commencement on creditor application

(20) Where the application for commencement is made by a creditor, the insolvency law should require that:

(a) notice of the application promptly be given to the debtor;
(b) the debtor be given the opportunity to respond to the application; and
(c) the court promptly determine whether the insolvency proceeding should be commenced.

Notification of commencement

(21) Notice of the commencement of insolvency proceedings should be given to creditors and published in [*a publication such as the official government gazette or a widely circulated national newspaper*].

(22) Known creditors should be notified individually, unless the court considers that, under the circumstances, some other or additional form of notification would be more appropriate. The notification to creditors should specify:

(a) any applicable time period for submitting a claim, the manner in which the claim should be made and the place at which the claim can be submitted;
(b) the procedure and any form requirements necessary for submitting a claim; and
(c) the consequences of the failure to submit a claim.

(23) The insolvency law should allow the court to deny an application or refuse to commence proceedings if the court determines that:[6]

(a) the application is an improper use of the insolvency law; or
(b) in an application for liquidation, [that the debtor is solvent] [that the commencement criteria have not been met].

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[6] In certain circumstances it may be appropriate for the proceedings, once commenced, to be converted from liquidation to reorganization or from reorganization to liquidation: see chapter I section B.

III. Treatment of assets on commencement of insolvency proceedings

A. Assets to be affected [A/CN.9/WG.V/WP.58, paras. 40-45; 50]

Purpose

The purpose of provisions relating to assets affected by the commencement of insolvency proceedings is to:

(a) identify those assets that will constitute the insolvency estate;
(b) indicate the manner in which rights in those assets will be affected by the commencement of insolvency proceedings;
(c) identify those assets that will specifically be excluded from the insolvency estate;
(d) indicate the manner in which assets owned by third parties and assets subject to a security interest will be affected by the commencement of insolvency proceedings.

Recommendations

Assets constituting the insolvency estate

(24) The assets constituting the insolvency estate should include:

(a) assets owned by the debtor, including both tangible and intangible assets, irrespective of whether they are in the possession of the debtor and whether they are subject to a security interest in favour of a creditor [*determined in accordance with the propertyand secured transactions law of the State*]; and
(b) assets acquired after commencement of the insolvency proceedings.

Assets that may be excluded - natural persons

(25) Where the debtor is a natural person, the insolvency law should specify the assets to be excluded from the insolvency estate, specifically those required to preserve the personal rights of the debtor, which may include assets acquired after commencement of the insolvency proceedings.

B. Protection and preservation of the insolvency estate [A/CN.9/WG.V/WP.58, paras. 53-79; 81-83]

Purpose

The purpose of provisions on protection and preservation of the insolvency estate is to:

(a) provide for the application of measures that will ensure the assets are not diminished by the actions of the [various interested parties] [debtor, creditors or third parties];
(b) determine the scope of those measures and the parties to whom they will apply;
(c) establish the conditions for application of those measures, including method, time and duration of application;
(d) establish the grounds for relief from the application of those measures.

Recommendations

Provisional measures

(26) The insolvency law should provide that the court may grant relief of a provisional nature, at the request of any interested party, [where relief is urgently needed to protect the assets of the debtor or the interests of the creditors,] between the filing of an application to commence an insolvency proceeding and commencement of the proceedings, including:

(a) staying execution against the debtor's assets;
(b) entrusting the administration of realization of all or part of the debtor's assets to an interim insolvency representative or other person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
(c) any other relief mentioned in recommendation (28)(c).

(27) Where provisional measures of the kind referred to in recommendation (26) are granted by the court they should terminate when the measures referred to in recommendation (28) take effect.

Measures automatically applicable on commencement[7]

(28) Upon the commencement of an insolvency proceeding, the insolvency law should provide that:

(a) commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities [except to the extent those individual actions or proceedings are considered necessary by the court to preserve or quantify a claim against the debtor] are stayed;
(b) execution against the debtor's assets is stayed; and

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[7] See Art. 20 UNCITRAL Model Law on Cross-Border Insolvency.

(c) the debtor's right to transfer, encumber or otherwise dispose of any assets is suspended.[8]

Discretionary measures on commencement[9]

(29) The insolvency law should provide that, where necessary to protect the interests of the creditors, assets of the debtor, or the ability to reorganize the debtor's business, the court may, following the commencement of an insolvency proceeding, grant additional relief.

Time and duration of application

(30) The insolvency law should clearly state the specific time at which measures referred to in recommendations (26) and (28) become effective.[10]

(31) The insolvency law should provide that the measures applicable on commencement of insolvency proceedings (of the kind referred to in recommendation (28)), will apply (subject to recommendation (32)):

(a) for the duration of the insolvency proceedings;
(b) in respect of secured creditors in a liquidation proceeding, for a period of [30-60] days, unless the court extends that period [for an additional […] day period] upon a showing that:
  (i) an extension is necessary to maximize the value of assets for the benefit of creditors; and
  (ii) the secured creditor will not suffer unreasonable harm as a result of an extension;

Secured creditors

(32) The insolvency law should provide that a secured creditor is entitled to relief from the type of measures referred to in recommendation (28)(a) and (b) on grounds that may include:

(a) that the economic value of the secured asset is eroding [or the asset is not protected against the erosion of its value];
(b) that the secured asset has no value to the estate and is not necessary either to a reorganization of the debtor's business or a sale of the business as an ongoing business concern;
(c) that there is no reasonable prospect for a reorganization of the debtor's business;
(e) that, in reorganization, the plan is not approved within […] days.

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[8] The limitation on the debtor's right to transfer or dispose of property may be subject to an exception for those cases where the continued operation of the business by the debtor is authorised and the debtor can transfer, encumber or otherwise dispose of assets in the ordinary course of business.

[9] See Art. 21 UNCITRAL Model Law on Cross-Border Insolvency.

[10] E.g. at the time of the making of the order, retrospectively from the commencement of the day on which the order is made or some other specified time.

(33) Protection against diminution of the value of secured assets may be provided by cash payments, provision of additional security or such other means as the court determines will provide such protection.

Modification or termination of measures

(34) The insolvency law should provide that the court may, at the request of the insolvency representative or any person affected by measures of the kind referred to in recommendations (26) and (28), or at its own motion, modify or terminate those measures.

C. Use and disposition of assets [New section: A/CN.9/WG.V/WP.58, paras. 46-49; 51; 80; 115]

Purpose

The purpose of provisions on use and disposition of assets is to:

(a) address the manner in which assets may be used and disposed of in the insolvency proceedings, including methods for sale of assets;
(b) establish the limits to powers of use and disposition;
(c) provide for the abandonment of burdensome assets and for the surrender of unprofitable securities.

Recommendations

(35) When continued operation of the business of the debtor is authorized under liquidation or reorganization, the insolvency law should:

(a) permit the insolvency representative to sell or lease property in the ordinary course of business;
(b) permit the insolvency representative to use, sell or lease property other than in the ordinary course of business, subject to approval by [the court] [creditors] [and in accordance with recommendations on the use of secured assets and third-party assets].

Assets subject to security interests and third party-owned assets

(36) Assets subject to security interests [secured assets] and assets owned by a third party that are in the possession of the debtor at the date of commencement may be used by the insolvency representative where those assets [will be of benefit to][are necessary for] the conduct of the insolvency proceedings.[11]

Abandonment and surrender

(37) The insolvency law should permit the insolvency representative to abandon any assets that are burdensome to the estate or that are not of benefit to the estate.

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[11] The use of these assets will be subject to other provisions of the insolvency law including those relevant to treatment of contracts, avoidance and […].

(38) The insolvency law should permit the insolvency representative to surrender assets subject to a valid security interest to the secured creditor where the asset is determined to be of no value to the insolvency estate or cannot be realised in a reasonable period of time by the insolvency representative.

Methods for sale of assets

(39) The insolvency law should provide for methods of sale that will maximize the value of the assets being sold, permitting both public auctions and private sales and requiring that adequate notice of any sale be provided to creditors. Private sales may be subject to supervision by the court or approval by creditors.

[Ability to sell free and clear of security interests, charges and other encumbrances

(40) The insolvency law may permit the insolvency representative to sell assets of the insolvency estate free and clear of any interest of an entity other than the estate, subject to certain conditions. These may include that law other than insolvency law permits such a sale; the entity consents; the priority of interests in the proceeds of sale of the asset is preserved; […].]

D. Treatment of contracts [A/CN.9/WG.V/WP.58, paras. 84-114]

Purpose

The purpose of provisions on treatment of contracts is to:

(a) establish the manner in which contracts that have not or not fully been performed by either the debtor and its counterparty should be addressed in the insolvency law, including the relationship between the insolvency law and general contract law, with the objective of maximizing the value and reducing the liabilities of the estate;
(b) define the scope of the powers to deal with those contracts and the situations in which those powers may be exercised;
(c) identify the contracts that should be excluded from the exercise of those powers.

Recommendations

(41) The insolvency law should address the treatment of contracts that have not or not fully been performed by either the debtor and its counterparty.

(42) The insolvency law may render unenforceable as against the insolvency representative any contract provision that would provide a right to terminate a contract upon, or identify as an event of default:

(a) the commencement of, or application for commencement of, insolvency proceedings; or
(b) the appointment of an insolvency representative.

Continuation

(43) The insolvency law should provide that the insolvency representative can [elect to] continue a contract where continuation would be beneficial to the insolvency estate.

(44) In the period after the commencement of an insolvency proceeding, and before a contract is continued or rejected, if the counterparty has performed to the benefit of the insolvency estate, the insolvency law should provide that the benefits conferred upon the insolvency estate pursuant to the contract are payable as an expense of administering the estate.[12]

(45) Where a contract is continued, the insolvency law should provide that damages for the subsequent breach of that contract should be payable as an expense of administering the estate.

Continuation of contracts where debtor in breach

(46) Where the debtor [is in default under][has breached] a contract, and the insolvency representative seeks to continue that contract, the insolvency law may take different approaches to the issue of curing the breach:

> (a) the insolvency representative may have the power to [elect to] continue that contract, provided the default is cured and the non-breaching counterparty is returned to the position it was in before the breach, and the insolvency representative gives appropriate assurances as to the [debtor's][insolvency estate's] ability to perform under the continued contract;
> (b) the insolvency representative may have the power to [elect to] continue that contract without having to cure the breach, provided the insolvency representative gives assurance as to satisfaction of post-commencement claims arising from the contract. The counterparty [should submit][will have] a pre-commencement claim in respect of the default.

Rejection

(47) The insolvency law should provide that the insolvency representative can elect to reject a contract.

(48) Where a contract is rejected, the insolvency law should provide that the rejection gives rise to a [ordinary unsecured] [pre-commencement] claim for the damages arising from the rejection, which would be determined in accordance with the general rules on damages. [Claims relating to the rejection of a long-term contract may be limited by the insolvency law.]

Timing of continuation and rejection

(49) Where the insolvency representative elects to reject a contract, the insolvency law should indicate the date on which the rejection will be effective.

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[12] See chapter V section C.

(50) The insolvency law may provide a time limit within which the insolvency representative is to act to elect to continue or reject a contract, which time period may be extended by the court. The insolvency law may specify the consequences of the failure of the insolvency representative to act.

Assignment of contracts

Variant A

(51) [The insolvency law need not provide rules relating to assignment of contracts if this issue is addressed by other law, such as general contract law, and it is considered that such issues should be determined by the application of that other law.]

(52) Where it is considered desirable to have special provisions relating to assignment of contracts in the insolvency law, the insolvency law might provide that the insolvency representative can [elect to] assign a contract that has been continued.

(53) Where the counterparty objects to assignment of a contract, the insolvency law may provide that the court can nonetheless approve the assignment [if] [provided]:

(a) the assignee can perform the contractual obligations;
(b) the counterparty [does not suffer unreasonable harm as a result of] [is not disadvantaged by] the assignment;
(c) the assignment is necessary for the reorganization of the debtor.

Variant B

(51) The insolvency law [may][should] provide that the insolvency representative can [elect to] assign a contract that has been continued.

(52) Where the counterparty objects to assignment of a contract, the insolvency law may provide that the court can nonetheless approve the assignment [if] [provided]:

(a) the assignee can perform the contractual obligations;
(b) the counterparty [does not suffer unreasonable harm as a result of] [is not disadvantaged by] the assignment;
(c) the assignment is necessary for the reorganization of the debtor.

Special treatment of certain contracts

(54) The insolvency law may provide special rules for the treatment of labour and […] contracts.[13]

[13] For treatment of financial and related contracts, see chapter III section F.

Review of decisions concerning treatment of contracts

(55) The insolvency law should permit interested parties to seek judicial review of decisions taken by the insolvency representative with respect to continuation and rejection. Grounds for review may include: […].[14]

E. Avoidance actions [A/CN.9/WG.V/WP.58, paras. 142-151]

Purpose

The purpose of avoidance provisions is to:

(a) preserve the integrity of the estate and the fair treatment of creditors;
(b) establish the circumstances in which transactions [occurring] prior to the commencement of insolvency proceedings involving the debtor may be considered injurious and therefore subject to avoidance;
(c) enable the insolvency representative to take proceedings to avoid those transactions;
(d) facilitate the recovery of money or assets from persons involved in transactions that have been avoided.

Recommendations

(56) The insolvency law should include provisions which apply retrospectively and are designed to overturn past transactions to which the debtor was a party and which have the effect of either reducing the net worth of the debtor or of upsetting the principle of fair treatment of creditors.

Transactions subject to avoidance

(57) The insolvency law should provide that the insolvency representative may commence proceedings in court to set aside as void the following types of transactions:

(a) transactions intended to defeat, delay or hinder the ability of creditors to collect claims by transferring assets to any third party where the third party knew of that intent (fraudulent transactions);
(b) transactions where a transfer of an interest in property or the undertaking of an obligation by the debtor was made in exchange for a nominal or less than

[14] NOTE TO THE WORKING GROUP: The Working Group may wish to consider whether this type of provision should be included under each topic heading (see for e.g. recommendations (64), (83)) or as a general provision perhaps under chapter IV, section B on "The Insolvency Representative" along the following lines:
The insolvency law need not provide rules relating to the right of interested parties to seek review of decisions taken by the insolvency representative in the administration of the proceedings if that right to review exists under other law and it is considered that that issue should be determined by the application of that other law. Where it is considered desirable for reasons of clarity and transparency to include special provisions in the insolvency law, the insolvency law might provide also the grounds upon which such a review might be sought.

equivalent value (undervalued transactions) which occurred at a time when the debtor was insolvent or as a result of which the debtor became insolvent; and

(c) transactions involving creditors where the creditor obtains more than its pro rata share of the debtor's assets (preferential transactions) which occurred at a time when the debtor was insolvent.

Establishing the suspect period

(58) The insolvency law should establish that a transaction with the characteristics described in recommendation (57) may be set aside if it occurred within a specified period (the suspect period) [prior to] [calculated retrospectively from] the [application for] commencement of the insolvency proceeding. The insolvency law may specify different suspect periods for different types of transactions.

Time limitations on commencement of avoidance actions

(59) Following commencement of the insolvency proceedings the period within which an avoidance action may be commenced in respect of a transaction of which the insolvency representative is aware, may be limited by the insolvency law or by applicable procedural law.

Evidentiary issues

(60) The insolvency law should specify the elements to be proved in order to establish a case for avoidance and also possible defences to those actions.

Related person[15] transactions

(61) The insolvency law should provide that the insolvency representative may commence proceedings in court to set aside as void undervalued and preferential transactions involving related persons.

(62) The insolvency law should clearly establish the suspect period for the types of transactions referred to in recommendation (61), which would generally be longer than the time periods applicable to both undervalued and preferential transactions that do not involve related persons.

(63) The insolvency law may provide that special evidential presumptions apply in the case of avoidance actions against related persons.

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[15] NOTE TO THE WORKING GROUP: The Working Group may wish to consider including the term "related party" in the glossary, with a definition along the following lines: a related person means a person who is or has been a director or officer of a corporation in liquidation, a shareholder or member of such corporation, a director or officer or shareholder of a corporation that is related to the corporation in liquidation, and includes any relative of such a person; a "relative" in relation to a related person means the spouse, parent, grandparent, son, daughter, brother or sister of the related person.

Pursuit of avoidance actions

(64) The insolvency law may provide alternative approaches to address situations where the insolvency representative does not pursue an avoidance action either on the basis of an assessment that the action is not likely to succeed or that it will impose costs upon the insolvency estate. These approaches may include permitting individual creditors or the creditor committee to pursue the actions and allowing the creditor(s) who pursue the action to retain an amount of any sum recovered towards satisfaction of their claim, or to pay the costs of the action from the insolvency estate in the event that the action is successful or to change the priority of the claim of the creditor pursuing the action.

Review of decisions concerning avoidance

(65) The insolvency law should permit interested parties to seek judicial review of decisions taken by the insolvency representative with respect to avoidance. Grounds for review may include: […].

F. Financial contracts: netting and set-off [A/CN.9/WG.V/WP.58, paras. 116-123]

(66) In general, netting and close-out arrangements should be legally protected and should, to the greatest extent possible, not be unwound.

(67) A pre-commencement right of set-off existing under general law should be protected during liquidation proceedings and generally should be exercisable by both creditors and the insolvency estate. Moreover, the law should also permit post-commencement set-off if the mutual claims arise under the same [transaction] [agreement]. In addition, countries may also wish to consider allowing for post-commencement set-off in other circumstances, particularly with respect to mutual financial obligations which derive from financial contracts[16] defined by law.[17]

(68) In countries where post-commencement set-off is not permitted for mutual financial obligations or where the insolvency representative is able to interfere with contract termination provisions, it may be necessary to make an exception to these rules so that "close-out netting" provisions contained in financial contracts between the debtor and another party can be applied with certainty.[18]

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[16]The definition from the United Nations Convention on Assignment of Receivables in International Trade, 2001, Art. 5(k) provides: "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above.

[17] IMF: Orderly and Effective Insolvency Procedures, 1999: Principal Conclusion p43.

[18] ibid., p44.

IV. Participants and institutions

A. The debtor [A/CN.9/WG.V/WP.58, paras. 152-170]

Purpose

The purpose of provisions concerning the debtor is to:

(a) establish the rights and obligations [responsibilities] of the debtor [and persons associated with the debtor] during the continuation of the insolvency proceedings;
(b) address the remedies available for failure of the debtor to meet its obligations;
(c) address issues relating to management of the debtor in both liquidation and reorganization.

Recommendations

Right to be heard

(69) The insolvency law should provide that [in both liquidation and reorganization proceedings,] the debtor has a right to be heard in the proceedings.

Right to participate and request information

(70) The insolvency law may also provide that the debtor is entitled to participate in insolvency proceedings, particularly reorganization proceedings, and to request information from the insolvency representative and the court.

Obligations

(71) The insolvency law should clearly identify the debtor's obligations in respect of both liquidation and reorganization proceedings. The debtor's obligations should include:

(a) to co-operate with and assist the insolvency representative to perform its duties;
(b) to provide accurate, reliable and complete information relating to its financial position and affairs that might reasonably be requested by the court, the insolvency representative or the creditor committee;
(c) to enable the insolvency representative to take effective control of the insolvency estate;
(d) to prepare a list of creditors and their claims in cooperation with the insolvency representative and revise and amend the list as claims are processed.

Confidentiality

(72) Where information provided by the debtor is commercially sensitive, appropriate provisions to protect confidentiality should apply, whether set forth in the insolvency law or applicable procedural law.

Continued operation of the debtor's business

(73) The law should address the issue of the role to be played by the debtor in the continuing operation of the business. Different approaches may be taken, including:

(a) total displacement of the debtor from any role in the business and the appointment of an insolvency representative;
(b) limited displacement where the debtor may continue to operate the business on a day-to-day basis, subject to the supervision of an appointed insolvency representative, in which event the division of responsibilities between the debtor and the insolvency representative should be specified in the insolvency law;
(c) retention of full control of the business (debtor-in-possession) with no insolvency representative appointed, with provision for displacement of the debtor in specified circumstances.

Sanctions for failure to comply

(74) The insolvency law should provide sanctions for the debtor's failure to comply with the specified obligations.

B. The insolvency representative [A/CN.9/WG.V/WP.58, paras. 171-186]

Purpose

The purpose of provisions concerning the insolvency representative is to:

(a) specify the qualifications required for appointment as an insolvency representative;
(b) establish a mechanism for the appointment of insolvency representatives;
(c) define the powers and functions of the insolvency representative;
(d) provide for the liability, removal and replacement of an insolvency representative.

Recommendations

Qualifications

(75) The insolvency law may specify the qualifications and personal qualities required for appointment as an insolvency representative. Relevant criteria include that the insolvency representative is independent and impartial, has the requisite knowledge of relevant commercial law and experience in commercial and business matters.

Appointment

(76) The insolvency law should establish the mechanism for appointment of the insolvency representative on commencement of the proceedings. Different approaches may be taken, including appointment by the court; by an independent appointing authority; on the basis of a recommendation by creditors or the creditor committee; by

the debtor; or by operation of law, where the insolvency representative is a government or administrative agency or official.

Conflict of interest

(77) The insolvency law should require a person proposed for appointment as an insolvency representative to disclose circumstances that may lead to a conflict of interest or lack of independence.

Powers and functions

(78) The insolvency law should clearly specify the insolvency representative's powers and functions including:

(a) control of the inventory, collection, sale and distribution of assets;
(b) obtaining information concerning the debtor, its assets, liabilities, past transactions and […];
(c) ensuring the debtor's compliance with its obligations;
(d) assisting the debtor to prepare a list of creditors and their claims and ensuring that the list is revised and amended as claims are admitted;
(e) verification and admission of claims;
(f) management of the business in reorganization and in liquidation where the business is to be sold as a going concern;
(g) provision of information and reporting on the conduct of the proceedings;
(h) appointment and remuneration of professionals to assist the insolvency representative;
(i) general administration of the estate;
(j) other matters as determined by the court.

Liability

(79) The insolvency law should address the consequences, including possible personal liability for, or arising from, the insolvency representative's failure to perform or the performance of its powers and functions.

Removal and replacement

(80) The insolvency law should establish the circumstances in which the insolvency representative can be removed and the procedure for removal. Circumstances in which the insolvency representative may be removed include:

(a) for incompetence, negligence, failure to perform or failure to exercise the proper degree of care in the performance of its powers and functions;
(b) where it is found that the specific insolvency proceedings require a particular or different competency that the appointed representative does not have;
(c) where the insolvency representative has engaged in illegal acts; or
(d) where conflicts of interest arise in circumstances that would justify removal.

(81) The procedure for removal of the insolvency representative will reflect the manner in which the insolvency representative was appointed, but may include removal by the court on an application by the creditors or the creditors' committee; removal by

the court on its own motion; removal by the creditors where the creditors have appointed the insolvency representative and […].

(82) In the event of the death, resignation, inability to perform or removal of the insolvency representative, the insolvency law should provide for appointment of a successor.

Remuneration

(83) The insolvency law should provide for the remuneration of the insolvency representative, specify a mechanism for fixing that remuneration and establish priority for payment of that remuneration.

Judicial review

(84) [A general provision for review of decision taken by the insolvency representative e.g. on treatment of contracts, avoidance actions, admission of claims etc: see footnote 14]

C. Creditors [A/CN.9/WG.V/WP.58, paras. 192-212]

1. Categories of creditors and their claims

2. Participation of creditors in insolvency proceedings

Purpose

The purpose of provisions on participation of creditors in insolvency proceedings is to:

(a) establish the functions and responsibilities of the general body of creditors;
(b) provide for the participation in insolvency proceedings of the general body of creditors by the appointment of a creditor committee;
(c) provide a mechanism for the appointment of a committee;
(d) establish the functions and responsibilities of the creditor committee.

Recommendations

General body of creditors [assembly of creditors]

(85) The insolvency law should establish the powers and functions of the general body of creditors. These should include:

(a) approval or rejection of a reorganization plan;
(b) [involvement in] [advising on] issues referred by the insolvency representative.[19]

[19] These issues may include: advising on continuation of the business in liquidation, distribution of assets, post-commencement financing, compensation of professionals, treatment of judicial proceedings to which the debtor was a party at the time of commencement, distribution of assets, […].

(86) The insolvency law should specify the matters on which a vote of the general body of creditors is required and establish the relevant voting requirements.

(87) Creditors should have the right to be heard in the insolvency proceedings.

Creditor committee

(88) The insolvency law should provide for the general body of creditors to actively participate in the insolvency proceedings through a creditor committee. Where the interests and categories of creditors involved in the insolvency proceeding are diverse and participation will not be facilitated by the appointment of a single committee, the insolvency law may provide for the appointment of different creditor committees.

Creditors that may be appointed

(89) The insolvency law should specify the categories of creditors that may or may not be appointed to the committee. The creditors who [may] [should] not be appointed to the creditor committee would include related persons such as creditors related to the debtor (whether personally or as a director, manager or advisor of the debtor) and creditors with a personal interest in the affairs of the debtor where that interest has the potential to affect the creditor's impartiality in carrying out the functions of the committee (e.g. a competitor of the debtor).

Participation of secured creditors

(90) Where secured creditors have surrendered their security to the insolvency representative, the insolvency law should enable them to participate in the proceedings to the same extent as ordinary unsecured creditors. Where secured creditors rely on secured assets to pay part or all of their claims, the insolvency law should limit their participation in the proceedings.

Mechanism for appointment

(91) The insolvency law should establish the mechanism for appointment of the creditor committee. Different approaches may include selection of the creditor committee by the general body of creditors or appointment by the court or other administrative body.

Functions

(92) The insolvency law should establish the powers and functions of the creditor committee including:

(a) in both liquidation and reorganization proceedings, a general advisory function, providing advice and assistance to the insolvency representative;
(b) a supervisory function with respect to development of the reorganization plan, the sale of significant assets and in other matters as directed by the court or determined in cooperation with the insolvency representative;
(c) the right to be heard in insolvency proceedings.

Employment and remuneration of professionals

(93) The insolvency law should permit the creditor committee, subject to approval by [the court] [the general body of creditors], to employ and remunerate professionals that may be needed to assist the creditor committee to perform its functions.

Liability

(94) The insolvency law should provide that members of the creditor committee are exempt from liability for their actions in their capacity as members of the committee unless they are found, for example, to have acted fraudulently.

Removal and replacement

(95) The insolvency law should provide for removal and replacement of members of the creditor committee and specify the grounds, including [gross] negligence, [lack of the necessary skills], [incompetence or inefficiency].

Procedural rules for the committee

(96) The insolvency law may provide for the establishment of rules to govern the performance of the functions and decision making of the creditor committee, including rules relating to majorities and voting.

D. Institutional framework [New section]

Recommendations

(97) The insolvency law should address the institutional framework required for implementation of the insolvency law.

(98) To ensure that the insolvency law is applied with predictability, the insolvency law should provide adequate guidance on how the court or other body supervising the insolvency process should exercise its powers and functions under the insolvency law.

V. Management of proceedings

A. Treatment of creditor claims [A/CN.9/WG.V/WP.58, paras. 213-252]

Purpose

The purpose of provisions on treatment of creditor claims is to:

(a) define the claims that can be submitted;
(b) enable persons who have a claim against a debtor to make claims against the insolvency estate;
(c) establish a mechanism for verification and admission or rejection (in full or in part) of claims;
(d) provide for review of disputed claims;
(e) establish the treatment of particular claims, including those of secured creditors, foreign creditors, creditors whose claims are in a foreign currency, conditional or non-monetary claims, claims for interest, and claims in respect of non-mature liabilities.

Recommendations

(99) Claims that may be submitted should include all rights to payment which arise from acts or omissions by the debtor prior to commencement of the insolvency proceedings, whether mature or unmature, whether of a determined [liquidated] or undetermined [unliquidated] amount, whether fixed or contingent. The insolvency law should identify claims that will not be affected by the insolvency proceedings.[20]

Equal treatment

(100) The insolvency law should provide that all creditors, including foreign creditors, are treated equally with respect to the submission and treatment of claims.

Timing of claims

(101) The insolvency law should establish the time in which claims can be submitted, either:

(a) within a specified time after [the commencement of proceedings] [notice of commencement of proceedings]; or
(b) at any time prior to final distribution or at a specified time prior to the consideration of a reorganization plan.

Consequences of failure to claim

(102) The insolvency law should address the consequences that apply where a claim is not submitted within the specified time.

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[20] These claims may include, for example, fines and penalties and taxes. The claims will continue to exist and would not be included in any discharge.

Foreign currency claims

(103) In respect of foreign currency claims, the insolvency law should indicate whether the conversion of the claim into local currency would be determined by reference to the time of the application for or the commencement of insolvency proceedings.

Evidence of claims

(104) The insolvency law should provide that a creditor may be required to provide evidence of its claim to the court or alternatively, to the insolvency representative without having to personally appear.

Admission or rejection of claims

(105) The insolvency law should provide for admission or rejection of any claim, in full or in part, by the insolvency representative. Where the insolvency representative rejects a claim it should be required to give reasons for the rejection. Creditors whose claims have been rejected or disputed should have a right to review. An interested party may seek review of the admission of any claim.

Provisional admission

(106) To facilitate the conduct of the proceedings and in particular the voting of creditors, the insolvency law should provide that claims of undetermined value, secured claims and claims disputed in the insolvency proceedings can be provisionally admitted by the insolvency representative pending valuation of the claim, or resolution of the dispute by the court.

(107) Valuation of a claim may be undertaken by the insolvency representative or by the court. Where the valuation is made by the insolvency representative, it should be subject to review by the court where disputed by an interested party.

Effects of admission

(108) The insolvency law should establish the effect of admission, including provisional admission, of a claim. These effects may include:

(a) permitting the creditor to vote at a meeting of the general body of creditors, including on approval or rejection of a reorganization plan;
(b) determining the [class in which the creditor is entitled to vote] [the priority to which the creditor's claim is entitled];
(c) determining the amount for which the creditor is entitled to vote;
(d) except in the case of provisional admission of a claim, permitting the creditor to participate in a distribution.[21]

[21] However, when making a distribution, the insolvency representative should take account of claims which have been provisionally admitted, or submitted but not yet admitted: see recommendations on distribution.

Claims by related parties

(109) The insolvency law should specify the treatment to be accorded to claims by related parties. Different approaches may include:

(a) subjection of the claim to careful scrutiny;
(b) restriction of the voting rights of the related party;
(c) subordination of the claim;
(d) limitation of the amount of the claim.

B. Post-commencement finance and credit [A/CN.9/WG.V/WP.58, paras. 187-191]

Purpose

The purpose of provisions on post-commencement finance and credit is to:

(a) permit finance and credit to be obtained for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the assets of the debtor;
(b) provide appropriate protection for the providers of post-commencement finance;
(c) provide appropriate protection for those parties whose rights may be affected by the provision of post-commencement finance and credit.

Recommendations

(110) The insolvency law should permit the insolvency representative to obtain post-commencement finance where the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the assets of the debtor. The insolvency law may provide that authorization of the court is required.

(111) The insolvency law should permit the insolvency representative to obtain post-commencement credit where the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the assets of the debtor.

Security for post-commencement finance

(112) The insolvency law should enable security to be provided for repayment of post-commencement finance, including security on unencumbered assets and a junior or lower priority security on encumbered assets.

(113) The insolvency law should provide that a security over the assets of the debtor to secure post-commencement finance does not have priority ahead of any existing security over the same assets unless the insolvency representative notifies the existing security holder and obtains their agreement or follows the procedure in recommendation (114).

(114) The insolvency law should provide that where the holder of the existing security does not agree, the court may authorize the [granting] [creation] of that security provided specified conditions are satisfied, including:

(a) that the existing secured creditor has sufficient security in the assets that it will not [be harmed] [suffer unreasonable harm] by a priority given to the post-commencement finance;
(b) the secured creditor was given notice and the opportunity to be heard by the court;
(c) the debtor can prove that it cannot obtain the finance in any other way; and
(d) the interests of the existing security holder will be adequately protected.

Priority for post-commencement finance

(115) The insolvency law should establish the priority that may be provided for post-commencement finance, ensuring at least the payment of the post-commencement finance provider ahead of payment of ordinary unsecured creditors (an administrative priority).

C. Distribution following liquidation of assets [A/CN.9/WG.V/WP.58, paras. 253-255]

Purpose

The purpose of provisions on distribution is to:

(a) establish the order in which claims should be paid from the estate of the debtor following realization of the assets in liquidation;
(b) ensure that creditors of the same class are treated equally and are paid proportionately out of the assets of the estate.

Recommendations

(116) The insolvency law should establish the order in which claims, other than secured claims, are to be paid from the estate of the debtor following sale of the assets in liquidation.

(117) The insolvency law should minimize priorities. Where priorities are granted by operation of law other than the insolvency law, they should be clearly set forth in the insolvency law.

(118) Secured claims should be paid from the proceeds of the realization of the security, subject to any claims that are superior in priority, if any.[22]

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[22] NOTE TO THE WORKING GROUP: The European Bank for Reconstruction and Development has suggested that the Guide consider the proposition that a secured creditor should share some of the burden of a financial failure, at least with respect to involuntary creditors, such as tort claimants and employees and in particular where the secured creditor holds an "enterprise mortgage" over every asset of the debtor entity. To this end, the following drafting for the

(119) With respect to the payment of classes of claims other than secured claims, the insolvency law should provide that the amount available for distribution to creditors be paid in the following order:

(a) administrative costs and expenses, including those in connection with the appointment, performance of the powers and functions and remuneration of the insolvency representative and the creditor committee;
(b) pre-commencement claims with priority;
(c) ordinary pre-commencement claims;
(d) deferred or subordinated pre-commencement claims;
(e) the debtor.

(120) With respect to the payment of claims of the same class, the insolvency law should provide, as a general principle, that claims in each class are ranked equally as between themselves. All the claims in a particular class should be paid in full before the next class is paid. If there is insufficient funds to pay them in full they should be paid in proportion.

(121) The insolvency law should provide that distributions be made promptly and that they may be paid as far as possible on an interim or regular basis. In making a distribution an insolvency representative is required to make provision for provisionally admitted claims, and submitted claims that are not yet admitted.

D. Discharge [A/CN.9/WG.V/WP.58, paras. 256-260]

Purpose

The purpose of provisions on discharge is to:

(a) enable an individual debtor to be finally discharged from liabilities for pre-commencement debts, thus providing the debtor with a fresh start;
(b) establish the circumstances under which discharge will be granted and the terms of that discharge.

Recommendations

(122) Where the insolvency law allows the insolvency of individuals engaged in business activity, the issue of discharge of the debtor from liability for pre-commencement debts following [liquidation of the assets of the estate] [termination of the liquidation proceedings] should be addressed. Different approaches may be taken:

(a) the debtor may be discharged completely and immediately where the debtor [is honest] [and] has not acted fraudulently] [acts in good faith];

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protection of employees rights is proposed to be added at the end of this recommendation: "…provided, however, that if a secured creditor holds a lien or mortgage over substantially all the assets of the debtor, the proceeds from the realization of the security should be paid first to satisfy all accrued and unpaid employee wage claims (if not otherwise guaranteed by a State agency) and then to satisfy all personal injury claims (not covered by insurance) and then to the secured creditor in accordance with the first clause of this recommendation."

(b) the discharge may not apply until after the expiration of a specified period of time following [distribution] [commencement], during which period the debtor is expected to make a good faith attempt to satisfy its obligations;
(c) certain debts may be excluded from the discharge, such as those that were not disclosed by the debtor;[23]
(d) the discharge may be subject to certain conditions, such as restricting access to new credit or preventing the carrying on of business for a certain period of time.

E. Closing [and re-opening] of proceedings [New section]

(123) After an insolvency estate is fully administered [and the insolvency representative discharged] provision should be made for the insolvency proceedings to be closed.

(124) [*reopening*]

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[23] Where the insolvency law provides that certain claims will not be affected by the insolvency proceedings, those claims will also be excluded from the discharge, but do not need to be specifically included in this section: see recommendations on treatment of creditor claims: see footnote 20.

VI. Reorganization – additional issues

A. The reorganization plan [A/CN.9/WG.V/WP.58, paras. 261-299]

Purpose

The purpose of provisions relating to the reorganization plan is to:

(a) facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment;
(b) facilitate maximization of the value of the insolvency estate;
(c) facilitate the negotiation and approval of a reorganization plan and establish the effect of approval, including a mechanism to bind all creditors and other interested parties;
(d) address the consequences of a failure to propose an acceptable reorganization plan or inability to have the plan approved by creditors, including conversion of the proceedings to liquidation in certain circumstances;
(e) provide for the implementation of the reorganization plan, including discharge of debts and claims, and the consequences of failure of implementation.

Recommendations

Preparation of the plan - timing

(125) The insolvency law should provide that the reorganization plan is [prepared] [filed] on or after the making of an application to commence insolvency proceedings, but no later than the end of a specified time period after commencement of the insolvency proceeding.

(a) The time period may be set by the court or alternatively fixed by the insolvency law.
(b) The court should be authorized to extend the time period in appropriate circumstances.

Preparation of the plan – parties responsible

(126) The insolvency law should specify the parties responsible for the preparation of the reorganization plan.

(127) In providing for the preparation of the reorganization plan, the insolvency law should adopt a flexible approach that potentially involves all parties central to the insolvency proceedings, i.e. the debtor, the creditors and the insolvency representative. The insolvency law may combine different elements:

(a) An exclusive period may be given to one party to propose a plan. To encourage debtors to apply for commencement of proceedings at an early stage of financial difficulty, it [may] [should] be the debtor that is given that opportunity. The party provided with the exclusive period may be required to

consult with other parties in order to ensure that the most acceptable plan will be proposed;

(b) Where no acceptable plan is forthcoming within the exclusive period, other parties, such as the insolvency representative, creditors or the creditors committee in collaboration with the insolvency representative may be given the opportunity to propose a plan.

Content of the plan

(128) The insolvency law should specify the minimum contents of a reorganization plan, which should include:

(a) the classes of creditors and the treatment respectively provided for each of them by the plan (e.g. how much they will receive and the timing of payment);

(b) treatment of contracts, including employment contracts;

(c) means for the implementation of the plan which may include:

(i) the possibility of sale of the business as a whole;

(ii) proposed changes in the capital structure of the debtor's business.

Explanatory statement

(129) The insolvency law should require a reorganization plan submitted for the approval of creditors to be accompanied by a disclosure statement that will enable creditors to make an informed decision about the plan. The statement should include:

(a) the financial situation of the debtor including asset and liability and cash flow statements;

(b) a comparison of the treatment afforded to creditors by the plan and what they would otherwise receive in liquidation;

(c) the basis upon which the business would be able to keep trading and could be successfully reorganized; and

(d) information showing that, having regard to the effect of the plan, the assets of the debtor will exceed its liabilities.

Approval of the plan

(130) The insolvency law should establish a mechanism for voting on approval of the reorganization plan. This should address the manner in which the vote can be conducted, either at a meeting of creditors convened for that purpose or voting by mail or other means, including electronic means, and whether or not creditors should vote in classes according to their respective rights.

(131) The insolvency law should establish the majority required for approval of the reorganization plan. The majority should be limited to those creditors actually voting. Unanimity or a simple majority based upon numbers of creditors voting is not recommended. A simple majority based on number of creditors voting and a majority in amount of claims of those voting should be required. The required majority in amount of claims may be a simple majority or greater e.g. two-thirds. [Where creditors vote in classes the requisite majority of each class may be required.]

Binding dissenting creditors

(132) The insolvency law should address the treatment of creditors who do not vote in support of the reorganization plan and provide a mechanism for binding those creditors to the plan, provided certain criteria are met. The criteria may include that the dissenting creditors will receive at least as much under the plan as they would have received in liquidation; that creditors with lower-ranking claims, the debtor and shareholders of the debtor will not receive more under the plan than the dissenting creditors; that no creditor to be treated equally with the dissenting creditor will receive an advantage over the dissenting creditor[; and that, where creditors vote in classes, a majority of classes has approved the plan with the requisite majorities].

Confirmation of the plan

(133) Where the insolvency law provides for the court to confirm the reorganization plan, the court should refuse to confirm the plan if:

(a) the approval process was improperly conducted;
(b) creditors will not receive at least as much under the plan as they would have received in liquidation; or
(c) the plan contains provisions forbidden by law.

Effect of the plan

(134) A confirmed reorganization plan should bind the debtor, creditors and equity owners and discharge the debtor from any debt arising before [confirmation] [commencement of the proceedings].

Challenges to the plan

(135) The insolvency law should allow interested parties to challenge the approval of the reorganization plan and specify the time at which that challenge may be made. The law may include criteria against which the challenge can be assessed, including *[criteria same as for confirmation]:*

(a) the approval process was improperly conducted;
(b) creditors will not receive at least as much under the plan as they would have received in liquidation; or
(c) the plan contains provisions forbidden by law.

Post-approval [confirmation] amendment of the plan

(136) The insolvency law should include limited provision for amendment of the reorganization plan, specifying the parties that may propose amendments and the time at which the plan may be amended. The limited circumstances in which the plan may be amended may include where, after approval [and confirmation], implementation of the plan breaks down or the plan is found to be incapable of implementation in whole or in part, and the matter can be easily remedied. The amended plan should be subject to approval by the creditors and satisfy the rules for confirmation.

Supervision of implementation

(137) The insolvency law may provide for court supervision of the implementation of the reorganization plan or for the court to authorize the appointment of a supervisor or the insolvency representative to undertake that function.

Termination of implementation

(138) The insolvency law should provide that where implementation of the reorganization plan fails and the plan cannot be amended:

(a) the plan can be terminated; and
(b) if the reorganization proceedings have not closed, the proceedings can be converted to liquidation.

Closing [and reopening] of proceedings

(139) After an insolvency estate is fully administered [and the insolvency representative discharged] the court should close the proceedings.

(140) [*reopening*]

B. Expedited reorganization proceedings [see A/CN.9/WG.V/WP.61/Add.1]