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Draft legislative guide on insolvency law

Note by the Secretariat

Contents

[The Introduction and Part One of the draft Guide appear in document A/CN.9/WG.V/WP.63; Part Two, Chapter I appears in documents A/CN.9/WG.V/WP.63/Add.1 and Add.2; Chapter II.A and B appear in documents A/CN.9/WG.V/WP.63/Add.3 and Add.4; Chapter III.A-F appear in documents A/CN.9/WG.V/WP.63/Adds.5-9; Chapter IV. A-D appear in Adds. 10-11, Chapter V appears in Add.12, Chapter VI. A appears in Add.13, Chapter VII.A-B appear in Add.15, and Chapter VI.D-E will appear in Add.16]

* This document was submitted late because of the need to complete consultations and finalize consequent amendments.

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Paragraph numbers in [..] refer to relevant paragraph numbers in A/CN.9/WG.V/WP.58, the previous version of the text of the Guide.

Recommendation numbers in [..] refer to relevant recommendations in A/CN.9/WG.V/WP.61 and A/CN.9/WG.V/WP.61/Add.1, the previous version of the recommendations. Additions to the recommendations are indicated in this document by underlined text.

Part Two (continued)

VI. Management of proceedings

B. Post-commencement finance

1. Need for post-commencement finance

412. [187] The continued operation of the debtor's business after the commencement of insolvency proceedings is critical for reorganization and, to a lesser extent, in liquidation where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs, insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets. It may also be relevant in those cases of liquidation where funds are required to continue the business for a short period to facilitate sale of the assets. In some insolvency cases, the debtor may already have sufficient liquid assets to fund the ongoing business expenses in the form of cash or other assets that can be converted to cash (such as anticipated proceeds of receivables). Alternatively, those expenses can be funded out of the debtor's existing cash flow through operation of the stay and cessation of payments on pre-commencement liabilities. Where the debtor has no available funds to meet its immediate cash flow needs, it will have to seek financing from third parties. This financing may take the form of trade credit extended to the debtor by vendors of goods and services, or loans or other forms of finance extended by lenders.

413. To ensure the continuity of the business where this is the object of the proceedings, it is highly desirable that a determination on the need for new finance is made at an early stage, in some cases even in the period between the making of the application and commencement of proceedings. In many jurisdictions, however, the provision of finance in the period before commencement raises difficult questions relating to avoidance powers, and the liability of the lender and of the debtor. Some insolvency laws provide, for example, that where a lender advances funds to an insolvent debtor it may be responsible for any increase in the liabilities of other creditors that arise from what is simply a postponement of the commencement of liquidation. Beyond that initial period, particularly in reorganization proceedings, the availability of new finance will also be important in the period between commencement of the proceedings and consideration of the plan; obtaining finance in the period after approval of the plan generally should be addressed in the plan, especially in those jurisdictions which prohibit new borrowing unless the need for it is identified in the plan.

414. [187] An insolvency law can recognize the need for such post-commencement finance, provide authorization for it and create priority for repayment of the lender. The central issue is the scope of the power, and in particular, the inducements that can be offered to a potential creditor as a means of obtaining finance from that creditor. To the extent that the solution adopted impacts the rights of existing secured creditors or those holding an interest in assets that was established prior in time, it is desirable that provisions addressing post-commencement financing are balanced against the general need to uphold commercial bargains, protect the pre-existing rights and priorities of creditors and minimize any negative impact on the availability of credit, in particular secured finance, that may result from interfering with those pre-existing security rights and priorities. As a general rule, the economic value of the rights of pre-existing secured creditors should be protected so that they will not be unreasonably harmed. If necessary (and as already discussed in relation to protection of the insolvency estate: see Part two, chapter III.B.5), pre-existing secured creditors should receive additional protections to preserve the economic value of their security rights, such as periodic payments or security rights in additional assets in substitution for any assets that may be used by the debtor or encumbered in favour of new lending. In addition to issues of availability and security or priority for new lending, an insolvency law may need to consider the treatment of funds that may have been advanced before the reorganization fails and where the debtor subsequently is to be liquidated. Some insolvency laws provide that any security provided in respect of new lending can be set aside in a subsequent liquidation, while other laws provide that creditors obtaining priority for new funding will retain that priority in any subsequent liquidation.

2. Sources of post-commencement finance

415. [188] Post-commencement lending is likely to come from a limited number of sources. The first is pre-insolvency lenders or vendors of goods who have an ongoing relationship with the debtor and its business and may advance new funds or provide trade credit in order to enhance the likelihood of recovering their existing claims and perhaps gaining additional value through the higher rates charged for the new lending. A second type of lender has no pre-insolvency connection with the business of the debtor and is likely to be motivated only by the possibility of high returns. The inducement for both types of lender is the certainty that special treatment will be accorded to post-commencement lending and credit. For existing lenders there are the additional inducements of the ongoing relationship with the debtor and its business, the assurance that the terms of their pre-commencement lending will not be altered and under some laws, the possibility that, if they do not provide post-commencement finance, their priority may be displaced by the lender who does provide that finance.

3. Attracting post-commencement finance—providing security or priority

416. [189] A number of different approaches can be taken to attracting post-commencement finance and providing for repayment. [190] Many insolvency laws provide that the insolvency representative can obtain unsecured credit without approval by the court or by creditors, while other laws require approval by the court or creditors in certain circumstances. Where the lender requires security, it can be provided on unencumbered property, or as a junior or lower security interest on already encumbered property where the value of the encumbered asset is

significantly in excess of the amount of the secured obligation. In that case, no special protections will generally be required for the pre-existing secured creditor, unless circumstances change at a later time.

417. [189] Where these approaches are either insufficient or not available, for example because there are no unencumbered assets or there is no excess value in those assets already encumbered, insolvency laws adopt a variety of approaches to obtaining new finance. A number of insolvency laws do not specifically address the issue of new finance and do not provide for any priority to be given for its repayment. In those cases where there are no unencumbered assets that the debtor can offer as security or the lender is prepared to take the risk of lending without security, no new money will be available.

418. [189] Some insolvency laws provide that new lending will be afforded some level of priority over other creditors, in some cases including existing secured creditors. One level of priority is classed as an administrative priority (see Part two, chapter VI.C), which will rank ahead of ordinary unsecured creditors, but not ahead of a secured creditor with respect to its security. In some cases, this priority is afforded on the basis that the new lending is extended to the insolvency representative, rather than to the debtor, and becomes an expense of the insolvency estate. Some insolvency laws require such borrowing to be approved by the court or by creditors, while other laws provide that the insolvency representative may obtain the necessary finance without approval, although this may involve an element of personal liability for the insolvency representative. Such a requirement is likely to result in reluctance to seek new finance.

419. [189] Other insolvency laws provide for a “super” administrative priority, which ranks ahead of administrative creditors or a priority that ranks ahead of all creditors, including secured creditors (sometimes referred to as a “priming lien”). In countries where this latter type of priority is permitted, insolvency courts recognize the risk to the existing secured lenders and authorize these types of priority reluctantly and as a last resort. The granting of such a priority may be subject to certain conditions such as the provision of notice to affected secured creditors and the opportunity for them to be heard by the court; proof by the debtor that it is unable to obtain the necessary finance without the priority; and the provision of adequate protection for any diminution of the economic value of the security interests of the affected secured creditor. In some legal systems, all of these options for attracting post-commencement finance are available.

420. It may be desirable in considering the issue of authorization to link it to the damage that may occur or the benefit that is likely to be provided as a result of the provision of new finance. Although many insolvency laws require authorization by the court, and court involvement may assist in promoting transparency and provide additional assurance to lenders, in many instances the insolvency representative may be in a better position to assess the need for new finance. In any event, the court generally will not have expertise or information additional to that provided by the insolvency representative on which to base its decision. Alternative approaches may include establishing a threshold above which approval of the court is required or requiring court approval only where affected creditors object to what is proposed by the insolvency representative.

Recommendations

Purpose of legislative provisions

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 and credit;

(c) Provide appropriate protection for those parties whose rights may be affected by the provision of post-commencement finance and credit.

Content of legislative provisions

(161) [(110)] The insolvency law should permit the insolvency representative to obtain post-commencement finance and 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. The insolvency law may provide that authorization by the court or creditors 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

(162) [(112)] The insolvency law should enable security to be provided for repayment of post-commencement finance, including security on unencumbered assets [<u>including after-acquired assets</u>] and a junior or lower priority security on <u>already</u> encumbered assets of the debtor.

(163) [(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)].

(164) [(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;~~

(a) The existing [secured creditor] [security holder] was given notice and the opportunity to be heard by the court;

(b) The debtor can prove that it cannot obtain the finance in any other way; and

(c) The interests of the existing [secured creditor] [security holder] will be adequately protected, including through a sufficient excess in the value of the secured asset so that the existing secured creditor will not suffer unreasonable harm by a priority given to the post-commencement finance.

Priority for post-commencement finance

(165) [(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)~~ [including those unsecured creditors with administrative priority]. Where reorganization proceedings are converted to liquidation, any priority provided to post-commencement finance in the reorganization should continue to be recognized in the liquidation.

C. Priorities and distribution [of proceeds of liquidation]

1. Priorities

421. [253] Distribution of the proceeds of the estate will generally be made according to the ranking of creditor's claims by class. To the extent that different creditors have struck different commercial bargains with the debtor, the ranking of creditors may be justified by the desirability of the insolvency system recognizing and respecting those commercial bargains and promoting the equal treatment of similarly situated creditors. Establishing a clear and predictable ranking system for distribution can help to ensure that creditors are certain of their rights at the time of entering into commercial arrangements with the debtor and, in the case of secured credit, facilitate its provision. [215] In addition to relying upon these categories based upon commercial and legal relationships between the debtor and its creditors, distribution policies also very often reflect choices that recognize important public interests (such as the protection of employment), the desirability of ensuring the orderly and effective conduct of the insolvency proceedings (providing priority for the remuneration of insolvency professionals and the expenses of the insolvency administration), and promoting the continuation of the business and its reorganization (by providing a priority for post-commencement finance).

422. Insolvency laws adopt a wide variety of different approaches to the ranking of creditors, both in terms of priorities between different classes and in terms of the treatment of creditors within a particular class, for example those creditors broadly defined as unsecured.

(a) Secured creditors

423. [218] Many insolvency laws recognize the rights of secured creditors to have a first priority for satisfaction of their claims, either from the proceeds of sale of the specific assets secured or from general funds. The method of distribution to secured creditors depends on the method used to protect the secured creditor during the proceedings. If the security interest was protected by preserving the value of the secured asset, the secured creditor generally will have a priority claim on the proceeds of the sale of that asset to the extent of the value of its secured claim (provided this does not exceed the value of the asset). Alternatively, if the security interests of the secured creditor were protected by fixing the value of the secured portion of the claim at the time of the commencement of the proceedings, the creditor generally will have a priority claim to the general proceeds of the estate with respect to that value. Where the secured creditor's claim is in excess of the value of the secured asset, or the value of the secured claim as determined at commencement (where that approach is followed), the unsecured portion of the claim will generally be treated as an ordinary unsecured claim for purposes of distribution.

424. [219] In insolvency laws that do not afford secured creditors a first priority, payment of secured creditors may be ranked after costs of administration and other claims which are afforded the protection of priority, such as unpaid wage claims, tax claims, environmental claims and personal injury claims. Another approach is reflected in those laws which provide that the amount that can be recovered (in priority) by secured creditors from the assets securing their claim is limited to a certain percentage of that claim. The carved-out portion of the claim is generally used to serve the claims of other creditors, whether lower ranking priority creditors or ordinary unsecured creditors, or to pay the remuneration and expenses of the insolvency representative and costs in connection with the preservation and administration of the estate where the value of assets of the estate is insufficient to meet these costs. One of the rationales of this approach is that the secured creditor should share, in some equitable manner, some of the losses of other creditors in liquidation and, in reorganization, some of the costs. It is desirable, however, that these types of exceptions to the rule of first priority of secured creditors are limited to provide certainty with respect to the recovery of secured credit, thus encouraging the provision of secured credit and lowering the associated costs.

425. [219] Where the secured claim is satisfied directly from the net realization proceeds of the asset concerned, the secured creditor, unlike unsecured creditors, generally will not contribute (either directly or indirectly) to the general costs of the insolvency proceeding, unless there are provisions such as noted above. However, the secured creditor still may be required in those cases to contribute to other costs directly related to its interests, such as the administrative expenses related to the maintenance of the secured asset. If the insolvency representative has expended resources in maintaining the value of the secured asset, it may be reasonable to recover those expenses as administrative expenses from the amount that would otherwise be paid in priority to the secured creditor from the proceeds of the sale of the asset. A further exception to the first priority rule may also relate to priorities provided in respect of post-commencement finance, where the effect on the interests of secured creditors of any priority granted should be clear at the time the finance is

obtained, particularly since it may have been approved by the secured creditors (see Part two, chapter VI.B).

(b) Administrative claims

426. [220] The administrative expenses of the insolvency proceeding often have priority over unsecured claims, and generally are accorded that priority to ensure proper payment for the parties acting on behalf of the insolvency estate. These expenses would generally include remuneration of the insolvency representative and any professionals employed by the insolvency representative; debts arising from the proper exercise of the insolvency representative's (or in some cases the debtor's) functions and powers (see Part two, chapter IV.A and B); costs arising from continuing contract obligations (e.g. labour and lease agreements); costs of the proceedings (e.g. court fees) and, under some insolvency laws, the remuneration of any professionals employed by a committee of creditors.

(c) Priority or privileged claims

427. [223] Insolvency laws often attribute priority rights to certain (mainly unsecured) claims which in consequence will be paid in priority to other, unsecured and non-privileged (or less privileged) claims. These priority rights, which are often based upon social, and sometimes political, considerations, militate against the principle of *pari passu* distribution and generally operate to the detriment of ordinary unsecured debts by reducing the value of the assets available for distribution to ordinary unsecured creditors. The provision of priority rights has the potential to foster unproductive debate on the assessment of which classes of creditors should be afforded priority and the justifications for doing so. The provision of these rights in an insolvency law also has an impact on the cost of credit, which will increase as the amount of funds available for distribution to other creditors decreases.

428. [226] Some priorities are based on social concerns that may more readily be addressed by non-insolvency law such as social welfare legislation than by designing an insolvency law to achieve social objectives which are only indirectly related to questions of debt and insolvency. Providing a priority in the insolvency law may at best afford an incomplete and inadequate remedy for the social problem, while at the same time rendering the insolvency process less effective. Where priorities are to be included in an insolvency law or priorities exist in other laws which will affect the operation of the insolvency law, it is desirable that these priorities be clearly stated or referred to in the insolvency law (and if necessary ranked with other claims). This will ensure that the insolvency regime is at least certain, transparent and predictable as to its impact on creditors and will enable lenders to more accurately assess the risks associated with lending.

429. [225] In some recent insolvency laws there has been a significant reduction in the number of these types of priority rights, reflecting a change in the public acceptability of such treatment. A few countries, for example, have recently removed the priority traditionally provided to tax claims. In other countries, however, there is a tendency to increase the categories of debt that enjoy priority. Maintaining a number of different priority positions for many types of claims has the potential to complicate the basic goals of the insolvency process and to make the achievement of an efficient and effective process difficult. It may create inequities

and, in reorganization, complicates preparation of the plan. In addition, it should be remembered that adjusting the order of distribution to create these priorities will not increase the total amount of funds available for creditors. It will only result in a benefit to one group of creditors at the expense of another group. The larger the number of categories of priority creditors, the greater the scope for other groups to claim that they also deserve priority treatment. The greater the number of creditors receiving priority treatment, the less beneficial that treatment becomes.

430. Some of the factors that may be relevant in determining whether compelling reasons exist to grant privileged status to any particular type of debt may include the need to give effect to international obligations; the need to strike a balance between private rights and public interests and the alternative means available to address those public interests; the desirability of creating incentives for creditors to manage credit efficiently and to fix the price of credit as low as possible; the impact of creating certain preferences on transaction and compliance costs; and the desirability of drawing fine distinctions between creditors that result in one class of creditor having to bear a greater burden of unpaid debt.

431. [224] Many different approaches are taken to the types of claims that will be afforded priority and what that priority will be. The types of priorities afforded by countries vary, but two categories are particularly prevalent. The first is a priority for employee salaries and benefits (social security and pension claims), and a second is for tax claims. Consideration of the priority of tax claims may be of particular concern in transnational cases. One approach might be to disallow priority for all foreign tax claims. An alternative might be to recognize some type of priority for such tax claims, perhaps limited in scope, either where there is reciprocity with respect to the recognition of such claims or where insolvency proceedings in respect of a single debtor are being jointly administered in more than one state. Article 13 of the UNCITRAL Model Law on Cross-Border Insolvency recognizes the importance of the non-discrimination principle with respect to the ranking of foreign claims, but also provides that countries which do not recognize foreign tax and social security claims can continue to discriminate against them.[1]

(i) Employee claims

432. In a majority of countries, workers' claims (including claims for wages, leave or holiday pay, allowances for other paid absence, and severance pay) constitute a class of priority claims, which in a number of cases ranks above tax and social security claims. [224] This approach is generally consistent with the special protection that is afforded to employees in other areas of insolvency law (see Part two, chapter III.D.6), as well as with the approach of some international conventions.[2] In some insolvency laws, the importance of maintaining continuity of employment in priority to other objectives of the insolvency process, such as maximization of value of the estate for the benefit of all creditors, is evidenced by a focus on sale of the business as a going concern (with the transfer of existing

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[1] UNCITRAL Model Law on Cross-Border Insolvency article 13(2) and footnote 2.

[2] For example, the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173). Article 8(1) provides that "national laws or regulations shall give workers' claims a higher rank of privilege than most other privileged claims, and in particular those of the State and social security system". The Convention entered into force in 1995.

employment obligations), as opposed to liquidation or reorganization where these obligations may be altered or terminated.

433. In some countries, employee claims are afforded priority but will rank equally with taxes and social security claims in a single class of priority claims and may be satisfied proportionately in the event of insufficient funds. In other countries, no priority is provided for employee claims and they are ranked as ordinary unsecured claims, although in some cases payment of certain obligations accrued over specified periods of time (for example, for wages and remuneration arising within three months before commencement of insolvency proceedings) may be guaranteed by the State through a wage guarantee fund. The fund guaranteeing the payment of such claims may itself have a claim against the estate and may or may not have the same priority vis-à-vis the insolvency estate as the employee claims, depending upon policy considerations such as the use of public monies (as opposed to the assets of the insolvent debtor) for funding the provision of wage compensation. [230] Usual practice would be for the fund to enjoy the same rights as the employee, at least in respect of a certain specified amount which may be denoted in terms of an amount of wages or a number of weeks of pay.

(ii) Tax claims

434. [224] Priority is often accorded to government tax claims on the basis of protecting public revenue. According a priority to such claims has been justified on a number of other grounds. These grounds include that it can be beneficial to the reorganization process because tax authorities will be encouraged to delay the collection of taxes from a troubled business entity on the basis that eventually they will be afforded a priority for payment under insolvency, and that because the government is a non-commercial and unwilling creditor, it may be precluded from some commercial debt recovery options. Providing a priority to such claims, however, can be counterproductive because failure to collect taxes can compromise the uniform enforcement of tax laws and may constitute a form of state subsidy which undermines the discipline that an effective insolvency regime is designed to support. It may also encourage tax authorities to be complacent about monitoring debtors and collecting debts in a commercial manner that would assist to prevent insolvency and the depletion of assets.

(d) Ordinary unsecured creditors

435. [227] Once all secured and priority creditors have had their claims satisfied the balance of the insolvency estate generally would be distributed pro rata to ordinary unsecured creditors. There may be subdivisions within the class, with some claims being treated as subordinate or with a priority as noted above. Some claims that generally are subordinated are discussed below.

(e) Owners and shareholders

436. [232] Owners and shareholders may have claims arising from loans extended to the debtor and claims arising from their equity or ownership interest in the debtor. Many insolvency laws distinguish between these different claims. With respect to claims arising from equity interests, many insolvency laws adopt the general rule that the owners and shareholders of the business are not entitled to a distribution of the proceeds of assets until all other claims which are senior in priority have been

fully repaid (including claims of interest accruing after commencement). As such, shareholders and owners will rarely receive any distribution in respect of their equity interest in the debtor. Where a distribution is made, it would generally be made in accordance with the ranking of shares specified in the company law and the corporate charter. Debt claims, such as those relating to loans, however, are not always subordinated.

(f) Related persons

437. [233] A category of creditors that may require special consideration is those persons related to the debtor, whether in a familial or business capacity (discussed above, see Part two, chapter III.E.3(e) and chapter VI.A). Under some insolvency laws, these claims are always subordinated, and under other laws they are subordinated only on the basis of inequitable conduct or fraudulent or quasi-fraudulent conduct. Where they are subordinated, the claims may rank after ordinary unsecured claims. Other approaches for treatment of these claims do not relate to ranking, but to restrictions on voting rights or to the amount of the claim that will be admitted in the proceedings.

(g) Fines, penalties and post-commencement interest

438. [227] Some countries treat claims such as gratuities, fines and penalties (whether administrative, criminal or some other type) as ordinary unsecured claims, and subordinate them to other unsecured claims. In some insolvency laws these types of claims are treated as excluded claims.

439. Different approaches are taken to the accrual and payment of interest on claims. Some insolvency laws provide that interest on claims ceases to accrue on all unsecured debts once liquidation proceedings have commenced, but that payment in reorganization will depend upon what is agreed in the plan. In other cases where provision is made for interest to accrue after commencement of proceedings, payment may be subordinated and it will be paid only after all other unsecured claims have been paid.

2. Distribution

440. [254] Where there are a number of different categories of claims with different priorities, each level of priority generally will be paid in full before the next level is paid. Once a level of priority is reached where there are insufficient funds to pay all the creditors in full, the creditors of that priority share pro rata. In some laws which do not establish different levels of priority, all the creditors share pro rata if there are insufficient funds to pay them in full.

441. [255] It may be desirable to provide in reorganization proceedings that priority claims must be paid in full as a predicate to confirmation of a plan unless the affected priority creditors agree otherwise [*reasons*?] A plan of reorganization may propose distribution priorities that are different to those provided by the insolvency law in a liquidation, provided that creditors voting on the plan approve such a modification.

Recommendations

Purpose of legislative provisions

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 or upon confirmation of the reorganization plan;

(b) Ensure that creditors of the same class are treated equally and are paid proportionately out of the assets of the estate;

[(c) Specify limited circumstances in which priority in distribution is permitted.]

Content of legislative provisions

(166) [(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.

(167) [(117)] The insolvency law should minimize the priorities accorded to categories of unsecured claims. Where priorities are granted by operation of law other than the insolvency law, they should be clearly set forth in the insolvency law.

(168) [(118)] Secured claims should be paid from the proceeds of the realization of the security, subject to claims that are superior in priority to the secured claim, if any.[3]

(169) [(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;

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[3] 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 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."

(d) Deferred or subordinated pre-commencement claims;

(e) The debtor (i.e. equity interests or owners of the debtor).

(170) [(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 unless the holders of the affected claims agree otherwise. 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.

(171) [(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.