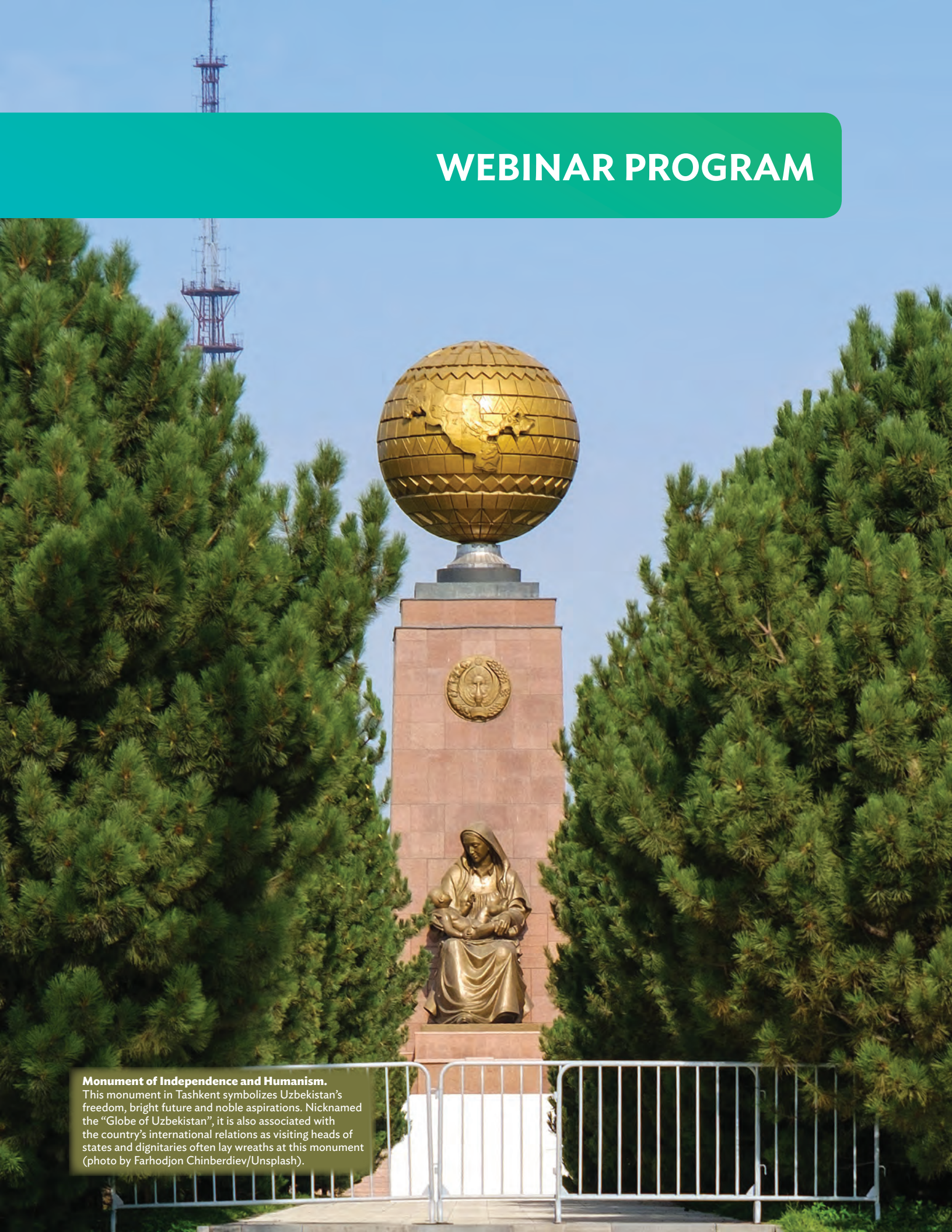
KNOWLEDGE SHARING DIALOGUE WITH UZBEKISTAN AND INTERNATIONAL JUDGES ON INSOLVENCY LAW AND PRACTICE

21 FEBRUARY 2024 | 16:30-17:20 TASHKENT TIME | VIA ZOOM
SIMULTANEOUS TRANSLATION IN ENGLISH AND UZBEK

Program Booklet

CONTENTS

WEBINAR PROGRAM



Monument of Independence and Humanism. This monument in Tashkent symbolizes Uzbekistan's freedom, bright future and noble aspirations. Nicknamed the "Globe of Uzbekistan", it is also associated with the country's international relations as visiting heads of states and dignitaries often lay wreaths at this monument (photo by Farhodjon Chinberdiev/Unsplash).

KNOWLEDGE SHARING DIALOGUE WITH UZBEKISTAN AND INTERNATIONAL JUDGES ON INSOLVENCY LAW AND PRACTICE

This online seminar convenes Uzbek judges and eminent international experts from the International Insolvency Institute to discuss contemporary insolvency frameworks and best practices.

OPENING REMARKS

Hon. Tadjiev Ibragim Isakovich
Judge, Supreme Court of Uzbekistan

PANEL DISCUSSION

MODERATORS

Christina Pak
Principal Counsel and Team Leader, Law and Policy Reform Program, Asian Development Bank

John Martin
Former President, International Insolvency Institute

PANELISTS

Hon. Daniel Carnio Costa
Judge, First Bankruptcy Court of Sao Paulo, Brazil

Hon. Anna Elisabeth de Vos
Senior Judge, District Court of Amsterdam, The Netherlands

Hon. Allan L. Gropper
Judge (Ret.), United States Bankruptcy Court, Southern District of New York

Hon. Lisa G. Beckerman
Judge, United States Bankruptcy Court, Southern District of New York

QUESTION-AND-ANSWER SESSION WITH UZBEK JUDGES

Scan the QR code to join the event.

BIOGRAPHIES

Facade of the Karshi railway station. The "Afrosiyob" high-speed train now connects Karshi to the capital Tashkent. The development of railway transport in Uzbekistan has been accelerated in the past several years, facilitating trade through growing volumes of freight and passenger transportation (photo by Relisa Granovskaya/ADB).

Opening Remarks

HON. TADJIEV IBRAGIM ISAKOVICH

Judge, Supreme Court of Uzbekistan

He has been working in the judicial system since 1997. He started his professional career as a judge of the Economic Court of Tashkent city. From 1999 to 2004 he worked as the deputy chairman of the Tashkent city Economic Court. From 2004 to 2009 he worked as a judge of the Tashkent Regional Economic Court. From 2010 to 2017 he worked as the chief adviser and department head of the Supreme Economic Court of the Republic of Uzbekistan. He has been working as a judge of the Supreme Court of the Republic of Uzbekistan since 2017.

Moderators

CHRISTINA PAK

Principal Counsel and Team Leader, Law and Policy Reform Program, Asian Development Bank

Ms. Christina Pak specializes in international development finance and law and policy reform. She is currently a Principal Counsel of the Asian Development Bank and is responsible for managing the Office of General Counsel's Law and Policy Reform Program which designs, processes, and implements technical assistance projects directly to developing member countries relating to legal and judicial reforms. She oversees a diverse portfolio in the areas of environment protection and climate change, gender equality, private sector development, public-private partnerships and digital economy. Christina also serves as ADB's Accountability Mechanism Policy Counsel and the Office of the General Counsel's technical assistance, partnerships and knowledge focal point and is a member of ADB's Climate Change and Disaster Risk Management, Environment, Gender and Governance Thematic Groups. In her previous role as a project counsel at ADB, she worked on complex multi-sector projects across the Central West, Southeast and East Asia regions.

Christina specializes in international arbitration reform and has been assisting various countries in the South Pacific region accede to the New York Convention and put in place implementing arbitration law, including Fiji, Palau, Papua New Guinea and Tonga and assisted Uzbekistan with its new Law on International Commercial Arbitration.

Prior to joining ADB, she was a legal counsel and vice president for markets and international banking at a major UK bank in Singapore and a finance associate at a large law firm in New York City.

Christina is a Steering Committee Member of the IUCN World Commission on Environmental Law and a Member of the Chartered Institute of Arbitrators. She is a US-qualified lawyer, admitted in the States of New York and New Jersey.

Moderators

JOHN MARTIN

Former President, International Insolvency Institute

John Martin is one of Australia's leading insolvency and restructuring law experts based in Sydney, with a particular specialty in cross-border insolvency.

John's cross-border experience has included assisting clients with issues in England, United States, Fiji, Bermuda, Cambodia, Cayman Islands, Brunei Darussalam, Myanmar, and Norfolk Island.

In June 2016, John was appointed to the Board of the prestigious International Insolvency Institute, and he also served as President until 2023. John's appointment is recognition of his commitment to the Institute and his standing in the profession, both within Australia and overseas.

In July 2017, John presented a paper (jointly authored with Professor Ros Mason) to the United Nations' 50th Anniversary UNCITRAL Congress in Vienna, titled "Conflict and Consistency in Cross-Border Insolvency Judgments".

Together with another restructuring expert, John drafted new insolvency laws for the Republic of Myanmar, and has twice presented to members of the Parliament's Upper House.

In the field of cross-border insolvency, John has been directly involved in three of the seminal international cases:

- In 2008, he advised the successful appellants in the House of Lords in Re HIH, in which Lord Hoffmann identified the "golden thread of universalism" as having been the foundation for cross-border insolvency law.
- In 2012, he advised the successful Australian liquidator of New Cap Re in the Grant proceedings determined jointly with Rubin v Eurofinance, in which a majority of the UK Supreme Court retreated from Lord Hoffmann's embrace of universalism.
- He was also part of the Australian legal team acting for Perpetual Trustees in the so called "flip clause" litigation in the US and the UK arising out of the Lehman bankruptcy.

Panelists

HON. DANIEL CARNIO COSTA

Judge (Ret.), First Bankruptcy Court of Sao Paulo, Brazil

Hon. Daniel Carnio Costa sat as bankruptcy judge in São Paulo, Brazil from 2011 to 2023. He is the current secretary-general of the National Forum of Bankruptcies of the National Council of Justice of Brazil (CNJ). He earned his Master and PhD in law in Brazil, Master on comparative law at Samford University in the USA, and was a post-doctor fellow at University of Paris 1 - Panthéon/Sorbonne. He also served as Guest Professor at California Western School of Law and is a Permanent Professor of Business Law at PUC/SP.

HON. ANNA ELISABETH DE VOS

Senior Judge, District Court of Amsterdam, The Netherlands

Hon. Anna Elisabeth de Vos is concurrently a Senior Judge at the District Court of Amsterdam and Substitute Justice at the Court of Appeal Arnhem/Leeuwarden. Previously, she was an Assistant Professor of International Law at Leiden University.

Hon. de Vos received her undergraduate degree on Dutch law, focusing on public international law, from University Utrecht. She earned her PhD at the University of Nijmegen, where her dissertation covered the nexus between public international law and the international debt crisis. Thereafter, she completed the Diploma Program on International Law and International Relations at the Institute of Social Studies, The Hague, The Netherlands.

HON. ALLAN L. GROPPER

Judge (Ret.) United States Bankruptcy Court, Southern District of New York

Allan L. Gropper was appointed as a United States Bankruptcy Judge for the Southern District of New York on October 4, 2000. He retired in 2015 and since then has acted as a mediator, arbitrator, expert witness and consultant on legal matters.

Panelists

Hon. Allan L. Gropper *(continued)*

Judge Gropper graduated from Yale College, cum laude, in 1965 and from 1965-1966 was a Fulbright Tutor in English at Christ Church College, Kanpur, India. He graduated from Harvard Law School, cum laude, in 1969 and became an attorney in the Civil Appeals Unit of the New York City Legal Aid Society. In 1972 Judge Gropper joined the law firm of White & Case, becoming a partner in 1978. He was for many years head of the firm's bankruptcy and reorganization practice group and was active in many of the nation's largest Chapter 11 cases, including Manville Corporation, Texaco, LTV Corporation, Federated Department Stores/Allied Stores Corp, Maxwell Communications Corp., MGM, United States Lines, Pan American World Airways, and Waterman Steamship Corp.

Judge Gropper was also active in international insolvencies and restructurings and was located in the White & Case Hong Kong office during the year 1999–2000. He has lectured in several foreign countries on insolvency matters and is a co-editor of a two-volume text entitled International Insolvency published in 2000. He is adjunct professor of law at Fordham Law School and teaches a course in International Insolvency Law.

HON. LISA G. BECKERMAN

Judge, United States Bankruptcy Court, Southern District of New York

Lisa G. Beckerman was sworn in as a United States Bankruptcy Judge for the Southern District of New York on February 26, 2021.

Judge Beckerman received an A.B. from University of Chicago in 1984, an M.B.A. from University of Texas in 1986 and a J.D. from Boston University in 1989. From May 1999 until she was appointed to the bench, she was a partner in the financial restructuring group at Akin Gump Strauss Hauer & Feld LLP. From September 1989 until May 1999, she was an associate and then a partner in the bankruptcy group at Stroock & Stroock & Lavan LLP.

Prior to her appointment, she served as a co-chair of the Executive Committee of UJA-Federation of New York's Bankruptcy and Reorganization Group, a co-chair and as a member of the Advisory Board of the American Bankruptcy Institute's New York City Bankruptcy Conference, and a member of the Board of Directors of the American Bankruptcy Institute from 2013 through 2019.

Judge Beckerman is a Fellow of the American College of Bankruptcy. She is a member of the National Conference of Bankruptcy Judges (NCBJ) and the 2021 NCBJ Education Committee. She is a member of the Dean's Advisory Board for Boston University School of Law.

Supported by the ADB Secretariat

CHRISTINA PAK
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MIRO FRANCES CAPILI
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Associate Legal Operations Administrator

SHERZODBEK MASADIKOV
Legal Expert (Consultant)

JOYCELYN B. LUCENA
IT and Multimedia Specialist (Consultant)

ACCOMPANYING MATERIALS

Aerial view of the city of Khiva. Khiva was founded as early as the 6th century but prospered in the 18th century as a trade depot along the caravan routes used to cross the Karakum desert (photo by Relisa Granovskaya/ADB).

PRESENTATION OF HON. DANIEL CARNIO COSTA

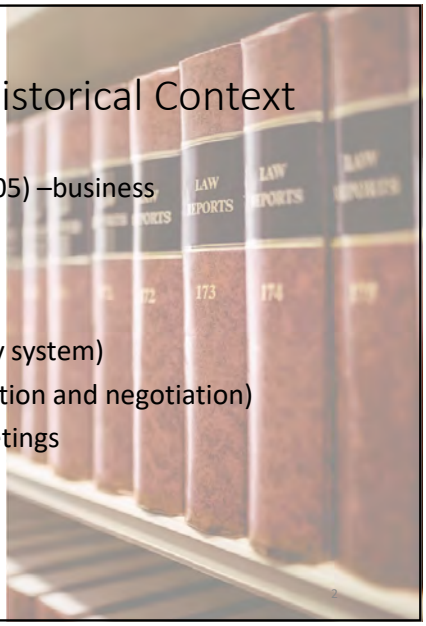
International Insolvency Institute Seminar to Uzbekstan Judiciary

Judge Daniel Carnio Costa (ret)
Brazil

1

The Brazilian Bankruptcy Code - Historical Context

- Restructuring regime since 2005 (Law n. 11.101/05) –business reorganization
- Crisis 2014/2015 and Pandemic
- The great reform: Law n. 14.112/20:
- * adoption of a hybrid proceeding (pre-insolvency system)
- * incentives for out-of-court restructuring (mediation and negotiation)
- * use of electronic tools and virtual creditors meetings



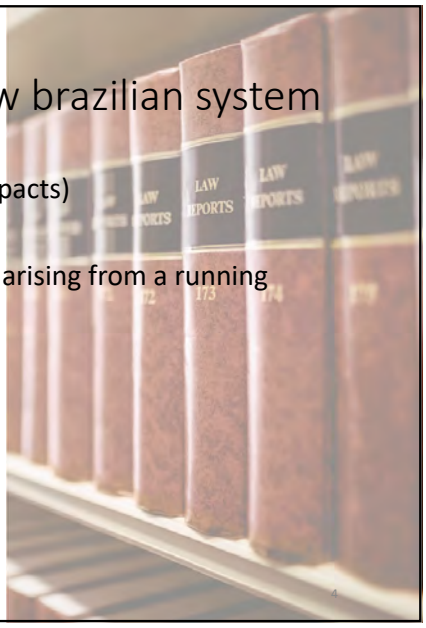
2

The Brazilian Bankruptcy Code - Historical Context

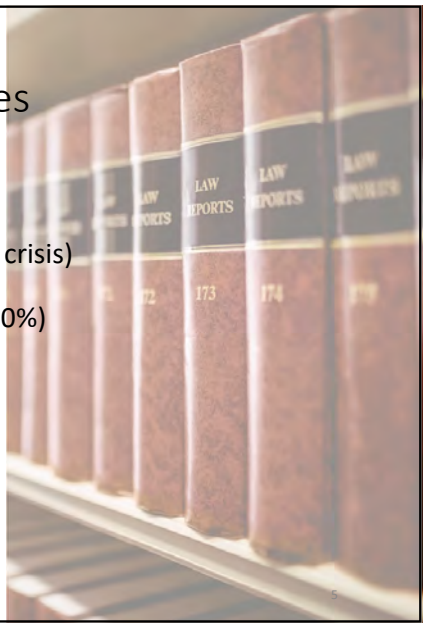
- * legal changes for making pre-pack option more attractive. DIP; creditor´s plan; cross-border insolvency
- * regulation of procedural and substantive consolidation
- * legal changes to accelerate reallocation of assets in liquidation proceedings
- * facilitation of a more effective discharge (fresh-start)

Fundamental Principles of the new brazilian system

- Social Function of the companies (community impacts)
- Going-concern restructuring if possible
- Preservation of the social and economic benefits arising from a running business (jobs, salaries, wealth, tax revenue…)
- Taxes are not impaired by reorganization effects

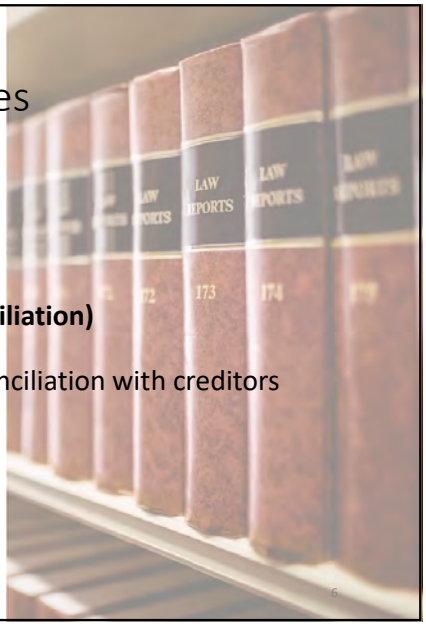


Restructuring Options – broad lines



1- Business Reorganization
- Only for companies
- There is no insolvency test (struggling or financial crisis)
- Chapter 11´s alike – 180 + 180 stay period
- Creditor divided on 4 classes to vote (majority – 50%)
- Cross-class cramdown

Restructuring Options – broad lines



2- Pre-pack (extrajudicial business reorganization)
- 90 days stay period

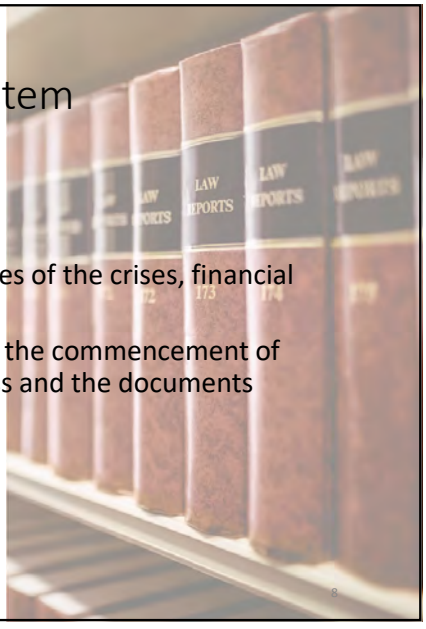
3- Pre-insolvency proceeding (mediation and conciliation)
- Early stage of crisis
- Protection of a 60 days stay to bust mediation/conciliation with creditors

Cross-border Insolvency

- Adopted Model Law 2020
- Only 2 Cross-border proceedings so far
- Adopt JIN Guidelines on court-to-court cooperation and communication (Resolution CNJ 394/2021)
- Will recognize foreign judgments absent fraud or public policy concerns

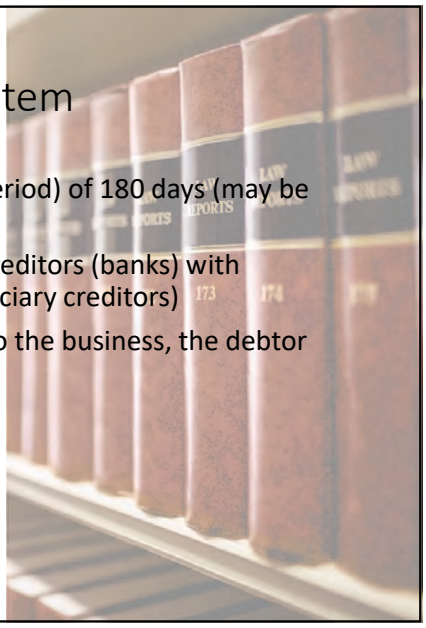
Important Aspects of the New System

- BUSINESS JUDICIAL REORGANIZATION
- Eligibility to file: Only the debtor (company)
- Commencement of the case: inicial petition (causes of the crises, financial statements and list of creditors) – Art. 51
- Previous examination – art. 51-A (before granting the commencement of the case) to make sure that there is a real business and the documents presented are complete and regular



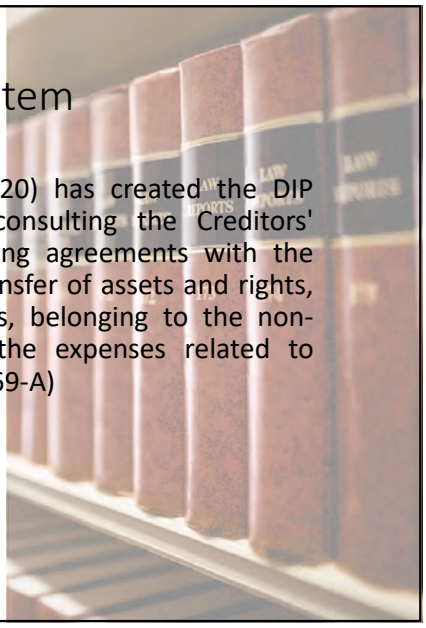
Important Aspects of the New System

- Commencement of the case: moratorium (stay period) of 180 days (may be extended only once for more 180 days)
- Unimpaired creditors – art. 49: mainly financial creditors (banks) with fiduciary assignement or transfer as security (fiduciary creditors)
- If the asset (collateral) is fundamental/essential to the business, the debtor has the right to keep it during the stay period



Important Aspects of the New System

- Post-petition financing – The legal reform (2020) has created the DIP financing in Brazil - The judge may, after consulting the Creditors' Committee, authorize the execution of financing agreements with the debtor, secured by encumbrance or fiduciary transfer of assets and rights, whether owned by the debtor or third parties, belonging to the non-current assets, to finance its activities and the expenses related to restructuring or preservation of asset value (art. 69-A)



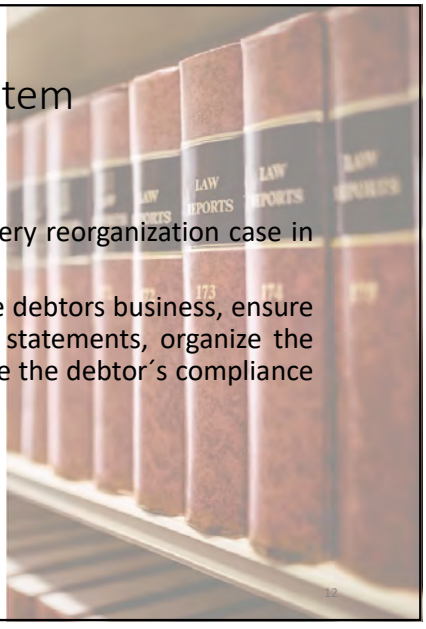
Important Aspects of the New System

- Use of the mootness doctrine in Brazil: art. 69-B – it´s not possible for the appellate court to reconsider the financing terms after it´s already implemented with the judicial authorization

11

Important Aspects of the New System

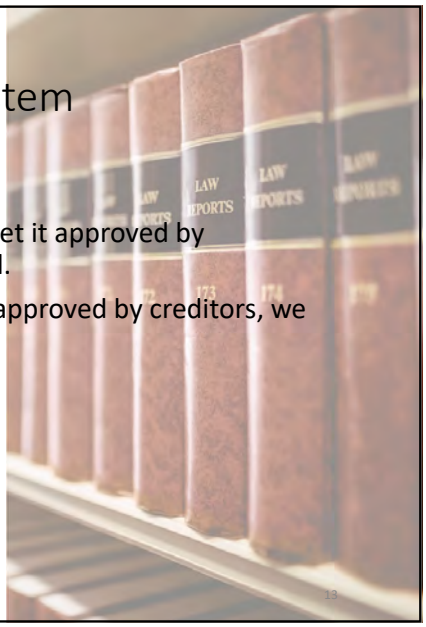
- The judicial administrator (trustee).
- The judge appoints a judicial administrator in every reorganization case in Brazil.
- The role of the judicial administrator: fiscalize the debtors business, ensure transparency regarding to the debtors financial statements, organize the creditors list and the general meeting and fiscalize the debtor´s compliance with the approved plan



12

Important Aspects of the New System

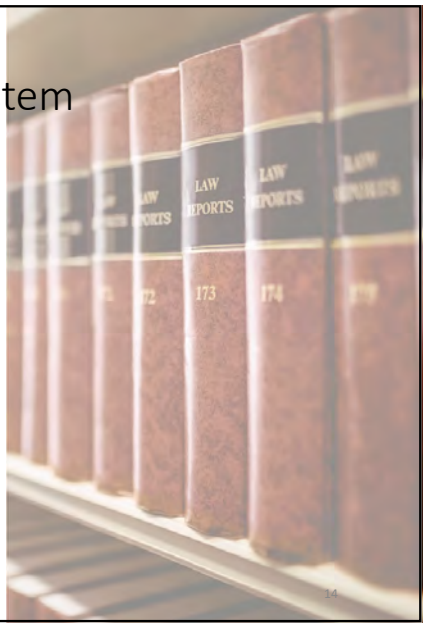
- The Plan
- Debtor has to present a plan within 60 days and get it approved by creditors (general meeting) during the stay period.
- If debtor fails to present a plan timely or it is not approved by creditors, we may have 2 options:
- - creditors may present a plan, or
- - judge converts the case into liquidation



13

Important Aspects of the New System

- Voting system:
- Creditors are diveded into 4 classes:
- 1- labor creditors;
- 2- Secured creditors;
- 3- Unsecured creditors;
- 4- Micro and Small business creditors.



14

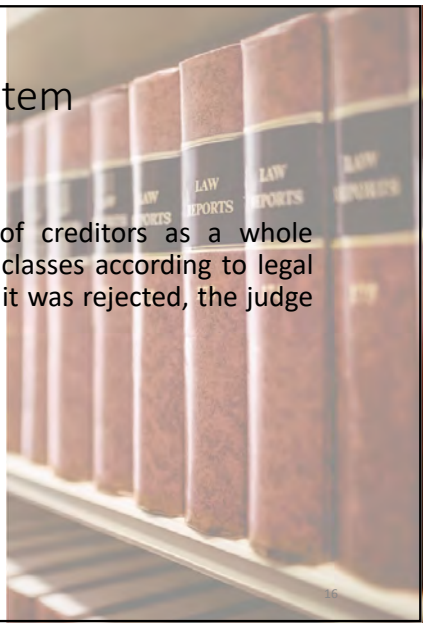
Important Aspects of the New System

- To be approved, the plan must receive the approval of more than 50% of creditors by number in classes 1 and 4, and more than 50% by both number and value in classes 2 and 4.

15

Important Aspects of the New System

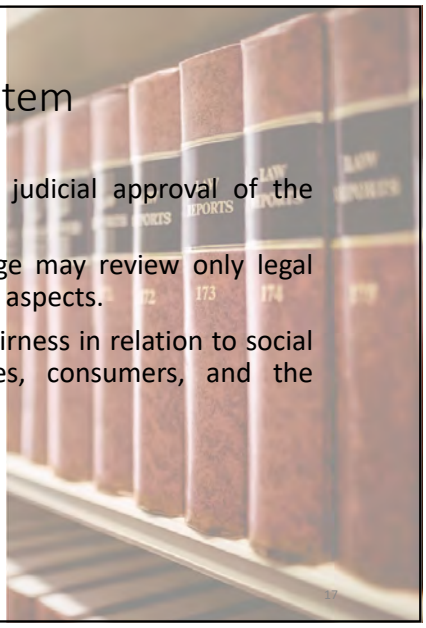
- Brazilian cram-down:
- If the plan is approved by more than 50% of creditors as a whole (regardless of the classes), is approved in three classes according to legal criteria, and has 1/3 approval in the class where it was rejected, the judge may grant judicial approval for the plan.



16

Important Aspects of the New System

- Brazilian law does not establish standards for judicial approval of the recovery plan.
- Courts have traditionally asserted that the judge may review only legal aspects, not financial, negotiation, or commercial aspects.
- Nevertheless, judges often consider the plan's fairness in relation to social aspects of reorganization, such as employees, consumers, and the community, when granting approval



17

Improving the institutional environment

- ESPECIALIZATION
- CNJ – incentives to State Judiciary for inslalling specialized courts (Bankruptcy Courts)

- JUDICIAL TRAINNING
- FONAJEM – keeping the judges with jurisdiction over insolvency cases connected and informed in a permanent basis (whatsapp group Only for the judges)

18

THANKS

19

- DANIEL CARNIO COSTA

- Contacts:
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- E-mail: danielcarniocosta@hotmail.com;

20

PRESENTATION OF HON. LISA G. BECKERMAN

Judicial Presentation

Judge Lisa G. Beckerman
United States Bankruptcy Judge, Southern District of New York
February 21, 2024

1

Role of Bankruptcy Procedures in the Rehabilitation of Enterprises-U.S. Bankruptcy Code

- The United States Bankruptcy Code (Title 11 of the United States Code) (the "U.S. Bankruptcy Code") has various tools that enable a business or a person to rehabilitate its financial condition. For business enterprise, the section of the U.S. Bankruptcy Code which governs rehabilitation is Chapter 11.
- Liquidation of a business enterprise can occur under (a) Chapter 11 through a plan of liquidation, (b) through a section 363 sale followed by dismissal, conversion to Chapter 7, or a plan of liquidation or (c) under Chapter 7.

2

Role of Bankruptcy Procedures in the Rehabilitation of Enterprises-U.S. Bankruptcy Code

- Chapter 11 includes special provisions for small business enterprises, including SubChapter V which took effect in February 2020.
- Once any type of bankruptcy filing occurs by a business enterprise, whether a rehabilitation or a liquidation proceeding, under section 362 of the U.S. Bankruptcy Code, the debtor gets the benefit of the automatic stay which precludes parties from continuing litigation, including debt collection and asset seizure, against the business enterprise. The purpose is to give the business enterprise a breathing spell to allow it to rehabilitate.

3

Role of Bankruptcy Procedures in the Rehabilitation of Enterprises-U.S. Bankruptcy Code

- During the bankruptcy proceeding, under section 365 of the U.S. Bankruptcy Code, the business enterprise has the opportunity to assume, assume and assign, or reject certain types of contracts (executory contracts, where substantial performance remains for both parties) and unexpired leases of real and personal property (there are some early deadlines for unexpired leases of non-residential real property).
- The purpose is to allow the business enterprise to rid itself of burdensome agreements which are no longer needed or economic for it.

4

Role of Bankruptcy Procedures in the Rehabilitation of Enterprises-U.S. Bankruptcy Code

- The business enterprise can seek court approval to sell all or some of its assets, either through a plan under section 1123 of the U.S. Bankruptcy Code or outside of a plan under section 363 of the U.S. Bankruptcy Code.
- Generally, under Chapter 11, a business enterprise is the only party who can propose a plan during the first 120 days of the bankruptcy proceeding ("exclusivity period") which exclusivity period can be extended for cause by the Court but cannot be extended beyond 18 months from the date of the commencement of the bankruptcy proceeding. If the exclusivity period lapses or is terminated by order of the Court, any party in interest may file a plan. See section 1121 of the U.S. Bankruptcy Code.
- An exception is that, under SubChapter V, only the business enterprise may file a plan and a plan must be filed within the first 90 days of the bankruptcy proceeding unless the time to file is extended by the Court for cause. See section 1189 of the U.S. Bankruptcy Code.

5

Role of Bankruptcy Procedures in the Rehabilitation of Enterprises-U.S. Bankruptcy Code

- A plan may seek to rehabilitate the business enterprise by refinancing debts, by providing for payment over time of the debts and/or conveying ownership of the business enterprise to some/all of its creditors by cancellation of the existing shares of stock held by shareholders and issuance of new shares of stock.
- A plan may also seek to sell assets and liquidate the business enterprise.
- Under a SubChapter V plan, the owners of the business enterprise retain their ownership of the business enterprise and the plan distributes the disposable income of the business enterprise, typically over a three to five year period, to its creditors. See section 1191 of the U.S. Bankruptcy Code

6

Role of Bankruptcy Procedures in the Rehabilitation of Enterprises-U.S. Bankruptcy Code

- Case Examples to be discussed: (a) SubChapter V-Dental practice/taxi cab business and (b) Large Chapter 11 cases-Delta/Lumileds/Parateum

7

PRESENTATION OF HON. ANNA ELISABETH DE VOS

INSOLVENCY IN THE NETHERLANDS

Elsbeth de Vos
Senior Judge District Court
Amsterdam

Dutch bankruptcy act (DBA)

- The DBA entered into force on 1 September 1896
- Over the years additions/revisons have been made to/of the DBA
- On 1 January 2021 a new addition was made to the DBA: the Act on Court Confirmation of Extra-Judicial Restructuring Plans (WHOA in Dutch)
- On 1 July 2023 there was a revision of another part of the DBA: the debt rescheduling scheme for Natural Persons.

Procedures under the DBA

- Suspension of Payment (SOP)
- Bankruptcy
- Debt rescheduling Scheme for Natural Persons
- WHOA

Suspension of Payment (SOP)

- Art 214 DBA – if a debtor foresees it will not be able to continue paying the upcoming and payable debts in the near future.
- Option is open only for legal entities, not for a Natural Person, nor for a bank or insurer (special procedures).
- The board/director of the debtor can file the request without the consent of the shareholders meeting.
- It does however need the approvel – if applicable – of the supervisory board.

Suspension of payment proceeding:

- Debtor files a request, court decides on the same day without a hearing;
- Request includes: articles of association, list of assets, liabilities, the creditors and the amount of their claims;
- Court opens the provisional suspension of payment immediately;
- Court schedules a meeting of creditors within 6 weeks which advises on the granting of a definitive suspension of payment;
- Court appoints an insolvency administrator (IA) and a supervisory judge;
- Termination of the proceeding: by the approval of a plan or by bankruptcy.

Aim SOP

- The aim is to rescue the company, not to liquidate it.

- Possible results of a SOP:

1. Full payment to all (unsecured) creditors;
2. A consensual Plan with part of the debt written off ;
3. Confirmation of a judicial Plan;
4. Liquidationprocedure in case a plan is not visable.

In general most SOPS end in a liquidation.

"Drawbacks" of SOP

- A plan only binds the unsecrured creditors and does not bind preferred and secured creditors;
- No possibility to dismiss employees.

Bankruptcy

- Requests must be dealt with expediently –hearings are on Tuesdays;
- Voluntary filing by the debtor: filing before Monday 12.00, court decides Tuesday;
- Voluntary filing: court hears only debtor;
- Involuntary filing will take up to 4 weeks to come before the court: court hears debtor and creditor;
- Hearings are not public (in Chambers) – to avoid negative impact for debtor when court declines to open proceedings;
- Right of review (in case debtor has not appeared in court) and right of appeal. Request for review should be filed within 14 days, appeals within 8 days;
- Third parties such as employees may request the court to review the decision in case of abuse within 8 days;
- Treshold: plurality of debts.

Character bankruptcy

It is a liquidation procedure - by way of

- sale of (part of) the company to a new entity; or
- via equity transaction, asset transaction or piece meal sale of the assets.

Leading principles in Dutch Insolvency Proceedings

- The principle of fixation: on the day of opening bankruptcy proceeding by the court the legal position of all parties involved becomes unchangeable;
- As of 00.00 hours of the day of opening bankruptcy proceedings an automatic stay on all assets of the bankruptcy estate. Except for the rights of the secured creditors- a stay has to be requested;
- The principle of paritas creditorum: creditors have equal rights except for security rights/preference by law;
- Principle of universality: all assets, where ever they are located, fall within the bankrupt estate in the Netherlands;
- Principle of territoriality: (in principle) foreign insolvency proceeding has limited effect in the Netherlands;

Actors in the Dutch proceedings

- The court
- The supervisory judge
- The insolvency administrator (IA)
- The creditors assembly
- The creditors committee

Role of the Court

- Opening and closing of the insolvency proceeding
- The appointment of the IA
- The appointment of the supervisory judge(s)
- Dismissal of IA
- Appeal of supervisory judge's decisions
- Approval of restructuring plans
- Determines renumeration of IA

Competences of a supervisory judge

Supervises the administration and the settlement of the estate by way of:

- supervising the work of the IA;
- hearing of directors, witnessess or experts;
- setting time limits for submission of claims and the date of the liquidation or verification meeting of the estate;
- authorizing certain acts of the IA;
- Conflict resolution;
- sparing-partner of the IA.

Supervision

- Limited authority:
  - gives approval for
    - dismissal of employees;
    - termination of rent or lease contracts;
    - continuation of the business (limited in time) or sale of the business (to new or previous owner);
    - starting legal proceedings against debtors, directors or shareholders (directors and shareholders liability);
    - entering into settlement agreements.
  - the IA reports to the supervisory judge by submitting a public report every 3 months;
  - informal contacts with the IA
  - no authority to adjudicate on claims, those are referred to the court;
  - most decisions of the supervisory judge are appelable.

Conflict resolution

- conflict between IA and director:
  - concilliation by way of dialogue/ informal communication (out of court);
  - hearing of the director in court
  - referral to mediation by a third party;
- conflict between IA and creditor:
  - concilliation by the supervisory judge by way of dialogue/ informal communication;
  - referral to mediation by a third party;
  - referral to the court in case of a disputed claim or an appelable decision by the supervisory judge.

Debt rescheduling scheme for NP

- As of December 1, 1998 the Dutch Bankruptcy Act (DBA) provides for a debt rescheduling scheme for natural persons.
- The scheme has a duration of 18 months, may be extended up to 3 years;
- At own request of the debtor or after a bankruptcy procedure;
- When it is reasonably foreseeable that he has ceased to pay his debt when they fall due.

Information and treshold

- The application shall include :
  - a personal statement by the debtor;
  - a reasoned statement issued by the competent authority of the municipality of residence that an extra-judicial settlement is not an option;
  - a list of creditors.
- The debts in the 3 years previous to the application should be made in 'good faith';
  - no debt caused by fraude, malicious intent, or criminal acts.
- 3 year bar may be circumvented if the circumstances which contributed to the debt situation are under control:
  - Addiction to drugs or alcohol: a statement of the doctor that the debtor has been clean for at least a year;
  - Budgettraining or otherwise proof that the (monthly) financial expenses are under control.

Procedure during scheme

If the scheme is granted:

- Court appoints administrator and a supervisory judge;
- The administrator will report to the supervisory judge every 3 months whether the debtor has fulfilled his legal obligations:
  - to actively look for paid employment (4 job applications per month);
  - not to enter into new debts.
  - to inform the administrator on all (financial) matters that are relevant for an efficient running of the scheme;

Procedure during scheme (2)

- The debtor is granted a monthly allowence for living expenses (90 percent of the social security standard or 95 percent of the national assistance standard)
- The debtor has to pay the surplus of his earnings into a special bankaccount out of which the adminstrator is paid (55,- p.m.) and if there is any balance left at the end of the 18 months period the creditors.
- After 18 months the court will assess whether the debtor has fulfilled all the obligations under the scheme:
  - If yes - then the debtor will obtain a discharge and debts that are not (fully) paid are no longer enforceable ('clean slate');
  - If no - then the scheme will be ended without a discharge and the debts are enforceable again.
- If during the duration of the scheme the debtor is not fulfilling the obligations arising out of the law the administrator may request the supervisory judge to request the court to terminated the scheme or in a case of minor breach to extend the duration of the scheme.
- If the debtor is discharged without a 'clean slate' because of entering into new debts any creditor may file for bankruptcy of the debtor.

Provisional measures

- if the debtor is filing for the scheme he may, in urgent matters, request for provisional measures (a stay) such as:
  - to prevent eviction from his house;
  - to prevent the termination of essential supplies such as gas, electicity and water.

WHOA

- Act on court confirmation of extrajudicial restructuring plans.
- Entered into force on 1 January 2021.
- Implementation (partly) of EU Directive 2019/1023, Pb EU 2019.
- WHOA is also inspired by the UK Scheme of Arrangement and US Chapter 11.
- Goal: to create an effective and accessable restructuring procedure, not only for larger (multinational) companies, but also for SME's.

Characteristics of WHOA

- Open for companies and NP's with a business or profession, not open for banks or insurers (see also SOP);
- Flexibel system;
- Court involvement only upon request;
- Debtor in possession procedure;
- Choice between Private/Undisclosed or Public procedure;
- Procedure outside of insolvency;

Characteristics of WHOA (2)

- Binding on all creditors included in the Plan; debtor may leave (groups of) creditors out of the restructuring Plan;
- Right of employees arising from employment contracts are not touched by the restructuring Plan. Same applies to debts to Pension Funds (ruling by the Supreme Court);
- No Court involvement in voting procedure;
- No specialized Court, but a national pool of specialized Judges;
- No appeal possible, however possibility for the court to ask the Supreme Court for a ruling on a question of law (as was done concerning position of the Pension Funds);
- No IP appointed, no supervisory Judge;
- Relatively cheap and quick procedure.

Start of Procedure - art 370 DBA

- By debtor: Filing of a statement by the debtor to the Court registry that it is preparing a restructuring (start-declaration);
- Threshold – the debtor is in a situation in which it may reasonably be assumed that it wil be unable to continue payment of its debts in the foreseeable future (‘state of impending insolvency’);
- The management of the debtor does not require the consent of the meeting of shareholders (like the SOP) to file this statement and start the process;
- In case of a Public procedure: the statement must be published in the Central Insolvency Register after the first court decision;
- In case of a Private/Undisclosed procedure: the statement will be accessible to creditors eligible to vote after the request for confirmation is made;
- By submitting this statement the debtor has access to provisions and protective measures provided for in the WHOA.

Start of Procedure (2)

- The procedure may also be started by a creditor, workers council or empolyee's represenative body, or shareholder;
- They cannot file a start-declaration;
- They can only ask the court for the appointment of a restructuring expert.

Restructuring expert – art 371 DBA

- Appointment of a restructuring expert (RE) by the Court;
  - Upon request of any creditor, shareholder, works council or employee's representative body;
  - Upon request of the debtor itself
- Request will be granted if debtor is in a state of impending insolvency, unless it is summarily clear that the appointment is not in the interest of the joint creditors;
- A request will be granted in any case if it is filed by the debtor or the majority of creditors.
- RE will offer the plan to the creditors and shareholders of the debtor, or to some of them;

Restructuring expert(2)

- In case RE is appointed on the request of another party than the debtor, the debtor is authorised to present a restructuring plan to the RE with the request to submit it to the creditors and shareholders eligble to vote;
- In that case there are two plans on which the eligible creditors and shareholders have to vote – has not happend yet.
- In case the debtor is a SME the RE may only put the plan up for vote with the consent of the debtor, the same applies if the RE is appointed at the request of any other party than the debtor;

Stay of execution (ECLI:NL:RBAMS:2021:1876 & ECLI:NL:RBDHA:2022:3956)

- No automatic stay;
- After filing the statement the debtor/RE may request for a stay of no more than 4 months if he has offered a plan or has declared the intention to offer a restructuring plan within a period of no more than 2 months;
- Possible extension: total duration 8 months max;
- During the stay any request for an insolvency or SOP will be suspended, no recovery of assets under the debtor's control (provided that these third parties have be informed of the order of the stay), the court may lift attachements at the request of the debtor, the creditor or the RE.
- Example: Excercise of voting rights attached to shares by the lien holder prohibited during stay (see Judgement RBAMS)

Ruling on aspects of the Plan (art 378 DBA)

- Before a restructuring plan is submitted to the vote the debtor/RE may request the Court to rule on aspects that are relevant in the context of Plan ;
- Reason: a plan may only be offered once for confirmation (the one strike–rule). If a plan fails at the confirmation stage the debtor cannot propose a new plan for a period of 3 years. Exception: if a new plan is proposed by a RE the 3 year period does not apply. The 3 year rule also does not apply to a rejected plan proposed by a RE;
- Ruling can only be requested by debtor or RE, affected parties have to have the opportunity to express their opinion on the aspect(s) before the court.

Ruling on aspects of the Plan (ECLI:NL:RBAMS:2021:6519)

- In order for the debtor to be able to put possible aspects before the Court, the affected creditors and shareholders are – by law- obliged to inform the debtor as soon as possible of any objection they may have to (parts of) the plan;
- Art 383 (9) DBA provides that a creditor/shareholder may not invoke any ground for refusal, of the confirmation of the Plan, to the court if it has not protested to the debtor or the RE within reasonable time after it has discovered this possible ground for refusal.

Aspects to be ruled upon

- Sufficient information (a full list of the required information in art 375 DBA), among others: the values and principles and assumptions used by the debtor for determining the liquidation and reorganistation value;
- The class composition;
- Admission to the vote of creditor or shareholder;
- Voting procedure and time allocated for the vote (min 8 days) ;
- In case of approval of the plan by all classes, any ground for refusal ex officio (art 384 (2) DBA);
- In case of a dissenting creditor or class – has the debtor acted in accordance with the best interest of creditors test and/or has the APR been applied correctly?

Class composition in bankruptcy cases

- Debts of the estate ;
  - Salary of IA
  - Experts and services provided after opening procedures
  - Unemployment agency for the salaries for the period of 6 weeks after opening of the insolvency and the dismissal of the emloyees by the IA
- Secured creditors (mortgage or lien/pledge);
- Creditors with a preference according to the law:
  - Taxs authorities on certain assets in the estate (may override securities)
  - Pensionfunds
  - Unemployment agency for the salaries due from 6 weeks before opening of the insolvency
- Unsecured creditors;
- Subordinate loans;
- Shareholders.

Class composition under the WHOA (art 374 (1) DBA)

- The debtor is at liberty to determine which (groups of) creditors and shareholders it wants to include in the Plan;
- Creditors and shareholders whose rights are affected– and therefore are entitled to vote on the Plan – are put in different classes if the rights they would have in the event of a liquidation of the debtor's assets or the rights they are offered on the basis of the Plan are so different that there is no comparable position :no 'sufficient commonality of interest' based of verifiable criteria (EU Directive).

Class composition (2)

- Secured creditors (pledge/lien or mortgage): for the amount which is covered by the value of the security in liquidation – for the remaining amount they will be classified as unsecured creditors;
- Prefered creditors: tax authorities or any other party with a preference according to the law;
- Unsecured creditors:
  - SME creditors – in general they have to receive a 20 % return in cash on their claim, unless there is a compelling reason to deviated from this rule;
  - Other unsecured creditors;
- Subordinated loans;
- Shareholders.

APR rule and cross class cram down

In general the APR rule is applicable, but the restructuring plan may still be confirmed by the court if the APR rule is derogated from to the detriment of a rejecting class, provided that there is a reasonble ground for the derogation and the interests of the relevant class of creditors/shareholders are not harmed (reasonableness test);

- APR only relevant between parties to the plan;
- Cross class cram down: combines
  - A intra class cram down;
  - A cross class cram down – in case more than one class is involved – class(es) in favour may overrule dissenting class(es)

Which rights may be affected in the plan

* As said rights of employees and pension funds may not be affected;
- Financial obligations; current rights (and future in case of credit provisions?);
- Extention of repayment period– market conform compensation;
- Shareholder rights;
- Termination of long term contracts; compensation for damages due to premature termination may be included in the plan;
- Third party releases – to what extent are releases permissabe and is the realease binding on dissenting classes/dissenting creditors in classes?

Other provisions

- Art 42 a DBA – Protection of DIP finance. DIP finance can be made avoidance proof with court consent. After this ruling it may not be annulled in a possible bankruptcy procedure; the financing must be allocated for the restructuring process or the continuation of the company during the restructuring process.
- Art 372 DBA – Termination/restructuring of group company obligations (groupgaranties);
- Art 373 DBA – Termination of onerous contracts and deactivation of ipso facto clauses in case a stay is granted;
- Art 379 DBA – Bespoke provision: At the request of the debtor/RE or *ex officio* the court may impose provisions and arrangements it deems neccessary to secure the interests of the creditors/shareholders. Among others: the appointment of the Observer (art 380 DBA) or the prohibition of a change of the composition of the Board of Directors or the supervisory Board.

Other provisions

- Up till now it has been mainly used to appoint an Observer. The role of the Observer is to guard the interests of the creditors/shareholders.
- An Observer may be appointed when there is a stay, an Observer must be appointed by the court in case of a request for confirmation of a plan by a debtor (no RE involved) in which one class has voted against the plan.
- The Observer has to have access to all information as a RE would have, he should be able to observe the whole process of the restructuring.
- If a RE is appointed the appointment of the Observer (automatically) ends.
- Twice a court ordered a prohibition on the replacement of (members of) the Board by the shareholder(request for the provision was made by the debtor company).

Voting and Confirmation of the plan

- The voting procedure is in the hands of the debtor/RE, it may be done in a meeting or electronically; the voting procedure can last several days/weeks;
- A class has accepted the Plan if creditors representing at least 2/3 of the total amount of claims belonging to the creditors who have cast their vote in that class approve the Plan;
- The voting record should be drawn up within 7 days after the end of the voting period;
- The record must then be filed with the court and a request for confirmation may be made if at least one of the classes has voted in favor (cross class cram down);
- In case the plan includes an amendment of the rights of creditors who are 'in the money', and would at least partly be satisfied in case of a bankruptcy, the class in favor must be an 'in the money' class.

Voting and Confirmation of the plan

- The Court confirmation hearing has to take place between 8 – 14 days after filing the request for confirmation and the voting record;
- Court will hand down its reasoned decision as soon as possible – usually within 14 days;
- If all classes have voted in favor the Court will confirm the Plan unless one of the grounds of art 384 (2) and (3) applies;
- The grounds of art 384 (2) are accessed *ex officio* by the court – they deal with the impending insolvency state and the procedural aspects of the Plan, the information requirements, whether performance of the Plan is sufficiently safeguarded, and no fraud or unlawful pressure was exercised etc.

Voting and Confirmation of the plan

- Wages and disbursements of the RE or Observer are paid or security has been provided for it;
- Other issues that might oppose court confirmation;
- Art 384 (3): the 'no creditor worse of' test – may be brought up by any creditor who did not vote in favor of the plan.
- Art 384 (4): APR rule has not been applied correctly. This ground may be invoked by a creditor/shareholder who voted against the plan and is in a class that has voted against the plan. This is the protection for the class(es) which is the 'victim' of the cross class cram down.

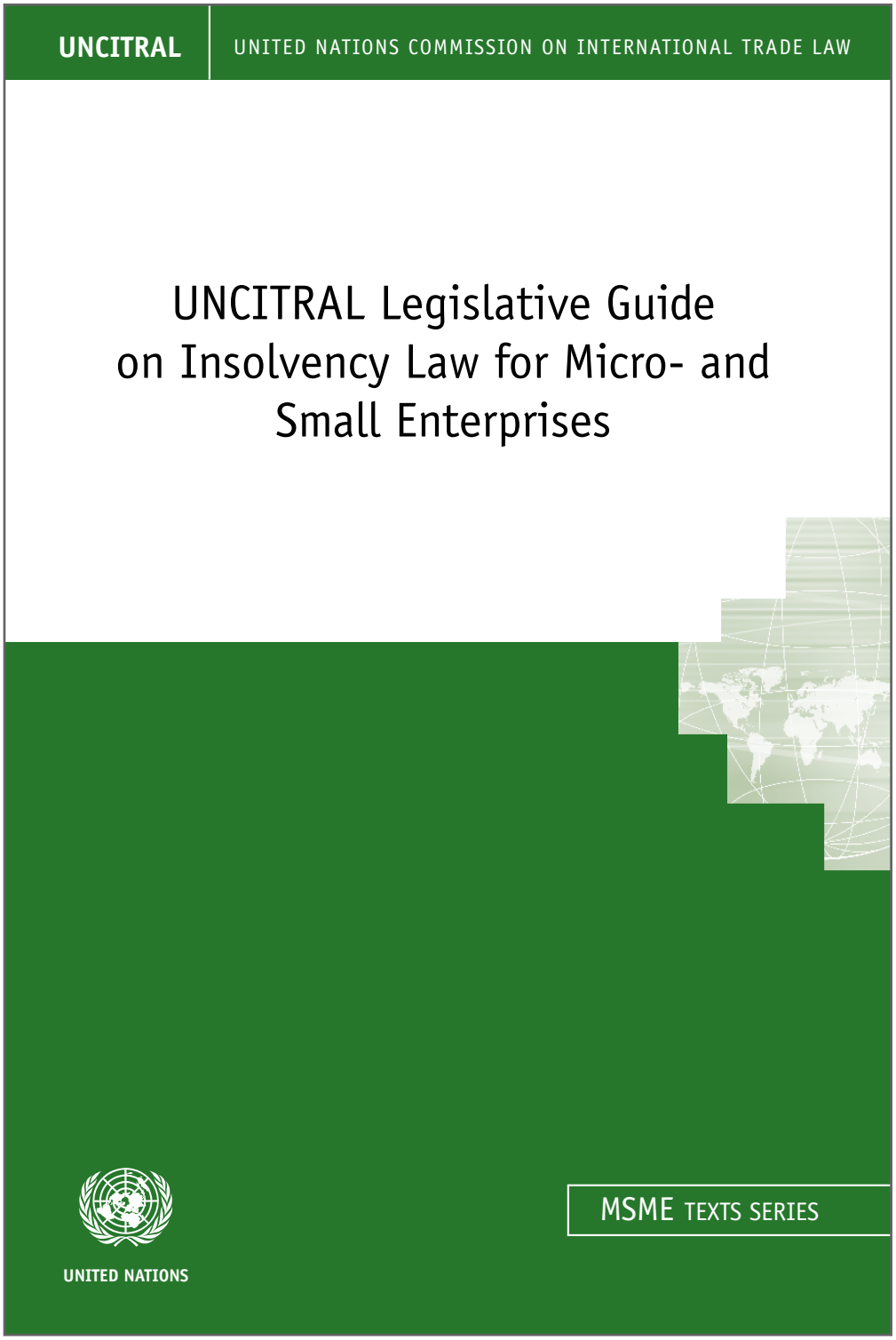
The End

- In case you have additional questions about the Dutch insolvency procedures please do not hesitate to contact me:

  email: a.de.vos@rechtspraak.nl

- Thank you for your kind attention.

UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW FOR MICRO- AND SMALL ENTERPRISES



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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises

MSME texts series

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Preface

The *UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises* is comprised of the *UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises*, adopted by the United Nations Commission on International Trade Law at its fifty-fourth session,[1] and the commentary to the *UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises,* finalized by UNCITRAL Working Group V (Insolvency Law) at its fifty-ninth session (Vienna, 13-17 December 2021) (A/CN.9/1088, paras. 17 and 18).

The project arose from a request of the Commission to its Working Group V (Insolvency Law) to conduct a preliminary examination of issues relevant to the insolvency of micro, small and medium-sized enterprises (MSMEs), and in particular to consider whether the *UNCITRAL Legislative Guide on Insolvency Law* provided sufficient and adequate solutions for MSMEs. If it did not, the Working Group was requested to consider what further work and potential work product might be required to streamline and simplify insolvency procedures for MSMEs.[2] On the basis of the Working Group's preliminary findings, the Commission agreed that the Working Group should develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. It was agreed that, while the key insolvency principles and the guidance provided by the *UNCITRAL Legislative Guide on Insolvency Law* should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the *Legislative Guide* to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient.[3]

The first draft of the *UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises* was considered by the Working Group at its fifty-fourth session (Vienna, 10–14 December 2018) at which the Working Group decided to focus the text on the needs of micro- and small enterprises (MSEs). Work developed through subsequent five sessions of the Working Group, the final session on the project taking place in December 2021. In addition to representatives of member States of UNCITRAL, representatives of observer States and a number of invited international organizations, both intergovernmental and non-governmental, participated actively in the preparatory work. The work was undertaken in close collaboration with the World Bank Group that was updating its Principles for Effective Insolvency and Creditor/Debtor Regimes with respect to specific aspects of the insolvency of MSEs.

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 77 and annex II.
[2] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.
[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

The final negotiations on the draft text in the Commission were held during its fifty-fourth session (Vienna, 28 June-16 July 2021), at which the *UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises* were adopted and the draft commentary was approved in principle by the Commission (for the decision of the Commission adopted at that session, see an annex to this publication). The General Assembly, in its resolution 76/229 of 24 December 2021, commended UNCITRAL for adopting the *Legislative Recommendations on Insolvency of Micro- and Small Enterprises*.

As requested by the Commission, the Working Group finalized the commentary and approved the *UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises* for publication at its fifty-ninth session, in December 2021 (A/CN.9/1088, paras. 17 and 18). As was agreed by the Commission, the *UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises* is published as part five of the *UNCITRAL Legislative Guide on Insolvency Law* and as part of the UNCITRAL MSME texts series. This publication is part of the UNCITRAL MSME texts series.

Contents

Part one

UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises

UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises

A. Key objectives of a simplified insolvency regime

1. States should provide for a simplified insolvency regime and for that purpose consider the following key objectives:

(a) Putting in place expeditious, simple, flexible and low-cost insolvency proceedings (henceforth referred to as "simplified insolvency proceedings");

(b) Making simplified insolvency proceedings available and easily accessible to micro- and small enterprises (MSEs);

(c) Promoting the MSE debtor's fresh start by enabling expedient liquidation of non-viable MSEs and reorganization of viable MSEs through simplified insolvency proceedings;

(d) Ensuring protection of persons affected by simplified insolvency proceedings, including creditors, employees and other stakeholders (henceforth referred to as "parties in interest") throughout simplified insolvency proceedings;

(e) Providing effective measures to facilitate participation by creditors and other parties in interest in simplified insolvency proceedings, and to address creditor disengagement;

(f) Implementing an effective sanctions regime to prevent abuse or improper use of the simplified insolvency regime and to impose appropriate penalties for misconduct;

(g) Addressing concerns over stigmatization because of insolvency; and

(h) Where reorganization is feasible, preserving employment and investment.

Those objectives are in addition to the objectives of an effective insolvency law as set out in recommendations 1–5 of the UNCITRAL Legislative Guide on Insolvency Law (the "Guide"), such as the provision of certainty in the market to promote economic stability and growth, maximization of value of assets, preservation of the insolvency estate to allow equitable distribution to creditors, equitable treatment of similarly situated creditors, ensuring transparency and predictability, recognition of existing creditor rights and establishment of clear rules for ranking of priority.

B. Scope of a simplified insolvency regime

Application to all micro- and small enterprises

2. States should ensure that a simplified insolvency regime applies to all MSEs. Aspects of the regime may differ depending on the type of MSE. (*See recommendations 8 and 9 of the Guide.*)

Comprehensive treatment of all debts of individual entrepreneurs

3. States should ensure that all debts of an individual entrepreneur are addressed in a single simplified insolvency proceeding unless the State decides to subject some debts of individual entrepreneurs to other insolvency regimes, in which case procedural consolidation or coordination of linked insolvency proceedings should be ensured.

Types of simplified insolvency proceedings

4. States should ensure that a simplified insolvency regime provides for simplified liquidation and simplified reorganization. (*See recommendation 2 of the Guide.*)

C. Institutional framework

Competent authority and an independent professional

5. The insolvency law providing for a simplified insolvency regime should:

(a) Clearly indicate the competent authority; (*See recommendation 13 of the Guide.*)

(b) Specify the functions of the competent authority and any independent professional used in the administration of simplified insolvency; and

(c) Specify mechanisms for review and appeal of the decisions of the competent authority and any independent professional used in the administration of simplified insolvency proceedings.

Possible functions of the competent authority

6. The insolvency law providing for a simplified insolvency regime may specify, for example, the following functions of the competent authority:

(a) Verification of eligibility requirements for commencement of a simplified insolvency proceeding;

(b) Verification of accuracy of information provided to the competent authority by the debtor, creditors and other parties in interest, including as regards the debtor's assets, liabilities and recent transactions;

(c) Resolution of disputes concerning the type of proceeding to commence;

(d) Conversion of one proceeding to another;

(e) Exercise of control over the insolvency estate;

(f) Verification and review of the reorganization plan and the liquidation schedule for compliance with law;

(g) Supervision of the implementation of a debt repayment or reorganization plan and verification of the implementation of the plan;

(h) Decisions related to the stay of proceedings, relief from the stay, creditors' objections or opposition, disputes, approval of a liquidation schedule and confirmation of a reorganization plan; and

(i) Oversight of compliance by the parties with their obligations under the simplified insolvency regime, including any obligations owed to employees under the insolvency law and other laws applicable within insolvency proceedings.

Appointment of persons to assist the competent authority in the performance of its functions

7. The insolvency law providing for a simplified insolvency regime should allow the competent authority to appoint one or more persons, including independent professionals, to assist it in the performance of its functions.

Possible functions of an independent professional

8. If the insolvency law providing for a simplified insolvency regime envisages the use of an independent professional in the administration of simplified insolvency proceedings, it should allocate the functions of the competent authority, such as those illustrated in recommendation 6, between the competent authority

and an independent professional. That law may provide for such allocation to be determined by the competent authority itself.

Support with the use of a simplified insolvency regime

9. The insolvency law providing for a simplified insolvency regime should specify measures to make assistance and support with the use of a simplified insolvency regime readily available and easily accessible. Such measures may include services of an independent professional; templates, schedules and standard forms; and an enabling framework for the use of electronic means where information and communications technology in the State so permits and in accordance with other applicable law of that State.

Mechanisms for covering costs of administering simplified insolvency proceedings

10. The insolvency law providing for a simplified insolvency regime should specify mechanisms for covering the costs of administering simplified insolvency proceedings where assets and sources of revenue of the debtor are insufficient to meet those costs. (*See recommendations 26 and 125 of the Guide.*)

D. Main features of a simplified insolvency regime

Default procedures and treatment

11. The insolvency law providing for a simplified insolvency regime should specify the default procedures and treatment that apply unless any party in interest objects or intervenes with a request for a different procedure or treatment or other circumstances exist that justify a different procedure or treatment.

Short time periods

12. The insolvency law providing for a simplified insolvency regime should specify short time periods for all procedural steps in simplified insolvency proceedings, narrow grounds for their extension and the maximum number, if any, of permitted extensions.

Reduced formalities

13. Consistent with the objective of establishing a cost-effective simplified insolvency regime, the insolvency law providing for a simplified insolvency regime should reduce formalities for all procedural steps in simplified insolvency proceedings, including for submission of claims, for obtaining approvals and for giving notices and notifications.

Debtor-in-possession in simplified reorganization proceedings

Debtor-in-possession as the default approach

14. The insolvency law providing for a simplified insolvency regime should specify that, in simplified reorganization proceedings, the debtor remains in control of its assets and the day-to-day operation of its business with appropriate supervision and assistance of the competent authority.

Rights and obligations of the debtor-in-possession

15. The insolvency law providing for a simplified insolvency regime should specify the rights and obligations of the debtor-in-possession, in particular as regards the use and disposal of assets,[1] post-commencement finance[2] and treatment of contracts,[3] and allow the competent authority to specify them on a case-by-case basis.

Limited or total displacement of the debtor-in-possession

16. The insolvency law providing for a simplified insolvency regime should specify:

(a) Circumstances justifying limited or total displacement of the debtor-in-possession in simplified reorganization proceedings;

(b) Persons who may displace the debtor-in-possession in simplified reorganization proceedings; and

---

[1] See recommendations 52–62 of the Guide that will be applicable mutatis mutandis in a simplified insolvency regime. References to the insolvency representative in those recommendations should be read as references to the debtor-in-possession unless limited or total displacement of the debtor from the operation of the business takes place.

[2] Idem., but with reference to recommendations 63–68 of the Guide.

[3] Idem., but with reference to recommendations 69–86 and 100–107 of the Guide.

(c) That the competent authority should be authorized to decide on displacement and terms of displacement on a case-by-case basis. (*See recommendations 112 and 113 of the Guide.*)

Possible involvement of the debtor in the liquidation of the insolvency estate

17. The insolvency law providing for a simplified insolvency regime may specify circumstances under which the competent authority may allow the debtor's involvement in the liquidation of the insolvency estate and the extent of such involvement.

Deemed approval

18. The insolvency law providing for a simplified insolvency regime should specify the matters which require approval of creditors and establish the relevant approval requirements. (*See recommendation 127 of the Guide.*) It should also specify that approvals on those matters are deemed to be obtained where:

(a) Those matters have been notified by the competent authority to relevant creditors in accordance with procedures and time periods established for such purpose in the insolvency law providing for a simplified insolvency regime or by the competent authority; and

(b) Neither objection nor sufficient opposition as regards those matters is communicated to the competent authority in accordance with procedures and time periods established for such purpose in the insolvency law providing for a simplified insolvency regime or by the competent authority.

E. Participants

Rights and obligations of parties in interest

19. The insolvency law providing for a simplified insolvency regime should specify rights and obligations of the MSE debtor, of the creditors and of other parties in interest, including employees where applicable under national law, such as:

(a) The right to be heard and request review on any issue in the simplified insolvency proceedings that affects their rights, obligations or interests; (*See recommendations 137 and 138 of the Guide.*)

(b) The right to participate in the simplified insolvency proceedings and to obtain information relating to the proceeding from the competent authority subject to appropriate protection of information that is commercially sensitive, confidential or private; (*See recommendations 108, 111 and 126 of the Guide.*)

(c) Where the debtor is an individual entrepreneur, the right of the debtor to retain the assets excluded from the insolvency estate by law. (*See recommendation 109 of the Guide.*)

Obligations of the debtor

20. The insolvency law providing for a simplified insolvency regime should specify the obligations of the MSE debtor that should arise on the commencement of, and continue throughout, the proceedings. The obligations should include the following:

(a) To cooperate with and assist the competent authority to perform its functions, including, where applicable, to take effective control of the estate, wherever located, and of business records, and to facilitate or cooperate in the recovery of the assets;

(b) To provide accurate, reliable and complete information relating to its financial position and business affairs, subject to allowing the debtor the time necessary to collect the relevant information, with the assistance of the competent authority where required, including an independent professional where appointed, and subject to appropriate protection of commercially sensitive, confidential and private information;

(c) To provide notice of the change of a habitual place of residence or place of business;

(d) To adhere to the terms of the liquidation schedule or reorganization plan; and

(e) In the day-to-day operation of the business, to have otherwise due regard to the interests of creditors and other parties in interest.

(*See recommendations 110 and 111 of the Guide.*)

Protection of employees' rights and interests in simplified insolvency proceedings

21. The insolvency law providing for a simplified insolvency regime should require the competent authority to ensure that all requirements of insolvency law and other laws applicable within insolvency proceedings relating to the protection of employees' rights and interests in insolvency are complied with in simplified insolvency

proceedings. Those requirements may include, in particular, the requirement to keep the MSE debtor's employees properly informed, either directly or through their representatives, about the commencement of a simplified insolvency proceeding and all matters arising from that proceeding affecting their employment status and entitlements.

F. Eligibility, application and commencement

Eligibility

22. The insolvency law providing for a simplified insolvency regime should establish the criteria that debtors must meet in order to be eligible for simplified insolvency proceedings, minimizing the number of such criteria, and specify under what conditions creditors of the eligible debtors may also apply for commencement of simplified insolvency proceedings with respect to those debtors.

(*See recommendations 8, 9 and 14–16 of the Guide.*)

Commencement criteria and procedures

23. The insolvency law providing for a simplified insolvency regime should:

(a) Establish transparent, certain and simple criteria and procedures for commencement of simplified insolvency proceedings;

(b) Enable applications for simplified insolvency proceedings to be made and dealt with in a speedy, efficient and cost-effective manner; and

(c) Establish safeguards to protect debtors, creditors and other parties in interest, including employees, from abuse of the application procedure.

(*See the text preceding recommendation 14 of the Guide.*)

Commencement on debtor application

Application

24. The insolvency law providing for a simplified insolvency regime should allow eligible debtors to apply for commencement of a simplified insolvency proceeding at an early stage of financial distress without the need to prove insolvency. (*See recommendation 15 of the Guide.*)

Information to be included in the application

25. The insolvency law providing for a simplified insolvency regime should specify information that the debtor must include in its application for commencement of a simplified insolvency proceeding, keeping the disclosure obligation at the stage of application to the minimum. It should require that information to be accurate, reliable and complete.

Effective date of commencement

26. The insolvency law providing for a simplified insolvency regime should specify that where the application for commencement is made by the debtor:

(a) The application for commencement will automatically commence a simplified insolvency proceeding; or

(b) The competent authority will promptly determine its jurisdiction and whether the debtor is eligible and, if so, commence a simplified insolvency proceeding.

(*See recommendation 18 of the Guide.*)

Commencement on creditor application

27. The insolvency law providing for a simplified insolvency regime should specify that a simplified insolvency proceeding may be commenced on the application of a creditor of a debtor which is eligible for simplified insolvency proceedings, provided that:

(a) Notice of application is promptly given to the debtor;

(b) The debtor is given the opportunity to respond to the application, by contesting the application, consenting to the application or requesting the commencement of a proceeding different from the one applied for by the creditor; and

(c) A simplified insolvency proceeding of the type to be determined by the competent authority commences without agreement of the debtor only after it is established that the debtor is insolvent.

(*See recommendation 19 of the Guide.*)

Denial of application

Possible grounds for denial of application

28. The insolvency law providing for a simplified insolvency regime should specify that, where the decision to commence a simplified insolvency proceeding is to be made by the competent authority, the competent authority should deny the application if it finds that:

(a) It does not have jurisdiction;

(b) The applicant is ineligible; or

(c) The application is an improper use of the simplified insolvency regime.

(*See recommendation 20 of the Guide.*)

Prompt notice of denial of application

29. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly give notice of its decision to deny the application to the applicant, and where the application was made by a creditor, also to the debtor. (*See recommendation 21 of the Guide.*)

Possible consequences of denial of application

30. The insolvency law providing for a simplified insolvency regime should set out possible consequences of denial of application, including that a different type of insolvency proceeding may commence if criteria set out in the insolvency law for the commencement of that other type of insolvency proceeding are met.

Possible imposition of costs and sanctions against the applicant

31. The insolvency law providing for a simplified insolvency regime should allow the competent authority, where it has denied an application to commence a simplified insolvency proceeding under recommendation 28, to impose costs or sanctions, where appropriate, against the applicant for submitting the application. (*See recommendation 20 of the Guide.*)

Notice of commencement of proceedings

32. The insolvency law providing for a simplified insolvency regime should require that:

(a) The competent authority should give the notice of the commencement of the simplified insolvency proceeding using the means appropriate to ensure that the information is likely to come to the attention of parties in interest; and

(b) The debtor and all known creditors should be individually notified by the competent authority of the commencement of the simplified insolvency proceeding unless the competent authority considers that, under the circumstances, some other form of notice would be more appropriate.

(*See recommendations 23 and 24 of the Guide.*)

Content of the notice of commencement of a simplified insolvency proceeding

33. The insolvency law providing for a simplified insolvency regime should specify that the notice of commencement of a simplified insolvency proceeding is to include:

(a) The effective date of the commencement of the simplified insolvency proceeding;

(b) Information concerning the application of the stay and its effects;

(c) Information concerning submission of claims or that the list of claims prepared by the debtor will be used for verification;

(d) Where submission of claims by creditors is required, the procedures and time period for submission and proof of claims and the consequences of failure to do so (See recommendation 51 below); and

(e) Time period for expressing objection to the commencement of a simplified insolvency proceeding (See recommendation 34 below).

(*See recommendation 25 of the Guide.*)

Creditor objection to the commencement of a simplified insolvency proceeding

34. The insolvency law providing for a simplified insolvency regime should specify that creditors may object to the commencement of a simplified insolvency proceeding or a particular type thereof or to the commencement of any insolvency proceeding with respect to the debtor, provided they do so within the time period established in the insolvency law as notified to them by the competent authority in the notice of the commencement of the simplified insolvency proceeding (See recommendations 32 and 33 above).

Possible consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding

35. The insolvency law providing for a simplified insolvency regime should specify consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding.

Dismissal of a simplified insolvency proceeding after its commencement

Possible grounds for dismissal of the proceeding

36. The insolvency law providing for a simplified insolvency regime should permit the competent authority to dismiss the proceeding if, after its commencement, the competent authority determines, for example, that:

(a) The proceeding constitutes an improper use of the simplified insolvency regime; or

(b) The applicant is ineligible.

(*See recommendation 27 of the Guide.*)

Prompt notice of the dismissal of the proceeding

37. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly give notice of its decision to dismiss the proceeding using the procedure that was used for giving notice of the commencement of the simplified insolvency proceeding. (*See recommendation 29 of the Guide.*)

Possible consequences of dismissal of the proceeding

38. The insolvency law providing for a simplified insolvency regime should set out possible consequences of the dismissal of the proceeding, including that a different type of insolvency proceeding may commence if criteria set out in the insolvency law for the commencement of that other type of insolvency proceeding are met.

Possible imposition of costs and sanctions against the applicant

39. Where the proceeding is dismissed, the insolvency law providing for a simplified insolvency regime should allow the competent authority to impose costs or

sanctions, where appropriate, against the applicant for commencement of the proceeding. (*See recommendation 28 of the Guide.*)

G. Notices and notifications

Procedures for giving notices

40. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notices related to simplified insolvency proceedings and use simplified and cost-effective procedures for such purpose. (*See recommendations 22 and 23 of the Guide.*)

Individual notification

41. The insolvency law providing for a simplified insolvency regime should require that the debtor and any known creditor should be individually notified by the competent authority of all matters on which their approval is required, unless the competent authority considers that, under the circumstances, some other form of notification would be more appropriate. (*See recommendation 24 of the Guide.*)

Appropriate means of giving notice

42. The insolvency law providing for a simplified insolvency regime should specify that the means of giving notice must be appropriate to ensure that the information is likely to come to the attention of the intended party in interest. (*See recommendation 23 of the Guide.*)

H. Constitution, protection and preservation of the insolvency estate

Constitution of the insolvency estate

43. The insolvency law providing for a simplified insolvency regime should identify:

(a) Assets that will constitute the insolvency estate, including assets of the debtor, assets acquired after commencement of the simplified insolvency proceeding and assets recovered through avoidance or other actions; (*See recommendation 35 of the Guide.*)

(b) Where the MSE debtor is an individual entrepreneur, assets excluded from the estate that the MSE debtor is entitled to retain (See recommendation 19 *(c)* above). (*See recommendations 38 and 109 of the Guide.*)

Undisclosed or concealed assets

44. The insolvency law providing for a simplified insolvency regime should specify that any undisclosed or concealed assets form part of the insolvency estate.

Date from which the insolvency estate is to be constituted

45. The insolvency law providing for a simplified insolvency regime should specify the effective date of commencement of a simplified insolvency proceeding as the date from which the estate is to be constituted. (*See recommendation 37 of the Guide.*)

Avoidance in simplified insolvency proceedings

46. The insolvency law providing for a simplified insolvency regime should ensure that avoidance mechanisms available under the insolvency law[4] can be used in a timely and effective manner to maximize returns in simplified insolvency proceedings. The competent authority should be allowed to convert a simplified insolvency proceeding to a different type of insolvency proceeding where the conduct of avoidance proceedings necessitates doing so.

Stay of proceedings

Scope and duration of the stay

47. The insolvency law providing for a simplified insolvency regime should specify that the stay of proceedings applies on commencement and throughout simplified insolvency proceedings unless: *(a)* it is lifted or suspended by the competent authority on its own motion or upon request of any party in interest; or *(b)* the relief from the stay is granted by the competent authority upon request of any party in interest. Any exceptions to the application of the stay should be clearly stated in the law. (*See recommendations 46, 47, 49 and 51 of the Guide.*)

[4] See recommendations 87–99 of the Guide.

Rights not affected by the stay

48. The insolvency law providing for a simplified insolvency regime should specify that the stay does not affect:

(a) The right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor;

(b) The right of a secured creditor, upon application to the competent authority, to protection of the value of the asset(s) in which it has a security interest;

(c) The right of a third party, upon application to the competent authority, to protection of the value of its asset(s) in the possession of the debtor; and

(d) The right of any party in interest to request the competent authority to grant relief from the stay. (*See recommendations 47, 50, 51 and 54 of the Guide.*)

I. Treatment of creditor claims

Claims affected by simplified insolvency proceedings

49. The insolvency law providing for a simplified insolvency regime should specify claims that will be affected by simplified insolvency proceedings, which should include claims of secured creditors, and claims that will not be affected by simplified insolvency proceedings. (*See recommendations 171 and 172 of the Guide.*)

Admission of claims on the basis of the list of creditors and claims prepared by the debtor

50. The insolvency law providing for a simplified insolvency regime may require the debtor to prepare the list of creditors and claims, with the assistance of the competent authority or an independent professional where necessary, unless the circumstances justify that the competent authority prepares the list itself with the assistance of the debtor or entrusts an independent professional with that task. It should specify that:

(a) The list so prepared should be circulated by the competent authority to all listed creditors for verification, indicating the time period for communicating any objection or concern as regards the list to the competent authority;

(b) In the absence of any objection or concern communicated to the competent authority or the independent professional as applicable within the established time period, the claims are deemed to be undisputed and admitted as listed;

(c) In case of objection or concern, the competent authority takes action with respect to disputed claim(s) (See recommendation 54 below).

(*See recommendations 110* (b)*(v) and 170 of the Guide.*)

Submission of claims by creditors

51. The insolvency law providing for a simplified insolvency regime should allow the competent authority, when circumstances of the case so justify, to require creditors to submit their claims to the competent authority, specifying the basis and amount of the claim. It should require in such case that:

(a) The procedures and the time period for submission of the claims and consequences of failure to submit a claim in accordance with those procedures and time period should be specified by the competent authority in the notice of commencement of the simplified insolvency proceeding (See recommendations 32 and 33 above) or in a separate notice;

(b) A reasonable period of time should be given to creditors to submit their claims expeditiously;

(c) Formalities associated with submission of claims should be minimized and the use of electronic means for such purpose should be enabled where information and communication technology in the State so permits and in accordance with other applicable law of that State.

(*See recommendations 169, 170, 174 and 175 of the Guide.*)

Admission or denial of claims

52. The insolvency law providing for a simplified insolvency regime should allow the competent authority to:

(a) Admit or deny any claim, in full or in part;

(b) Subject claims by related persons to a special scrutiny and treatment, in full or in part; and

(c) Determine the portion of a secured creditor's claim that is secured and the portion that is unsecured by valuing the encumbered asset.

(*See recommendations 177, 179 and 184 of the Guide.*)

Prompt notice of denial of claims or subjecting them to a special scrutiny or treatment

53. Where the claim is to be denied or subjected to a special scrutiny or treatment, the insolvency law providing for a simplified insolvency regime should require the competent authority to give prompt notice of the decision and the reasons for the decision to the creditor concerned, indicating the time period within which the creditor can request review of that decision. (*See recommendations 177 and 181 of the Guide.*)

Treatment of disputed claims

54. The insolvency law providing for a simplified insolvency regime should permit a party in interest to dispute any claim, either before or after admission, and request review of that claim. It should authorize the competent authority or another competent State body to review a disputed claim and decide on its treatment, including by allowing the proceeding to continue with respect to undisputed claims. (*See recommendation 180 of the Guide.*)

Effects of admission

55. The insolvency law providing for a simplified insolvency regime should specify the effects of admission of a claim, including entitling the creditor whose claim has been admitted to participate in the simplified insolvency proceeding, to be heard, to participate in a distribution and to be counted according to the amount and class of the claim for determining sufficient opposition and establishing the priority to which the creditor's claim is entitled. (*See recommendation 183 of the Guide.*)

J. Features of simplified liquidation proceedings

Decision on a procedure to be used

56. The insolvency law providing for a simplified insolvency regime should require that the competent authority, after commencement of a simplified liquidation proceeding, should promptly determine whether the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will take place in the proceeding:

(a) Where it is determined that the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will take place, the insolvency law providing for a simplified insolvency regime should require the preparation, notification and approval of the liquidation schedule (See recommendations 57–64 below);

(b) Where it is determined that the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will not take place, the insolvency law providing for a simplified insolvency regime should require the competent authority to close the simplified liquidation proceeding (See recommendations 65–67 below).

Procedure involving the sale and disposal of assets and distribution of proceeds

Preparation of the liquidation schedule

57. The insolvency law providing for a simplified insolvency regime may require the competent authority to prepare the liquidation schedule unless circumstances of the case justify entrusting the preparation of the liquidation schedule to the debtor, an independent professional or another person.

Time period for preparing a liquidation schedule

58. The insolvency law providing for a simplified insolvency regime should specify the maximum time period for preparing a liquidation schedule after commencement of a simplified liquidation proceeding, keeping it short, and authorize the competent authority to establish a shorter time period where the circumstances of the case so justify. It should also specify that any time period established by the competent authority must be notified to the person responsible for preparing the liquidation schedule and to (other) known parties in interest.

Minimum contents of the liquidation schedule

59. The insolvency law providing for a simplified insolvency regime should specify the contents of a liquidation schedule, keeping it to the minimum, including that the liquidation schedule should:

(a) Identify the party responsible for the realization of the assets of the insolvency estate;

(b) List assets of the debtor, specifying those that are subject to security interests;

(c) Specify the means of realization of the assets (public auction or private sale or other means);

(d) List amounts and priorities of the admitted claims; and

(e) Indicate the timing and method of distribution of proceeds from the realization of the assets.

Notification of the liquidation schedule to all known parties in interest

60. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notice of the liquidation schedule to all known parties in interest, specifying a short period for expressing any objection to the liquidation schedule.

Prior review of the liquidation schedule by the competent authority

61. Where the liquidation schedule is prepared by a person other than the competent authority, the insolvency law providing for a simplified insolvency regime should require the competent authority, before giving notice of the liquidation schedule, to review the liquidation schedule to ascertain its compliance with the law and when it is not so compliant, to make any required modifications to the liquidation schedule to ensure that it is compliant.

Approval of the liquidation schedule

62. The insolvency law providing for a simplified insolvency regime should require the competent authority to approve the liquidation schedule if it receives no objection within the established time period and there are no other grounds for the competent authority to reject the liquidation schedule.

Treatment of objections

63. Where there is objection, the insolvency law providing for a simplified insolvency regime should allow the competent authority either to modify the liquidation schedule, approve it unmodified or convert the proceeding to a different type of insolvency proceeding.

Prompt distribution of proceeds in accordance with the insolvency law

64. The insolvency law providing for a simplified insolvency regime should require distributions to be made promptly and in accordance with the insolvency law. (*See recommendation 193 of the Guide.*)

Procedure not involving the sale and disposal of assets and distribution of proceeds

Notice of a decision to proceed with the closure of the proceeding

65. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly notify the debtor, all known creditors and other known parties in interest about its determination that no sale and disposal of the assets of the insolvency estate and no distribution of proceeds to creditors will take place in the proceeding and its decision therefore to proceed with the closure of the proceeding. It should require the notice: *(a)* to include reasons for that determination and the list of creditors, assets and liabilities of the debtor; and *(b)* to specify a short time period for expressing any objection to that decision.

Decision to close the proceeding in the absence of objection

66. The insolvency law providing for a simplified insolvency regime should require the competent authority, in the absence of any objection to its decision to proceed with the closure of the proceeding, to close the proceeding.[5]

Treatment of objections

67. Where the competent authority receives an objection to its decision to proceed with the closure of the proceeding, the insolvency law providing for a simplified insolvency regime should permit the competent authority to commence verification of reasons for the objection, following which the competent authority may decide:

(a) To revoke its decision and commence a simplified liquidation proceeding involving the sale and disposal of assets and distribution of proceeds;

(b) To convert a simplified liquidation proceeding to a different type of insolvency proceeding; or

(c) To close the proceeding.[6]

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[5] The competent authority would be expected to take a decision on discharge not later than at the time of the closure of the proceeding even if discharge itself may take effect later, for example, after expiration of the monitoring period or implementation of a debt repayment plan. See section L for related recommendations on discharge.

[6] Idem.

K. Features of simplified reorganization proceedings

Preparation of a reorganization plan

68. The insolvency law providing for a simplified insolvency regime should allow the competent authority to appoint, where necessary, an independent professional to assist the debtor with the preparation of the reorganization plan or decide that circumstances of the case justify entrusting the preparation of the plan to an independent professional.

Time period for the proposal of a reorganization plan

69. The insolvency law providing for a simplified insolvency regime should fix the maximum time period for the proposal of a reorganization plan after commencement of a simplified reorganization proceeding and authorize the competent authority, where the circumstances of the case so justify, to establish a shorter time period subject to its possible extension up to the maximum period specified in the law. (*See recommendation 139 of the Guide.*)

Notice of the time period established for the proposal of a reorganization plan

70. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notice of the time period that it established for the proposal of a reorganization plan to the person responsible for preparing the reorganization plan and to (other) parties in interest.

Consequences of not submitting the reorganization plan within the established time period

71. The insolvency law providing for a simplified insolvency regime should specify that, if the reorganization plan is not submitted within the established time period, an insolvent debtor is deemed to enter the liquidation proceeding while, for a solvent debtor, the reorganization proceeding will terminate. (*See recommendation 158* (a) *of the Guide.*)

Alternative plan

72. The insolvency law providing for a simplified insolvency regime may envisage the possibility for creditors to file an alternative plan. Where it does so, it should specify the conditions and the time period for exercising such an option.

Content of the reorganization plan

73. The insolvency law providing for a simplified insolvency regime should specify the minimum contents of a plan, including:

(a) The list of assets of the debtor, specifying those that are subject to security interests;

(b) The terms and conditions of the plan;

(c) The list of creditors and the treatment provided for each creditor by the plan (e.g. how much they will receive and the timing of payment, if any);

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

(e) Proposed ways of implementing the plan.

(*See recommendations 143* (d) *and 144 of the Guide.*)

Notification of the reorganization plan to all known parties in interest

74. The insolvency law providing for a simplified insolvency regime could require the competent authority or an independent professional to ascertain compliance of the reorganization plan with the procedural requirements as provided in the law, and upon making any required modification to ensure that it is so compliant, to notify the plan to all known parties in interest to enable them to object or express opposition to the proposed plan. The notice should explain the consequences of any abstention and specify the time period for expressing any objection or opposition to the plan.

Effect of the plan on unnotified creditors

75. The insolvency law providing for a simplified insolvency regime should specify that a creditor whose rights are modified or affected by the plan should not be bound by the terms of the plan unless that creditor has been given the opportunity to express opposition on the approval of the plan. (*See recommendation 146 of the Guide.*)

Approval of the reorganization plan by creditors

Undisputed reorganization plan

76. The insolvency law providing for a simplified insolvency regime should specify that the plan is deemed to be approved by creditors if the requirements under recommendation 18 are fulfilled.

Disputed plan

77. The insolvency law providing for a simplified insolvency regime should:

(a) Allow the modification of the plan to address objection or sufficient opposition to the plan;

(b) Establish a short time period for introducing modifications and transmitting a modified plan to all known parties in interest;

(c) Require the competent authority to transmit any modified plan to all known parties in interest indicating a short time period for expressing any objection or opposition to the modified plan;

(d) Require the competent authority to terminate the simplified reorganization proceedings for a solvent debtor or convert the simplified reorganization proceeding to a simplified liquidation proceeding for an insolvent debtor (i) if modification of the original plan to address objection or sufficient opposition is not possible or (ii) if objection or sufficient opposition to the modified plan is communicated to the competent authority within the established time period; and

(e) Specify that the modified plan is approved by creditors if the competent authority receives no objection and no sufficient opposition to the modified plan within the established time period.

(*See recommendations 155, 156 and 158 of the Guide.*)

Confirmation of the plan by the competent authority

78. The insolvency law providing for a simplified insolvency regime should require the competent authority to confirm the plan approved by creditors. It should require the competent authority, before confirming the plan, to ascertain that the creditor approval process was properly conducted, creditors will receive at least as much under the plan as they would have received in liquidation, unless they have specifically agreed to receive lesser treatment, and the plan does not contain provisions contrary to law. (*See recommendation 152 of the Guide.*)

Challenges to the confirmed plan

79. The insolvency law providing for a simplified insolvency regime should permit the confirmed plan to be challenged on the basis of fraud. It should specify:

(a) A time period for bringing such a challenge calculated by reference to the time the fraud is discovered;

(b) The party that may bring such a challenge;

(c) That the challenge should be heard by the relevant review body; and

(d) That a simplified reorganization proceeding may be converted to a simplified liquidation proceeding or a different type of insolvency proceeding where the confirmed plan is successfully challenged.

(*See recommendations 154 and 158* (d) *of the Guide.*)

Amendment of a plan

80. The insolvency law providing for a simplified insolvency regime should permit the amendment of a plan and specify:

(a) The parties that may propose amendments;

(b) The time at which the plan may be amended, including between submission and approval and during implementation, and a mechanism for communicating amendments to the competent authority; and

(c) The mechanism for approval of amendments of the confirmed plan, which should include a notice by the competent authority of proposed amendments to all parties in interest affected by the amendments, the approval of the amendments by those parties, the confirmation of the amended plan by the competent authority, and the consequences of failure to secure approval of proposed amendments. (*See recommendations 155 and 156 of the Guide.*)

Supervision of the implementation of the plan

81. The insolvency law providing for a simplified insolvency regime may entrust supervision of the implementation of the plan to the competent authority or an independent professional as applicable. (*See recommendation 157 of the Guide.*)

Consequences of the failure to implement the plan

82. The insolvency law providing for a simplified insolvency regime should specify that, where there is substantial breach by the debtor of the terms of the plan or inability to implement the plan, the competent authority may on its own motion or at the request of any party in interest:

(a) Convert the simplified reorganization proceeding to a simplified liquidation proceeding or a different type of insolvency proceeding;

(b) Close the simplified reorganization proceeding and parties in interest may exercise their rights at law;

(c) If closed, reopen the simplified reorganization proceeding;

(d) If closed, open a simplified liquidation proceeding; or

(e) Grant any other appropriate type of relief.

(*See recommendations 158* (e) *and 159 of the Guide.*)

Conversion of a simplified reorganization to a liquidation

83. The insolvency law providing for a simplified insolvency regime should provide that at any point during a simplified reorganization proceeding, the competent authority may, on its own motion or at the request of a party in interest or an independent professional, where appointed, decide that the proceeding be discontinued and converted to a liquidation, if the competent authority determines that the debtor is insolvent and there is no prospect for viable reorganization. Where the competent authority considers conversion to liquidation before submission of a reorganization plan, the competent authority should be mindful of the time needed to prepare and submit a reorganization plan (See recommendations 69 and 70 above) and may consult the independent professional in making the decision, if one has been appointed.

L. Discharge

Discharge in simplified liquidation proceedings

Decision on discharge

84. The insolvency law providing for a simplified insolvency regime should specify that, in a simplified liquidation proceeding, discharge should be granted expeditiously.

Discharge conditional upon expiration of a monitoring period

85. Where the insolvency law provides that discharge may not apply until after the expiration of a specified period of time following commencement of insolvency proceedings during which period the debtor is expected to cooperate with the competent authority ("monitoring period"), the insolvency law providing for a simplified insolvency regime should:

(a) Fix the maximum duration of the monitoring period, which should be short;

(b) Allow the competent authority to establish a shorter duration of the monitoring period on a case-by-case basis;

(c) Specify that, after expiration of the monitoring period, the debtor should be discharged upon decision of the competent authority where the debtor has not acted fraudulently and has cooperated with the competent authority in performing its obligations under the insolvency law. (*See recommendation 194 of the Guide.*)

Discharge conditional upon the implementation of a debt repayment plan

86. The insolvency law providing for a simplified insolvency regime may specify that full discharge may be conditional upon the implementation of a debt repayment plan. In such case, it should allow the competent authority to specify the duration of the debt repayment plan ("discharge period") and require the discharge procedures to include verification by the competent authority:

(a) Before the debt repayment plan becomes effective, that the debt repayment obligations reflect the situation of the individual entrepreneur and are proportionate to his or her disposable income and assets during the discharge period, taking into account the equitable interest of creditors; and

(b) On expiry of the discharge period, that the individual entrepreneur has fulfilled his or her repayment obligations under the debt repayment plan, in which case the individual entrepreneur is discharged upon confirmation by the competent authority of the fulfilment of the debt repayment plan by the debtor.

Discharge in simplified reorganization proceedings

87. The insolvency law providing for a simplified insolvency regime may specify that full discharge in simplified reorganization is conditional upon successful implementation of the reorganization plan and it shall take immediate effect upon confirmation by the competent authority of such implementation.

General provisions

Conditions for discharge

88. Where the insolvency law providing for a simplified insolvency regime specifies that conditions may be attached to the MSE debtor's discharge, those conditions should be kept to a minimum and clearly set forth in the insolvency law. (*See recommendation 196 of the Guide.*)

Exclusions from discharge

89. Where the insolvency law providing for a simplified insolvency regime specifies that certain debts are excluded from a discharge, those debts should be kept to a minimum and clearly set forth in the insolvency law. (*See recommendation 195 of the Guide.*)

Criteria for denying discharge

90. The insolvency law providing for a simplified insolvency regime should specify criteria for denying a discharge, keeping them to a minimum.

Criteria for revoking a discharge granted

91. The insolvency law providing for a simplified insolvency regime should specify criteria for revoking a discharge granted. In particular, it may specify that the discharge is to be revoked where it was obtained fraudulently. (*See recommendation 194 of the Guide.*)

M. Closure of proceedings

92. The insolvency law providing for a simplified insolvency regime should specify minimal and simple procedures by which simplified insolvency proceedings should be closed. (*See recommendations 197 and 198 of the Guide.*)

N. Treatment of personal guarantees; procedural consolidation and coordination

Treatment of personal guarantees

93. A simplified insolvency regime should address, including through procedural consolidation or coordination of linked proceedings, the treatment of personal

guarantees provided for business needs of the MSE debtor by individual entrepreneurs, owners of limited liability MSEs or their family members.

Procedural consolidation or coordination of linked business, consumer and personal insolvency proceedings

Orders of procedural consolidation and coordination

94. The insolvency law may require procedural consolidation or coordination of linked business, consumer and personal insolvency proceedings in order to address comprehensively intertwined business, consumer and personal debts of individual entrepreneurs, owners of limited liability MSEs and their family members. The law may specify that, in such cases, the competent authority or another competent State body, as the case may be, may order procedural consolidation or coordination of linked proceedings on its own motion or upon request of any party in interest, which may be made at the time of application for commencement of insolvency proceedings or at any subsequent time.

Modification or termination of an order for procedural consolidation or coordination

95. The insolvency law should specify that an order for procedural consolidation or coordination may be modified or terminated, provided that any actions or decisions already taken pursuant to the order are not affected by the modification or termination. Where more than one State body is involved in ordering procedural consolidation or coordination, those State bodies may take appropriate steps to coordinate modification or termination of procedural consolidation or coordination.

Notice of procedural consolidation and coordination

96. The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural consolidation or coordination and modification or termination of procedural consolidation or coordination, including the scope and extent of the order, the parties to whom notice should be given, the party responsible for giving notice and the content of the notice.

O. Conversion

Conditions for conversion

97. The insolvency law should provide for conversion between different types of proceedings in appropriate circumstances and subject to applicable eligibility and other requirements.

Procedures for conversion

98. The insolvency law should address procedures for conversion, including notification to all known parties in interest about the conversion, and mechanisms for addressing objections to that course of action.

Effect of conversion on post-commencement finance

99. The insolvency law should specify that where a simplified reorganization proceeding is converted to a liquidation proceeding, any priority accorded to post-commencement finance in the simplified reorganization proceeding should continue to be recognized in the liquidation proceeding. (*See recommendation 68 of the Guide.*)

Other effects of conversion

100. The insolvency law should address other effects of conversion, including on deadlines for actions, the stay of proceedings and other steps taken in the proceeding being converted. (*See recommendation 140 of the Guide.*)

P. Appropriate safeguards and sanctions

101. The insolvency law providing for a simplified insolvency regime should build in appropriate safeguards to prevent abuses and improper use of a simplified insolvency regime and permit the imposition of sanctions for abuse or improper use of the simplified insolvency regime, for failure to comply with the obligations under the insolvency law and for non-compliance with other provisions of the insolvency law. (*See recommendations 20, 28 and 114 of the Guide.*)

Q. Pre-commencement aspects

Obligations of persons exercising control over MSEs in the period approaching insolvency

102. The law relating to insolvency should specify that, at the point in time when the persons exercising control over the business knew or should have known that insolvency was imminent or unavoidable, they should have due regard for the interests of creditors and other stakeholders and take reasonable steps at an early stage of financial distress to avoid insolvency and, where it is unavoidable, to minimize the extent of insolvency. Reasonable steps might include:

(a) Evaluating the current financial situation of the business;

(b) Seeking professional advice where appropriate;

(c) Not committing the business to the types of transaction that might be subject to avoidance unless there is an appropriate business justification;

(d) Protecting the assets so as to maximize value and avoid loss of key assets;

(e) Ensuring that management practices take into account the interests of creditors and other stakeholders;

(f) Considering holding informal debt restructuring negotiations with creditors; and

(g) Applying for commencement of insolvency proceedings if it is required or appropriate to do so.

(*See recommendations 255, 256 and 257 of the Guide.*)

Early rescue mechanisms

103. As a means of encouraging the early rescue of MSEs, a State should consider establishing mechanisms for providing early signals of financial distress to MSEs, increasing financial and business management literacy among MSE managers and owners and promoting their access to professional advice. These mechanisms should be available and easily accessible to MSEs.

Informal debt restructuring negotiations

Removing disincentives for the use of informal debt restructuring negotiations

104. For the purpose of avoiding MSE insolvency, the State may consider identifying and removing disincentives for the use of informal debt restructuring negotiations.

Providing incentives for participation in informal debt restructuring negotiations

105. The State may consider providing appropriate incentives for the participation of creditors, including public bodies, and other relevant stakeholders, in particular employees, in informal debt restructuring negotiations.

Institutional support with the use of informal debt restructuring negotiations

106. The State may consider providing for:

(a) Involvement of a competent public or private body, where necessary, to facilitate informal debt restructuring negotiations between creditors and debtors and between creditors;

(b) A neutral forum to facilitate negotiation and resolution of debtor-creditor and inter-creditor issues; and

(c) Mechanisms for covering or reducing the costs of the services mentioned in subparagraphs *(a)* and *(b)* above.

Pre-commencement business rescue finance

107. The law should:

(a) Facilitate and provide incentives for finance to be obtained by MSEs in financial distress before commencement of insolvency proceedings for the purpose of rescuing business and avoiding insolvency;

(b) Subject to proper verification of appropriateness of that finance and protection of parties whose rights may be affected by the provision of such finance, provide appropriate protection for the providers of such finance, including the payment of such finance provider at least ahead of ordinary unsecured creditors; and

(c) Provide appropriate protection for those parties whose rights may be affected by the provision of such finance.

Part two

Commentary to the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises

Commentary to the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises

I. Introduction

A. Purpose of the Legislative Guide on Insolvency Law for Micro- and Small Enterprises

1. Micro, small and medium-sized enterprises (MSMEs) constitute the majority of businesses in economies around the world. Those in the micro- and small part of the spectrum (MSEs), in most economies, take the form of sole proprietorships or small partnerships whose founders, owners or members do not enjoy limited liability protection and thus are exposed to unlimited liability for business debts of MSEs. Where MSEs operate as limited liability entities, limited liability protection is usually illusory for MSE owners because they are often expected to secure MSE business debts using their personal assets as collateral. MSEs tend to be relatively undiversified as regards creditor, supply and client base and heavily depend on payments from their clients. As a result, they often face cash-flow problems and higher default risks that follow from the loss of a significant business partner or from late payments by their clients. MSEs also face scarcity of working capital, higher interest rates and larger collateral requirements, which make raising finance, especially in situations of financial distress, difficult, if not impossible. As a consequence, they may be prone to business failure more often than larger enterprises. MSEs in financial distress may themselves be the clients of other MSEs that would share the same characteristics, with the consequence that business failure of one MSE may cause business failures in the MSE supply chain.

2. Standard business insolvency processes may be unavailable for MSEs. Where they are available for MSEs but costly, complex, lengthy and procedurally rigid, they may be prohibitive or unsuitable for MSEs. Burdened by unresolved financial difficulties and old debt, MSEs may be discouraged from taking new risks, may become trapped in a cycle of debt or may be driven to the informal sector of the economy.

3. Efforts are being made at the international, regional and national levels to find solutions tailored to the specific needs of MSEs in financial distress in the light of the broad impact of MSE insolvency on job preservation, the supply chain, entrepreneurship and the economic and social welfare of society. Solutions sought aim at allowing deserving MSEs to restart entrepreneurial activities, drawing on their know-how, skills and lessons from the past.

4. This Legislative Guide on Insolvency Law for Micro- and Small Enterprises (hereinafter referred to as "the MSE Insolvency Guide") was prepared to assist policymakers with those efforts. It discusses features of a simplified insolvency regime that could encourage MSEs to address financial distress at an early stage. The focus is on faster, simpler, accessible and affordable insolvency proceedings, with appropriate safeguards. The MSE Insolvency Guide also addresses some measures that should assist MSEs during the period preceding the commencement of simplified insolvency proceedings, acknowledging however that they would usually fall outside the insolvency law.

B. Interaction of the MSE Insolvency Guide with the UNCITRAL Legislative Guide on Insolvency Law

5. The introduction to the UNCITRAL Legislative Guide on Insolvency Law ("the Guide") explains that its purpose is to assist in the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. The Guide is intended to be used as a reference point when preparing new insolvency law or when reforming, modernizing or reviewing the adequacy of existing insolvency law.

6. The MSE Insolvency Guide is intended to supplement the advice given in the Guide and is specifically designed to address the unique circumstances of MSEs. It is not intended to replace the Guide, but to supplement it with a specific focus on how insolvency and its prevention should be dealt with where MSEs are involved, and it should therefore be read in this context. References are made in the MSE Insolvency Guide to specific recommendations in the Guide which are of particular relevance to, or are supplemented by, the MSE Insolvency Guide. Tables of concordance between recommendations of the MSE Insolvency Guide and recommendations of the Guide are annexed to this text for ease of reference. Where the MSE Insolvency Guide diverges from the recommendations in the Guide, this is expressly made clear in the commentary.

C. Issues taken into account in preparing the MSE Insolvency Guide

1. Specific characteristics of MSEs and issues they face in financial distress

7. MSEs may often operate without a separate legal personality and have closely intermingled business and personal debts and a centralized governance model in which ownership, control and management overlap (often within a family). Few or no business records may exist, including of transactions between owners, family members, friends and other individuals involved in the operation and financing of the business. There may be no clearly established ownership of key business assets (such as tools or other essential equipment). It is not unusual for owners to use personal assets for business purposes and to use business assets for personal or family needs. Work and services performed for MSEs may be undocumented or remunerated not in accordance with typical commercial practices.

8. Access to credit by MSEs is often made subject to the granting of personal guarantees by the owners or their relatives and friends whose personal assets could be equal to or of greater value than those of the MSE. A personal guarantee will typically extend liability for the debts of the MSE to those individuals, affecting both personal effects (such as the family home) and business assets.

9. When facing financial problems, the management may be unwilling to apply for the commencement of insolvency proceedings at the risk of losing control over the business. An owner may hide a financial crisis out of fear of damaging a good commercial name and relationships with employees, suppliers and the market and disrupting existing lines of credit. MSEs may be prone to adopt more high-risk strategies, attempting to save their business, which may be their only source of income, at all costs. Lack of sophistication of many MSEs in financial and business matters may aggravate the situation. In addition, because of the high prevalence of personal guarantees provided by owners or managers of MSEs for business debts of MSEs, owners or managers of MSEs may be reluctant to commence insolvency proceedings for the fear that such commencement would trigger creditors' demands to perform under personal guarantees. These factors may contribute to the financial crisis and lead MSEs to address financial difficulties at a time when liquidation of the business might be the only solution left.

10. Any physical assets of MSEs, which may be the main or the only assets of value to creditors, may already be encumbered to one or a very limited number of secured creditors who are usually able and willing to use enforcement methods available to them under law. Unencumbered assets of MSEs are usually of little or

no value for distribution to unsecured creditors. As a result, unsecured creditors may not be willing to invest the time and resources for resolution of MSE financial difficulties because the costs of their participation in those efforts may outweigh the return. The holdouts by secured creditors and disengagement of unsecured creditors jeopardize chances of successful debt restructuring negotiations and reorganization of viable MSEs, leaving liquidation as the only option.

11. Because MSEs lack the financial sophistication of larger enterprises, they may not have the financial information required for filing an application to commence insolvency proceedings as readily available as larger enterprises and they may not understand their rights and obligations in insolvency proceedings and in the period approaching insolvency. Because of all those characteristics, MSEs encounter specific difficulties in financial distress, which larger enterprises would not usually face.

2. Situation under existing insolvency regimes with respect to MSEs

12. Existing standard business insolvency regimes may be designed with complexities and sophistication of larger enterprises in mind. They may presuppose the presence of an extensive insolvency estate of significant value and the active engagement of creditors and an insolvency representative. These features are usually absent in MSE insolvency cases. An MSE in financial distress will most likely not have resources to finance insolvency proceedings, including services of an insolvency representative. It may have very few creditors interested to commence insolvency proceedings because no or very few assets for realization and no or very few proceeds for distribution to creditors would be expected. In some jurisdictions, MSEs unable to finance insolvency proceedings may be ineligible to apply for commencement of insolvency proceedings at all. In other jurisdictions, insolvency proceedings may be allowed to progress only if debtors can cover administrative costs and ensure a minimum percentage of proceeds to be distributed to creditors. Some other jurisdictions may allow insolvency proceedings to progress for debtors that cannot meet those requirements only if they were stricken by exceptional circumstances (hardship relief).

13. Existing standard business insolvency regimes usually presuppose separation of owners and managers of an insolvent entity from the operation of the business, which may operate as a disincentive for MSEs to apply for commencement of insolvency proceedings. In addition, they may address only business debts of legal entities whereas MSE insolvencies often necessitate addressing intermingled business and personal debts comprehensively. Individual entrepreneurs may be treated as individual defaulters and be subject to personal insolvency frameworks, where such frameworks exist. The personal insolvency framework may not provide

temporary protection from creditors, nor allow for debt restructuring procedures and discharge. Where discharge is available for individual entrepreneurs, a long waiting period before discharge may apply, leaving full personal liability for many years after liquidation of the business. Heavy penalties, including limitations on freedom of movement and other personal restrictions, may also apply.

3. Approaches taken in the MSE Insolvency Guide to treating MSEs in financial distress

14. The MSE Insolvency Guide recommends that States include a simplified insolvency regime in their legal framework, either by adjusting their standard business insolvency law or by establishing a separate simplified insolvency regime, where their existing insolvency regime does not serve the needs of MSEs. Such simplified insolvency regime should address specific issues faced by MSEs in financial distress, in particular an MSE's lack of resources and sophistication in financial, business and insolvency matters and creditor disengagement. The MSE Insolvency Guide suggests mechanisms to address those issues and, in doing so, to achieve a balance between competing goals and interests.

15. Conditions for access to a simplified insolvency regime may vary greatly from jurisdiction to jurisdiction since there is no uniform definition of an MSE. MSEs may cover a range of persons, from individual entrepreneurs to unincorporated and incorporated entities with limited and unlimited liability, that meet certain criteria (e.g. low liabilities, no real estate, no or very few employees). For those reasons, the MSE Insolvency Guide leaves it to domestic policymakers to identify persons in their jurisdictions that may benefit from access to a simplified insolvency regime envisaged in the MSE Insolvency Guide. At the same time, it recommends that eligibility and commencement criteria and procedures should be minimized in order not to create obstacles for access to a simplified insolvency regime.

16. The MSE Insolvency Guide provides for both simplified reorganization and simplified liquidation proceedings, recognizing that the need for either may arise depending on the situation. Streamlined, simplified and expedited procedures and reduced formalities are suggested for both types of proceeding to minimize their complexity, length and associated costs. The debtor-in-possession regime is envisaged in the MSE Insolvency Guide as the default in simplified reorganization proceedings to encourage and incentivize early access of MSEs to simplified insolvency proceedings and reduce concerns over stigmatization. Measures are suggested to overcome issues that may arise in simplified insolvency proceedings if any party in interest chooses not to participate in the proceedings or causes obstruction or delay. The MSE Insolvency Guide also suggests a cost-effective approach to discharge with the aim to expedite a fresh start by honest and cooperative MSE debtors.

17. At the same time, the MSE Insolvency Guide recognizes that expedited and simplified procedures should not jeopardize rights and legitimate interests of parties in interest, including their rights to obtain information, to be heard and to seek review. For this reason, it underscores the need to accompany expedited and simplified procedures with the effective system of safeguards and sanctions to prevent abuse, fraud and irresponsible behaviour and provide appropriate penalties for misconduct. Safeguards and sanctions may take different forms, including assistance and supervision and, where appropriate, displacement of the debtor from the operation of the business. They should be appropriate and proportionate.

4. The need for holistic legislative measures to address the needs of MSEs in financial distress

18. Amendments of existing legislation other than insolvency law may be required so as to ensure the smooth functioning of a simplified insolvency regime under a cohesive body of law. Business registry regulations as well as banking laws and regulations may, for example, be relevant to generating and maintaining information about MSEs throughout their life cycle and channelling that information to the MSE insolvency system. Data protection laws and regulations may also be relevant in that context.

19. Smooth interaction of a simplified insolvency regime with secured transactions law and law applicable to third-party guarantees would also be necessary in the light of the important role that secured creditors and personal guarantors usually play in the MSE context. In addition, in the light of its close interlinkage with consumer and personal insolvency, a simplified insolvency regime will have to properly interact with consumer protection law and regulations, family and matrimonial law, as well as human rights instruments.

20. Furthermore, specific issues faced by MSEs in financial distress suggest a need for legislative measures that would incentivize MSEs to be as forthcoming as possible with identifying and addressing financial distress at an early stage. Some of those measures can be addressed in the insolvency law, for example, protection from avoidance of agreements reached during informal debt restructuring negotiations, including pre-commencement business rescue finance provided to an MSE. Some other measures may fall outside the insolvency law. In particular, tax and accounting regulations may build in a system of early warning signals of financial distress to MSEs and create incentives for early debt restructuring negotiations (e.g. tax relief from debt write-offs).

21. Generally, constitutional, cultural, social and economic norms of the State will dictate policy choices for devising a simplified insolvency regime. Regional

integration dynamics and concerns that domestic MSEs would consider relocating their business to other jurisdictions to access more friendly regimes ("forum shopping") may also be relevant in that regard.

5. Institutional support

22. Not all measures aimed at mitigating the challenges faced by MSEs in financial distress are capable of legal resolution. A combination of institutional measures may be required to ensure that a simplified insolvency regime is effective in practice.

23. In particular, the proper institutional and administrative structures and human resources should be in place to operate and administer a simplified insolvency regime. Effective implementation and the operational efficacy of a simplified insolvency regime will also be enhanced by standardized online procedures and forms and sample documents and by appropriate interaction of relevant State bodies and systems at the administrative level. In addition, training may need to be provided, on the one hand, to State authorities and insolvency practitioners with the aim of building the capacity in the public and private sectors necessary to handle specificities of MSE insolvencies, and on the other hand, to MSEs to increase their financial and business management literacy and awareness of their obligations in the vicinity of and during insolvency.

24. Many insolvency reforms aimed at lowering barriers for access to insolvency by MSEs are complemented by other institutional support to MSEs, in particular debt counselling, mediation services and assistance with application for commencement of insolvency proceedings and compliance with disclosure obligations under insolvency law.

II. Glossary

25. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the MSE Insolvency Guide. They, as well as other terms used in the MSE Insolvency Guide, should be read in conjunction with the terms and explanations used in the Guide:

(a) "Avoidance": provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or

their value, to be recovered in the collective interest of creditors (see term *(c)* in the Glossary of the Guide);

(b) "Competent authority": an administrative or judicial authority that is responsible for conduct or oversight of simplified insolvency proceedings or both;

(c) "Discharge": the release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings (see term *(m)* in the Glossary of the Guide);

(d) "Independent professional": an individual or entity of appropriate qualifications, independent from the debtor, creditors and other parties in interest, appointed by the competent authority to perform one or more tasks related to a simplified insolvency proceeding, subject to appropriate clearances as regards ethical, professional and other requirements and the absence of conflicts of interest. In the performance of any tasks assigned to it by the competent authority, the independent professional remains accountable to the competent authority and is expected to adhere to any applicable instructions or guidance that may be issued by the competent authority with respect to a task assigned to the independent professional;

(e) "Liquidation schedule": an administrative document that is issued in simplified liquidation proceedings to convey to all known parties in interest information on how the simplified liquidation proceeding will be conducted. After its notification to all parties in interest and approval by the competent authority, it serves as the programme for realization of assets and distribution of proceeds. For avoidance of doubt, the term is to be differentiated from the term "liquidation report" which is usually used to describe a document issued at the end of a liquidation proceeding to report on realization of insolvency estate assets and to account for proceeds received, distributed to creditors and returned to the debtor, if any;

(f) "MSEs": micro- and small enterprises in any legal form, including individual entrepreneurs and unincorporated or incorporated, limited or unlimited liability entities, qualified as micro- and small enterprises under their domestic law;[1]

(i) "Individual entrepreneurs": natural persons exercising a trade, business, craft or profession in the form of a sole proprietorship or self-employed activity or as a founder, owner or member of unlimited or limited liability MSEs if qualified as individual entrepreneurs under domestic law. For avoidance of doubt, the term intends to encompass business income earners as opposed to wage earners (i.e. employees);

[1] It is left to policymakers of each State to define persons (natural and legal) that would qualify as MSEs under their domestic law. In that context, States may wish to take into account the *UNCITRAL Legislative Guide on Limited Liability Enterprises* (2021).

(ii) "Unlimited liability MSEs": micro- and small enterprises with or without separate legal personality and without limited liability protection of their founders, owners or members (e.g. proprietorships, partnerships and other unlimited liability entities); and

(iii) "Limited liability MSEs": micro- and small enterprises with or without separate legal personality and with limited liability of their founders, owners or members;

(g) "MSE debtor": an MSE with respect to which simplified insolvency proceedings have been commenced or initiated. The term "debtor" used in the MSE Insolvency Guide intends to convey the same meaning unless the specific context suggests otherwise;

(h) "Party in interest": any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, an independent professional, a creditor, a MSE owner, a government authority, employees or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest (see term *(dd)* in the Glossary of the Guide as amended here with the addition of an explicit reference to "employees", in line with recommendation 1*(d)* of the MSE Insolvency Guide);

(i) "Related person": as to a debtor that is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity (see term *(jj)* in the Glossary of the Guide);

(j) "Simplified insolvency proceedings": include both simplified reorganization and simplified liquidation proceedings; and

(k) "Stay of proceedings": a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate (see term *(rr)* in the Glossary of the Guide).

26. The following rules of interpretation apply: *(a)* "or" is not intended to be exclusive; *(b)* use of the singular also includes the plural; *(c)* "include" and "including" are not intended to indicate an exhaustive list; *(d)* "such as" and "for example" are to be interpreted in the same manner as "include" or "including"; *(e)* "may" indicates permission and "should" indicates instruction; and *(f)* references to "person" should be interpreted as including both natural and legal persons.

III. Core provisions for an effective and efficient simplified insolvency regime

A. Key objectives of a simplified insolvency regime

Recommendation 1: Key objectives of a simplified insolvency regime

1. States should provide for a simplified insolvency regime and for that purpose consider the following key objectives:

(a) Putting in place expeditious, simple, flexible and low-cost insolvency proceedings (henceforth referred to as "simplified insolvency proceedings");

(b) Making simplified insolvency proceedings available and easily accessible to micro- and small enterprises (MSEs);

(c) Promoting the MSE debtor's fresh start by enabling expedient liquidation of non-viable MSEs and reorganization of viable MSEs through simplified insolvency proceedings;

(d) Ensuring protection of persons affected by simplified insolvency proceedings, including creditors, employees and other stakeholders (henceforth referred to as "parties in interest") throughout simplified insolvency proceedings;

(e) Providing effective measures to facilitate participation by creditors and other parties in interest in simplified insolvency proceedings, and to address creditor disengagement;

(f) Implementing an effective sanctions regime to prevent abuse or improper use of the simplified insolvency regime and to impose appropriate penalties for misconduct;

(g) Addressing concerns over stigmatization because of insolvency; and

(h) Where reorganization is feasible, preserving employment and investment.

Those objectives are in addition to the objectives of an effective insolvency law as set out in recommendations 1–5 of the UNCITRAL Legislative Guide on Insolvency Law (the "Guide"), such as the provision of certainty in the market to promote

economic stability and growth, maximization of value of assets, preservation of the insolvency estate to allow equitable distribution to creditors, equitable treatment of similarly situated creditors, ensuring transparency and predictability, recognition of existing creditor rights and establishment of clear rules for ranking of priority.

27. Recommendations 1 to 5 of the Guide list the key objectives and other features of an effective insolvency law, including: providing certainty in the market to promote economic stability and growth; maximizing value of assets; striking a balance between liquidation and reorganization; ensuring equitable treatment of similarly situated creditors; providing for timely, efficient and impartial resolution of insolvency; preserving the insolvency estate to allow equitable distribution to creditors; ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and recognizing existing creditors' rights and establishing clear rules for ranking of priority claims. The MSE Insolvency Guide adds to that list the establishment of an effective simplified insolvency regime that should focus on specific issues faced by MSEs in financial distress, such as MSEs' lack of financial and business sophistication, creditor disengagement, the lack of (sufficient) assets in the insolvency estate and concerns over stigmatization because of insolvency.

28. Because of those specific issues, the key objectives of the simplified insolvency regime should be putting in place expeditious, simple, flexible and low-cost insolvency proceedings, both liquidation and reorganization, and making them available and easily accessible to MSEs. These measures should encourage MSEs at an early stage of financial distress to commence insolvency proceedings, which may be vital for a successful reorganization of a viable MSE business and also for preservation of employment and investment. Another key objective is to promote the MSE debtor's fresh start by enabling expedient liquidation of non-viable MSEs and reorganization of viable MSEs. Because concerns over stigmatization often prevent MSEs from commencing insolvency proceedings, fighting stigmatization because of insolvency should also be the key objective of the simplified insolvency regime. It matters particularly in the MSE insolvency context where the name and reputation of individuals behind an MSE are closely linked to the business.

29. Putting in place effective measures to address creditor disengagement in MSE insolvencies, including procedural safeguards to prevent possible negative consequences of such disengagement for a proceeding, is listed as another key objective to consider in devising a simplified insolvency regime. Those measures should be coupled with effective mechanisms to facilitate participation and to ensure protection of not only the MSE debtor in a simplified insolvency proceeding but of all persons affected by such proceeding, including creditors, employees and other

stakeholders (collectively referred to as "parties in interest", see para. 25 *(h)* above). Employees are specifically mentioned because they can be affected by insolvency proceedings beyond their role as creditors and may also enjoy additional protections under domestic laws.

30. Implementing an effective sanctions regime to prevent abuse or improper use of the simplified insolvency regime and to impose appropriate penalties for misconduct is listed as another objective of the simplified insolvency regime. It is included because simple, low-cost and fast procedures and easy access thereto may increase risks of abuse or improper use of simplified insolvency proceedings. Excessive sanctions and inappropriate imposition of sanctions may however discourage honest and cooperative MSE debtors from applying for commencement of simplified insolvency proceedings and may discourage creditors and other parties in interest from participating in simplified insolvency proceedings. In deterring abuses and improper use of a simplified insolvency regime, sanctions should thus become an integral part of the simplified insolvency regime by not defeating inadvertently other objectives of a simplified insolvency regime.

B. Scope of a simplified insolvency regime

1. Application to all MSEs

Recommendation 2: Application to all micro- and small enterprises

2. States should ensure that a simplified insolvency regime applies to all MSEs. Aspects of the regime may differ depending on the type of MSE. (*See recommendations 8 and 9 of the Guide.*)

31. Although it is left to States to identify persons that will be qualified as MSEs and thus be eligible for access to a simplified insolvency regime (see para. 25 *(f)* and the accompanying footnote above), the MSE Insolvency Guide was drafted primarily for persons that share the characteristics described in paragraphs 7–11 above, that is, micro- and small enterprises, which larger enterprises, including medium-sized ones, would not possess. A simplified insolvency regime should focus on early resolution of financial difficulties of all types of MSE, irrespective of the legal structure through which they conduct their economic activities (limited liability company, partnership, sole trader, etc.) and whether or not they conduct

such activities for profit. To the extent that any MSE is excluded from the insolvency law, it will neither enjoy the protections, nor be subject to the discipline, of the insolvency law. The MSE Insolvency Guide recommends an all-inclusive approach to the design of a simplified insolvency regime, encompassing individual entrepreneurs, unlimited liability MSEs and limited liability MSEs, while recognizing however that insolvency of individual entrepreneurs and unlimited liability MSEs may raise policy considerations different from insolvency of limited liability MSEs.

32. The term "economic activities" mentioned above should be given a broad interpretation so as to cover matters arising from all relationships involving economic activity, whether contractual or not. These relationships would include, but are not limited to: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; consulting; and joint venture and other forms of business cooperation.

2. Comprehensive treatment of all debts of individual entrepreneurs

Recommendation 3: Comprehensive treatment of all debts of individual entrepreneurs

3. States should ensure that all debts of an individual entrepreneur are addressed in a single simplified insolvency proceeding unless the State decides to subject some debts of individual entrepreneurs to other insolvency regimes, in which case procedural consolidation or coordination of linked insolvency proceedings should be ensured.

33. A number of States have insolvency laws that apply different rules to business debts as opposed to personal or consumer debts. In the context of MSEs, it may not always be possible to separate their debts into clear categories. Individual entrepreneurs, owners of limited liability MSEs and their family members may all be involved in the business and use consumer credit to finance the business either as start-up capital or for operations. Business insolvency may lead to personal or consumer insolvency once a business fails, even if the business is a separate legal entity. For that reason, separate proceedings with different access conditions and procedural steps applicable to various debts involved in MSE insolvency may not be an optimal solution. The MSE Insolvency Guide recommends therefore that all debts of an MSE debtor should be covered in a single simplified insolvency proceeding; where that is not possible under applicable domestic law, it recommends that at

least procedural consolidation or coordination of linked insolvency proceedings should be ensured.

3. Types of simplified insolvency proceedings

Recommendation 4: Types of simplified insolvency proceedings

4. States should ensure that a simplified insolvency regime provides for simplified liquidation and simplified reorganization. (*See recommendation 2 of the Guide.*)

34. The MSE Insolvency Guide recommends that a simplified insolvency regime should provide for both simplified liquidation and simplified reorganization. A majority of MSE insolvency cases may result in liquidation. For this reason, the MSE Insolvency Guide recommends putting in place simple and fast mechanisms for the sale of any MSE debtor's assets, distribution of proceeds and liquidation of the business. At the same time, a simplified insolvency regime should build in safeguards against the risk of prematurely liquidating viable MSEs. The MSE Insolvency Guide suggests several safeguards against that risk, in particular that the procedure most appropriate to resolution of the MSE debtor's financial difficulty is to be applied by the competent authority. That safeguard is found in recommendation 27 *(c)* recognizing that it would be especially relevant where commencement of a simplified insolvency proceeding is initiated by a creditor. In addition, recommendations 28 *(c)* and 36 *(a)* envisage a possibility for denial of application and dismissal of the proceeding on the basis of an improper use of a simplified insolvency regime. Finally, provisions on conversion do not exclude a possibility of converting a simplified liquidation proceeding to a simplified reorganization proceeding (see section O and its accompanying commentary).

35. Achieving a balance between liquidation (often preferred by secured creditors) and reorganization (often preferred by unsecured creditors and the debtor) will have implications for broader policy considerations and other objectives of the simplified insolvency regime, such as preservation of employment and investment (See recommendation 1 *(h)*). Informal debt restructuring negotiations may also be available under domestic law as an additional option for the timely rescue of viable MSEs. They may not fall under the insolvency law framework. They are discussed in section Q of the MSE Insolvency Guide.

C. Institutional framework

1. Competent authority (recommendations 5 *(a)*, 5 *(b)* and 6)

Recommendation 5: Competent authority and an independent professional

5. The insolvency law providing for a simplified insolvency regime should:

(a) Clearly indicate the competent authority; (*See recommendation 13 of the Guide.*)

(b) Specify the functions of the competent authority and any independent professional used in the administration of simplified insolvency; and

...

Recommendation 6: Possible functions of the competent authority

6. The insolvency law providing for a simplified insolvency regime may specify, for example, the following functions of the competent authority:

(a) Verification of eligibility requirements for commencement of a simplified insolvency proceeding;

(b) Verification of accuracy of information provided to the competent authority by the debtor, creditors and other parties in interest, including as regards the debtor's assets, liabilities and recent transactions;

(c) Resolution of disputes concerning the type of proceeding to commence;

(d) Conversion of one proceeding to another;

(e) Exercise of control over the insolvency estate;

(f) Verification and review of the reorganization plan and the liquidation schedule for compliance with law;

(g) Supervision of the implementation of a debt repayment or reorganization plan and verification of the implementation of the plan;

(h) Decisions related to the stay of proceedings, relief from the stay, creditors' objections or opposition, disputes, approval of a liquidation schedule and confirmation of a reorganization plan; and

(i) Oversight of compliance by the parties with their obligations under the simplified insolvency regime, including any obligations owed to employees under the insolvency law and other laws applicable within insolvency proceedings.

36. The competent authority to be designated by a State will play an important role in ensuring that a simplified insolvency regime fulfils its objectives, in particular that it provides for easily accessible, expeditious, simple, flexible and low-cost insolvency proceedings, and at the same time ensures that the regime is not abused or improperly used.

37. In the MSE Insolvency Guide, the term "competent authority" was preferred to the term "court" used in the Guide and defined in its Glossary,[2] to convey the point that the competent authority would not necessarily be a judicial or other authority competent to exercise overall supervision and control over insolvency proceedings in the State. In some States, the competent authority will indeed be such a body, while in other States, conduct and oversight of simplified insolvency proceedings may be entrusted to another body. The choice will depend, among other things, on the administrative and legal systems of the State as well as the capacities of existing institutions and the need to ensure cost-efficiency and speed of proceedings.

38. In most jurisdictions, insolvency proceedings are administered by a judicial authority, often through commercial courts or courts of general jurisdiction or, in a few cases, through specialized bankruptcy courts. Sometimes judges have specialized knowledge and responsibility only for insolvency matters, while in other cases insolvency matters are just one of a number of wider judicial responsibilities. In a few jurisdictions, non-judicial or quasi-judicial institutions fulfil the role of overall supervision and control over insolvency proceedings.

39. In those jurisdictions in which simplified insolvency proceedings are already handled or can be handled through the existing body, whether in the judiciary or otherwise, exercising overall supervision and control over insolvency proceedings in that jurisdiction, there may be little advantage in introducing another body in the system. Institutional reforms, including amendments in procedural rules, may nevertheless be needed to enable that body to deal efficiently with simplified insolvency proceedings, minimizing costs and delays while at the same time ensuring proper checks and balances. Procedural rules may need in particular to envisage the possibility of ex parte commencement of simplified insolvency proceedings and holding summary proceedings in lieu of ordinary proceedings.

[2] See term (i) "'Court': a judicial or other authority competent to control or supervise insolvency proceedings."

40. In other jurisdictions, where simplified insolvency proceedings before the existing body exercising overall supervision and control over insolvency proceedings in that jurisdiction are expected to be costly, or where the capacity of such body is limited, a different body may be entrusted with public functions related to simplified insolvency proceedings.

41. Recognizing the widely differing systems of State administration as well as varying approaches and capacities throughout the world, the MSE Insolvency Guide does not suggest to States that a specific State authority should become the competent authority; instead, it recommends that States should clearly indicate which authority will perform the role of the competent authority and specify its functions. The focus of the MSE Insolvency Guide is therefore on functions that the competent authority should be able to perform in order to fulfil the objectives of a simplified insolvency regime.

42. Some of the functions of the competent authority would stem from its general responsibility to provide public oversight over simplified insolvency proceedings necessary to ensure their integrity and promote confidence and trust in the use of a simplified insolvency regime. Those functions would typically include: *(a)* verification of eligibility requirements for commencement of a simplified insolvency proceeding; *(b)* verification of accuracy of information provided to the competent authority by the debtor, creditors and other parties in interest, including as regards the debtor's assets, liabilities and recent transactions (such verification may take place, for example, on the basis of the information included in publicly available records and registries, including business registries, registries of rights to immovable and movable property and registries of secured transactions or security interests); *(c)* resolution of disputes concerning the type of proceeding to commence; *(d)* conversion of one type of proceeding to another; *(e)* exercise of control over the insolvency estate; *(f)* verification and review of the reorganization plan and the liquidation schedule for compliance with law; *(g)* supervision of the implementation of a debt repayment or reorganization plan and verification of the implementation of the plan; *(h)* decisions related to the stay of proceedings, relief from the stay, creditors' objections or opposition, disputes, approval of a liquidation schedule and confirmation of a reorganization plan; and *(i)* oversight of compliance by the parties with their obligations under the simplified insolvency regime, including any obligations owed to employees under the insolvency law and other laws applicable within insolvency proceedings (See recommendation 6). Some of the listed functions could be delegated by the competent authority to an independent professional (see para. 25 *(d)* above) in order to ensure smooth proceedings, benefit from expertise of an independent professional or for other reasons (see paras. 48–50 below).

43. Other functions of the competent authority would stem from its responsibility to conduct simplified insolvency proceedings. In particular, the competent authority

will be expected to issue decisions on commencement, dismissal and closure of proceedings, to admit or deny creditor claims, to give notices, to ascertain the existence or absence of sufficient opposition and approval by creditors, etc.

44. Some other functions of the competent authority would stem from its general responsibility to provide institutional support to intended users of a simplified insolvency regime. Such support may take different forms, including raising public awareness about the existence of the simplified insolvency regime and its features and making available templates, standard forms, online procedures and services of independent professionals (see paras. 68–70 below). The competent authority may appoint one or more persons to assist it in the performance of those functions (See recommendation 7).

45. More than one competent authority may need to be involved in a simplified insolvency regime. A judicial body, for example, will not be able to perform certain functions envisaged in the MSE Insolvency Guide (see, for example, recommendation 52 on admission or denial of claims) that are more appropriate for an administrative body. An administrative body may not necessarily have review and adjudication powers (e.g. those envisaged in recommendation 54 on treatment of disputed claims): in some jurisdictions, such functions may be performed only by judicial bodies; in other jurisdictions such functions can be performed by administrative bodies but decisions will be subject to judicial review. When dividing different functions among several competent authorities involved in a simplified insolvency regime, the State should consider the need to avoid conflicts of interest among various functions and duties (e.g. public duties, review functions and duties to the insolvency estate and creditors and other parties in interest).

2. Independent professional (recommendations 5 *(b)*, 7 and 8)

Recommendation 5: Competent authority and an independent professional

5. The insolvency law providing for a simplified insolvency regime should:

…

(b) Specify the functions of the competent authority and any independent professional used in the administration of simplified insolvency; and

…

Recommendation 7: Appointment of persons to assist the competent authority in the performance of its functions

7. The insolvency law providing for a simplified insolvency regime should allow the competent authority to appoint one or more persons, including independent professionals, to assist it in the performance of its functions.

Recommendation 8: Possible functions of an independent professional

8. If the insolvency law providing for a simplified insolvency regime envisages the use of an independent professional in the administration of simplified insolvency proceedings, it should allocate the functions of the competent authority, such as those illustrated in recommendation 6, between the competent authority and an independent professional. That law may provide for such allocation to be determined by the competent authority itself.

46. The MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency regime should allow the competent authority to engage the services of an independent professional where necessary and as appropriate, on the understanding however that the competent authority would remain responsible for the oversight over, and for ensuring the integrity of, simplified insolvency proceedings. In that context, it would be necessary to identify the functions of the competent authority that can be assigned to an independent professional and the functions that are truly public and cannot be assigned to an independent professional, as otherwise trust and confidence in a simplified insolvency regime will be jeopardized (See recommendations 6 and 8 and paras. 42–44 above). The MSE Insolvency Guide recommends that, within the limits established by law, the competent authority should be allowed to determine itself which functions related to a specific simplified insolvency proceeding to allocate to an independent professional.

47. The term "independent professional" is generic and intends to encompass any professional (either an individual or a body) from the public, private or public-private sector whose services the competent authority may decide to engage for one or more tasks related to a simplified insolvency proceeding. In the MSE Insolvency Guide, that term was preferred to the term "insolvency representative" used in the Guide and defined in its Glossary,[3] in order to convey the idea that functions that may be entrusted by the competent authority to an independent professional would not necessarily relate to the administration of the reorganization or the liquidation of the insolvency estate.

[3] See term (v) "'Insolvency representative': a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate."

48. The services of an independent professional may in particular be required in the light of the expected low degree of sophistication of MSEs in financial, business and insolvency matters. Making them available to MSEs prior to commencement of a simplified insolvency proceeding may expedite subsequent steps in the proceeding. For those reasons, States may consider providing mechanisms for engaging services of an independent professional by the competent authority at an early stage, regardless of whether the competent authority is a judicial or administrative body, for example upon an expression of interest by an MSE that wishes to benefit from such services. Information about a possibility to request such services and standard forms to file such requests with the competent authority may be made available to MSEs, including online. Those requests may be processed by an official or office in the competent authority (e.g. court clerks). Processing them may not require a formal order issued by the competent authority, especially if pro bono services are available, or may be made subject to such a decision, which would address inter alia a mechanism for payment for such services where the MSE cannot pay for them (see the commentary to recommendation 10 below).

49. An independent professional may explain to the MSE its rights, duties and obligations and assist with the preparation of an application for commencement of insolvency proceedings or a response to the creditor's application for commencement of insolvency proceedings. In some cases, the competent authority may request an independent professional to prepare a detailed list of the debtor's assets, liabilities, payments, transactions and transfers or ascertain that the list prepared by the debtor is accurate and complete. In some other cases, the services of an independent professional may need to be engaged to assess the viability of the reorganization plan or for the valuation of the business or particular assets.

50. In the debtor-in-possession regime, an independent professional may be appointed to assist the parties with the preparation and negotiation of a reorganization plan, to supervise the activities of the debtor or to take partial control over the assets or affairs of the debtor during those negotiations, to oversee the implementation of the plan by the debtor and to ensure compliance with reporting obligations of the debtor to the competent authority. Where the debtor-in-possession regime is not an option from the outset or later in the proceedings, the competent authority may entrust an independent professional with the usual functions of the insolvency representative (See recommendation 120 of the Guide).

51. An independent professional will be expected to receive appropriate training and meet qualification and other criteria for appointment corresponding to the task for which that independent professional is appointed. The considerations raised in the Guide (part two, chapter III, section B.2, and recommendations 115–117) as regards the qualifications, personal qualities and the absence of conflicts of interest usually required of a person who can be appointed as an insolvency representative are relevant in that context.

52. Where an independent professional belongs to a regulated profession, such as administrator, liquidator, auditor, trustee, receiver, mediator or lawyer, the person will be expected to adhere to standards of that profession at the risk of losing the right to work in that profession. Those standards usually address ethical and other requirements, including as regards independence, impartiality, the code of conduct and standards of professional performance. In addition, independent professionals may be made subject to oversight and regulatory mechanisms aimed at supervising the work of independent professionals with a view to ensuring that their services are provided in an effective and competent way and, in relation to the parties involved, that they are provided impartially and independently. The same or additional mechanisms may exist for holding independent professionals accountable for failure to perform their duties to the expected standards. Information about the authorities exercising those functions over independent professionals should be made publicly available.

53. In addition to having the requisite knowledge, experience and skills, independent professionals will be expected to demonstrate integrity, impartiality and independence. Integrity should require that an independent professional has a sound reputation, no criminal record or record of financial wrongdoing and no previous insolvency or removal from a position of public administration. Impartiality and independence relate to the absence of conflicts of interest, whether existing or potential, between the independent professional and the debtor, the creditor and other parties in interest. An obligation to disclose existing or potential conflicts of interest would apply to a person proposed for appointment as the independent professional before the appointment and to the appointed person throughout the performance of the assigned task. Depending on the needs, one or more independent professionals may be appointed in any single simplified insolvency proceeding to avoid conflicts of interest and to ensure independence and impartiality vis-à-vis the debtor, creditors and other parties in interest as required. In order to avoid any conflict of interest, parties in interest should have the opportunity to either object to the selection or appointment of the independent professional or request the replacement of the particular independent professional.

54. The competent authority should be allowed to remove or replace an independent professional on its own motion or at the request of a party in interest, for example, because of gross negligence or incompetence, conflict of interest or failure to disclose such conflict, illegal conduct, but also for less serious reasons such as that the proceeding requires a particular or different competency that the appointed representative does not possess or the need for services of an independent professional ceased to exist. The latter may occur, for example, where the proceeding is converted from reorganization to liquidation or from liquidation to reorganization, which requires skills the independent professional may not have or which does not require any involvement of an independent professional (e.g. in the case of liquidation where the competent authority liquidates assets itself without involvement of an independent professional or where the proceeding is closed, or in the case of a debtor-in-possession reorganization where the competent authority supervises the debtor itself rather than through an independent professional).

55. The independent professional may also need to be replaced where, as the result of an investigation and review, it lost a licence or other authorization to perform duties expected of an independent professional in the context of the simplified insolvency proceeding for which it was appointed, or it faced other sanctions as subject to professional or regulatory supervision. The need for replacement may also arise where the independent professional decides to resign (e.g. because of conflict of interest or serious illness) or for the occurrence of any other event that might cause it to be unable to perform its duties (e.g. death). Where removal operates as a sanction against the independent professional, the independent professional should have the right to be heard and to present its case.

56. In case of a replacement of the independent professional, the competent authority should be authorized to address issues relating to substitution and succession to either title or control (as appropriate) of the assets of the estate, as well as handing over to the successor the books, records and other information relating to the debtor. It should also be able to rule, where necessary, on the validity of the acts undertaken in the conduct of the proceedings by the predecessor.

57. An independent professional is to be differentiated from other third parties whose services would not be engaged by the competent authority but who may nevertheless be relevant to a simplified insolvency regime. For example, various State and non-State entities may be involved, on a voluntary basis or otherwise, in informing MSEs about early signals of financial distress and their pre-insolvency obligations or in facilitating negotiations, or mediating disputes, between MSEs and their creditor(s). Those measures usually fall outside or go beyond the scope of the insolvency law. They are addressed in section Q of the MSE Insolvency Guide.

3. Review or appeal of decisions of the competent authority or an independent professional (recommendation 5 *(c)*)

Recommendation 5: Competent authority and an independent professional

5. The insolvency law providing for a simplified insolvency regime should:

…

(c) Specify mechanisms for review and appeal of the decisions of the competent authority and any independent professional used in the administration of simplified insolvency proceedings.

(a) General considerations

58. Recommendation 19 *(a)*, building on recommendations 137 and 138 of the Guide, addresses the right of any party in interest to be heard and request review on any issue in the simplified insolvency proceedings that affects their rights, obligations or interests. This right will entitle a party in interest concerned to object, to request review and relief available to it in simplified insolvency proceedings and to appeal from any decision of the competent authority. To make exercise of such right possible, recommendation 5 *(c)* states that the insolvency law providing for a simplified insolvency regime should specify mechanisms for review and appeal of the decisions of the competent authority or any independent professional used in the administration of simplified insolvency proceedings.

59. "Decisions" should be interpreted broadly in this context as encompassing also any acts or omission. They may be taken directly by the competent authority (e.g. approval of the liquidation schedule or confirmation of the reorganization plan) or by an independent professional (e.g. on organization of a sale of assets), the debtor-in-possession or another person entrusted by the competent authority to implement certain steps in simplified insolvency proceedings (e.g. a secured creditor as regards realization of an encumbered asset). The decision by an independent professional, the debtor-in-possession or another person may be subject to prior or post approval by the competent authority. Depending on whose decisions are challenged, initial challenges may be filed with the competent authority and appealed, if necessary, to another competent body (a judicial or a higher in hierarchy administrative body).

60. In the light of the features of simplified insolvency proceedings (in particular the debtor-in-possession reorganization and simplified and expedited procedures) as well as the broad discretion given to the competent authority with respect to administration of those proceedings, the right of any party in interest, whether the debtor, creditors, employees or other stakeholders, to seek review or appeal of decisions that affect their rights and interests should be considered as an additional safeguard against possible abuses or improper use of a simplified insolvency regime. At the same time, the right to seek review, coupled with the right of appeal, has the potential to considerably increase the complexity of the process, significantly interrupt the conduct of the proceedings and cause delay that may slow down other steps in the proceedings. This is especially true with respect to requests for review or appeal that will require verification and valuation (e.g. of whether a decision was contrary to the interests of a party in interest). In order not to jeopardize the achievement of other objectives of a simplified insolvency regime, the right to seek review or appeal must therefore be balanced against the need for efficient administration of simplified insolvency proceedings.

61. To avoid unreasonable disruptions to simplified insolvency proceedings, the insolvency law providing for a simplified insolvency regime may: *(a)* limit grounds upon which parties in interest may trigger review or appeal (e.g. only a wrongdoing); *(b)* limit decisions that may be subject of review or appeal (i.e. protecting certain aspects from review or appeal); *(c)* specify the standard of proof to be met in order for the competent authority or another body to uphold the request for review or appeal; and *(d)* limit possibility of further appeal of decisions taken on appeal. In order to ensure that the MSE insolvency can be addressed and resolved in an orderly, quick and efficient manner without undue disruption, the insolvency law should also provide that appeals in simplified insolvency proceedings should not, as a general rule, have suspensive effect (See recommendation 138 of the Guide and its footnote in that respect).

62. Limits on review and appeal may be especially appropriate where a simplified insolvency regime already builds in sufficient safeguards against abuses or improper use. For example, under recommendation 78, the competent authority, before confirming the reorganization plan approved by creditors, is required to ascertain that: *(a)* the creditor approval process was properly conducted; *(b)* creditors will receive at least as much under the plan as they would receive in liquidation (unless they have specifically agreed to receive lesser treatment); and *(c)* the plan does not contain provisions contrary to law. That last safeguard is sufficiently broad to ensure that rights of not only creditors but also the debtor and other parties in interest are duly protected. For that reason, the MSE Insolvency Guide recommends that challenges to the confirmed reorganization plan should be allowed only on the basis of fraud (See recommendation 79). Similar considerations should apply to possible challenges to the liquidation schedule approved by the competent authority, especially in the light of a different, administrative, nature of that document, unlike a reorganization plan (see para. 25 *(e)* above). Under recommendation 61, if the liquidation schedule is prepared by a person other than the competent authority, the competent authority is required to review the liquidation schedule to ascertain its compliance with the law and, when it is not so compliant, to make any required modifications to ensure that it is compliant. Under those circumstances, it may be desirable to permit challenges to the liquidation schedule approved by the competent authority also only on the basis of fraud.

63. To be consistent with the key objectives of a simplified insolvency regime (See recommendation 1) and means of achieving them, in particular short time period and reduced formalities in simplified insolvency proceedings (See recommendations 12 and 13), formalities for hearing requests for review or appeal related to simplified insolvency proceedings should be minimized and decision-making should be streamlined. Short time periods should be allowed for bringing challenges after notification of the decision or occurrence of other events (such as discovery of the fraud) and for taking a decision on review or appeal.

(b) Review or appeal of the competent authority's decisions

64. The system of review of decisions taken by the competent authority will reflect the legal tradition in a particular State as well as the place of the competent authority in the State administration and the structure of the State administration. For example, in some jurisdictions, decisions of the competent authority that is a judicial body would not be appealable at all or would be appealable only on limited grounds, such as fraud or prejudice to the parties. In other jurisdictions, no such limitations may be imposed. Decisions of a competent authority that is an administrative body should be reviewable by a judicial body. In some jurisdictions, such decisions may be reviewable also by an administrative body that would exercise hierarchical authority or control over the competent authority. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for other challenges have been exhausted. In other systems, the two means of challenge or review are available as options.

65. Keeping in mind the need to ensure expedited simplified insolvency proceedings, the MSE Insolvency Guide recommends that a simplified insolvency regime should build in measures to avoid protracted reviews of the competent authority's decisions (see paras. 61–63 above). To avoid abuse of the review mechanism, the request for review of the competent authority's decision should not by itself convert a simplified insolvency proceeding to a different type of proceeding.

(c) Review of an independent professional's decisions

66. Depending on a set-up of the institutional framework for administration of simplified insolvency proceedings, decisions of an independent professional may be subject to review by the competent authority as a matter of course or such review may be triggered by application of an aggrieved party in interest (most likely, the debtor or creditor(s)). A party in interest whose request for review of an independent professional's decisions was denied or unsuccessful should have a right to appeal to a relevant appeal body if it believes that the competent authority was in error.

67. Under the MSE Insolvency Guide (see para. 25 *(d)* above), the competent authority may direct an independent professional to take, or refrain from taking, a particular action related to the request for review. The competent authority should also have powers to confirm, reverse or modify decisions of the independent professional or to replace the independent professional, whether at the direct request of the aggrieved party in interest or on the motion of the competent authority. The competent authority may impose a monetary penalty on the independent professional if the independent professional is personally liable for damages intentionally

or negligently caused to parties in interest through the performance of its duties, or sanctions may be imposed on the independent professional by other relevant State authorities under other law.

4. Support with the use of a simplified insolvency regime

Recommendation 9: Support with the use of a simplified insolvency regime

9. The insolvency law providing for a simplified insolvency regime should specify measures to make assistance and support with the use of a simplified insolvency regime readily available and easily accessible. Such measures may include services of an independent professional; templates, schedules and standard forms; and an enabling framework for the use of electronic means where information and communications technology in the State so permits and in accordance with other applicable law of that State.

68. In addition to services of an independent professional addressed in paragraphs 46–50 above, the MSE Insolvency Guide recommends other measures that should be put in place to make a simplified insolvency regime easily accessible and usable, including by making available standard forms and templates. Introduction of support measures should not inadvertently make a simplified insolvency regime less flexible. For example, although the value of standard forms and templates for unification, standardization and compiling and processing of the relevant information cannot be underestimated, it might be counterproductive to require their use in all situations and at all costs. There could be situations when MSEs would be unable to fill in standard forms or follow suggested templates (e.g. due to the lack of sophistication or presence of unique circumstances that available forms and templates cannot accommodate). The possibility of submitting relevant information in a non-uniform and non-standardized form should therefore not be completely excluded.

69. Enabling the online filing of applications and claims, submission of restructuring plans, serving of notices and notifications and lodging of challenges and appeals could be essential means of achieving the objectives of the simplified insolvency regime. Recognizing that adoption of modern technology has not progressed equally among or within States, the use of online procedures and forms would by necessity be tailored to the State's technological and socioeconomic capacity. Phased-in

implementation of online procedures may start with the submission of online applications. This would allow, at a minimum, to store the information provided by the applicant in electronic form in a computer database. More advanced electronic systems may provide for standard forms that are easier to understand and complete (e.g. with automated error checks, suggested entries). Most advanced electronic systems would allow automatization of other stages of proceedings, verification of compliance with applicable law requirements through searches of the linked databases, such as business registries, registries of rights to immovable and movable property and registries of secured transactions. They may also facilitate collection, aggregation and disaggregation of data if necessary.

70. States should envisage interaction of the competent authority with other State bodies such as tax authorities and State-run registries. Electronic government platforms may considerably expedite that task. Those measures could facilitate the collection of information about the assets, liabilities and transfers of the MSE debtor and assist with channelling that information to the competent authority. They may also facilitate verification of that information by the competent authority, with the result that a decision on the application and the right course of action will be taken within a shorter time period.

5. Mechanisms for covering costs of administering simplified insolvency proceedings

Recommendation 10: Mechanisms for covering costs of administering simplified insolvency proceedings

10. The insolvency law providing for a simplified insolvency regime should specify mechanisms for covering the costs of administering simplified insolvency proceedings where assets and sources of revenue of the debtor are insufficient to meet those costs. (*See recommendations 26 and 125 of the Guide.*)

71. One of the purposes of putting in place a simplified insolvency regime is to address financial distress of MSEs with no or insufficient assets. As was noted in paragraph 12 above, under existing standard business insolvency regimes, applications for commencement of insolvency proceedings by such MSEs may be denied for the lack of sufficient funds in the insolvency estate to cover the costs of insolvency proceedings. The MSE Insolvency Guide recommends that access to simplified insolvency proceedings should not depend on the MSE's ability to cover the administrative costs of the proceedings. Eligible debtors that do not have enough

assets to fund a proceeding should be able to commence a proceeding to address their financial difficulties and obtain a discharge. Broader public interest considerations, such as the need to ensure the observance of fair commercial conduct or to further standards of good governance, may also require the simplified insolvency proceedings to progress in such cases. Among other benefits, this could complement any existing mechanisms and efforts aimed at identifying and locating misappropriated assets or their proceeds and returning them to their legitimate claimants and holding responsible persons accountable.

72. For these reasons, the MSE Insolvency Guide recommends that there should be alternative mechanisms to meet the costs of administering the simplified insolvency proceedings when the MSE debtor cannot meet them, including using public funds or establishing a fund out of which the costs of simplified insolvency proceedings may be met. Surcharging proceeds from the realization of insolvency estate assets could defray at least some of the costs of administration of a simplified insolvency proceeding. Creditors may be required to guarantee the payment of costs of any additional step that they may request in simplified insolvency proceedings (e.g. services of an independent professional), subject to reimbursement from the estate if assets of the debtor turn out to be sufficient to cover the cost of the proceedings or part thereof. Allowing payment of administrative expenses in instalments, including from future income through the implementation of a debt repayment plan or reorganization plan, would allow the MSE debtor to share the costs of the proceedings at least in part.

73. The services of an independent professional may be paid from public funds or the insolvency estate, depending on the circumstances, or may be provided pro bono. A schedule of fees may be established by the competent authority (fixed or sliding, depending on the size of the insolvency estate and the complexity of the case), coupled with a system of incentives for professionals to perform services pro bono in simplified insolvency proceedings.

74. While mechanisms for covering costs of administering simplified insolvency proceedings may include third-party financing, a party or the parties assessing the expenses or paying for them should not be allowed to unduly influence the conduct of proceedings. For this reason, the competent authority should have control over expenses and assessment of their reasonableness and necessity, by reference in particular to the key objectives of a simplified insolvency regime, the amount of resources available to the proceeding and the possible effect of the expense on the proceeding. In a simplified insolvency regime, prior authorization by the competent authority may be required before any administrative expense can be incurred. Alternatively, such prior authorization may be required only for expenses that would fall outside the scope of the ordinary course of business.

D. Main features of a simplified insolvency regime

1. Default procedures and treatment

Recommendation 11: Default procedures and treatment

11. The insolvency law providing for a simplified insolvency regime should specify the default procedures and treatment that apply unless any party in interest objects or intervenes with a request for a different procedure or treatment or other circumstances exist that justify a different procedure or treatment.

75. To avoid delays and at the same time to ensure transparency and predictability, the MSE Insolvency Guide recommends that a simplified insolvency regime should provide for the default procedures and treatment that can be overridden by the decision of the competent authority on its own motion or upon request of any party in interest. Such default procedures and treatment are found throughout the text (see, for example, recommendation 14 on the debtor-in-possession as the default approach in simplified reorganization proceedings, recommendation 47 on the application of the stay upon commencement of a simplified insolvency proceeding unless the stay is lifted or suspended or relief from the stay is granted, recommendation 50 on admission of claims on the basis of the list of creditors and claims prepared by the debtor unless a different approach would be justified or recommendation 57 on preparation of the liquidation schedule by the competent authority unless that task is entrusted to another person).

76. The competent authority may modify the default procedures and treatment where circumstances of the case so justify. It may, for example, displace the debtor-in-possession with an independent professional in simplified reorganization proceedings (See recommendation 16) or require creditors to submit their claims to the competent authority instead of relying on the list of creditors and claims prepared by the debtor (See recommendation 51).

77. To allow any party in interest to object to default procedures or treatment or request an alternative procedure or treatment in a timely fashion, the MSE Insolvency Guide ensures that all default procedures and treatment are notified to all parties in interest sufficiently in advance. These notification requirements are found throughout the text (see, for example, recommendations 33, 59, 60 and 65).

2. Short time periods

Recommendation 12: Short time periods

12. The insolvency law providing for a simplified insolvency regime should specify short time periods for all procedural steps in simplified insolvency proceedings, narrow grounds for their extension and the maximum number, if any, of permitted extensions.

78. Consistent with the objective of establishing an expeditious simplified insolvency regime, the MSE Insolvency Guide recommends establishing short deadlines for all procedural steps. Those deadlines should be shorter than those applicable in standard business insolvency proceedings and only narrow grounds for their extension should exist (e.g. extraordinary circumstances, such as a pandemic). Recommendation 12 envisages that the law may allow only a certain maximum number of permissible extensions (e.g. once or twice).

79. Provisions on deadlines are found throughout the MSE Insolvency Guide (see, for example, recommendations 58, 69 and 77 *(b)* on time to be allotted for preparing a liquidation schedule or a reorganization plan or recommendations 60, 65 and 77 *(c)* for time to be allotted for raising objections). Some of those provisions recognize that deadlines for some actions may be established in the law itself, with no discretion given to the competent authority to change them (see, for example, recommendations 34 and 72). With respect to some other actions, the competent authority may be given some discretion to vary deadlines, either by shortening or extending them or doing both, within the limits established by law (see, for example, recommendations 58, 69 and 85). With respect to some other actions, the competent authority may have broader discretion within the general objectives of the simplified insolvency regime (see e.g. recommendation 86).

80. In the context of some actions, the MSE Insolvency Guide emphasizes, in addition to recommendation 12, that the time periods for taking them should be short (See recommendation 77 *(b)* and *(c)*). In the context of other provisions, the MSE Insolvency Guide notes that the time periods, although still required to be short, should be reasonable or sufficient for the intended purpose (See recommendations 20 *(b)*, 51 *(b)* and 74 and the commentary thereto). Some other provisions, although not specifying any time periods, refer to prompt or expeditious actions (see, for example, recommendations 29, 37, 53 and 84).

81. The MSE Insolvency Guide envisages certain consequences, including conversion of one type of proceeding to another type, where the established deadlines cannot

be complied with. As noted in paragraph 95 below, the general insolvency law will determine how compliance with deadlines would be assessed, that is whether it is with reference to the time of dispatch or the time of receipt of communication.

3. Reduced formalities

Recommendation 13: Reduced formalities

13. Consistent with the objective of establishing a cost-effective simplified insolvency regime, the insolvency law providing for a simplified insolvency regime should reduce formalities for all procedural steps in simplified insolvency proceedings, including for submission of claims, for obtaining approvals and for giving notices and notifications.

82. Consistent with the objective of establishing an expeditious and cost-effective simplified insolvency regime and recognizing that MSEs tend to have less complicated operations and financial arrangements, the MSE Insolvency Guide recommends fewer and simpler procedural formalities than those existing in standard business insolvency proceedings. It does not envisage, for example, establishing a creditor committee, convening a creditor meeting and organizing a voting. It considerably simplifies commencement of a proceeding by eligible debtors, admission of claims and liquidation, especially where little or no value is available for distribution. It invites States to reconsider the need for public notices in all cases and considerably simplify publication where a public notice requirement is applicable.

4. Debtor-in-possession in simplified reorganization proceedings

Recommendation 14: *Debtor-in-possession as the default approach*

14. The insolvency law providing for a simplified insolvency regime should specify that, in simplified reorganization proceedings, the debtor remains in control of its assets and the day-to-day operation of its business with appropriate supervision and assistance of the competent authority.

83. The MSE Insolvency Guide recommends the use of the debtor-in-possession approach as the norm in simplified reorganization proceedings. This is justified by reference to the characteristics of MSEs and their insolvency. In particular, the insolvency estate of the MSE debtor may be insufficient to fund the appointment of the insolvency representative. The appointment of the insolvency representative may also be unnecessary in the light of simple business operations that make their supervision by the competent authority possible and sufficient. In addition, the risk of being displaced from the helm can create a disincentive for the MSE debtor to seek timely commencement of insolvency proceedings.

84. In some jurisdictions, the insolvency representative may be a mandatory participant in insolvency proceedings and, although a debtor-in-possession approach may still be possible, it may need to be coupled with the involvement of an independent professional who will closely supervise the process and keep the competent authority continuously informed.

Recommendation 15: *Rights and obligations of the debtor-in-possession*

15. The insolvency law providing for a simplified insolvency regime should specify the rights and obligations of the debtor-in-possession, in particular as regards the use and disposal of assets,[1] post-commencement finance[2] and treatment of contracts,[3] and allow the competent authority to specify them on a case-by-case basis.

[1] See recommendations 52–62 of the Guide that will be applicable mutatis mutandis in a simplified insolvency regime. References to the insolvency representative in those recommendations should be read as references to the debtor-in-possession unless limited or total displacement of the debtor from the operation of the business takes place.

[2] Idem, but with reference to recommendations 63–68 of the Guide.

[3] Idem, but with reference to recommendations 69–86 and 100–107 of the Guide.

85. The common rights and obligations of the debtor are addressed in recommendations 19 and 20 (see the commentary to those recommendations below). In addition, the debtor-in-possession will have distinct rights and obligations. The debtor-in-possession will in particular be expected to keep interests of other parties in interest in mind in day-to-day operations of its business, to protect and preserve the assets of the estate and when the assets are subject to a security or other interest (e.g. a lease), to take special measures to protect the economic rights of the holder of that interest. The MSE Insolvency Guide cross-refers in that respect to provisions of the Guide on the use and disposal of assets (recommendations 52–62), post-commencement finance (recommendations 63–68) and treatment of contracts (recommendations 69–86 and 100–107) that will be applicable in simplified insolvency

proceedings and for this reason, are not reproduced in the MSE Insolvency Guide. In the debtor-in-possession approach, references to the insolvency representative in those provisions should be read as references to the debtor-in-possession.

86. The debtor-in-possession may be assisted by the competent authority or an independent professional in the day-to-day operation of the business in addition to being subject to supervision by the competent authority or an independent professional. Supervision may take different forms, including inspections, audits and periodic reports by the debtor about transactions entered, other business operations and developments (e.g. loss of assets or employees) within a certain period (weekly, monthly, etc.). Stricter supervision may be established with respect to some operations (payment for trade supplies) as opposed to more routine ones (such as payment of rent or utilities (electricity, telephone, etc.)).

87. Some transactions may need to be authorized by an independent professional before they are concluded (e.g. sale of perishable assets); for others, a prior approval by the competent authority may be required (e.g. related to cash or to property held jointly by the debtor and another person; abandonment of assets that have lost value to the estate). Some transactions outside the ordinary course of business (e.g. sale of an encumbered asset) may be prohibited altogether since they may raise complexities unsuitable for speedy resolution through simplified insolvency proceedings. Post-commencement finance may fall into that category as it may trigger disputes with existing secured creditor(s) and assessment of whether the value of the estate will be enhanced by that transaction. Alternatively, post-commencement finance may be made subject to special assessment by the competent authority, with involvement of an independent professional where necessary, to determine whether: *(a)* new money is required for the continued operation or survival of the business or the preservation or enhancement of the value of the estate; *(b)* if so, whether unsecured or secured credit should be obtained; *(c)* in the latter case, security over which assets should be provided (unencumbered assets, assets that are not fully encumbered or assets that are already fully encumbered); and *(d)* special protection to be accorded to secured creditors where the already encumbered assets are used for raising additional finance.

88. The debtor-in-possession and other parties in interest would need to know which rights the debtor-in-possession will have with respect to the day-to-day operation of the business and which safeguards will be in place to ensure that those rights are not abused and the obligations of the debtor-in-possession are fulfilled. For this reason, it will be important to clearly identify the content and terms of the debtor-in-possession's obligations and to whom each obligation is owed. To facilitate the debtor-in-possession's continuing day-to-day operation of the business, without imposing the complexity of obtaining approvals to conduct routine activities, it will also be important to achieve clarity as regards permissible disposals of assets made in or outside the ordinary course of business and possibility of incurring liabilities

(any or above specified caps). Rights and obligations of the debtor-in-possession may however be adjusted if necessary. The competent authority may, for example, issue an interim stay order preventing the debtor from disposing a specific asset.

Recommendation 16: *Limited or total displacement of the debtor-in-possession*

16. The insolvency law providing for a simplified insolvency regime should specify:

(a) Circumstances justifying limited or total displacement of the debtor-in-possession in simplified reorganization proceedings;

(b) Persons who may displace the debtor-in-possession in simplified reorganization proceedings; and

(c) That the competent authority should be authorized to decide on displacement and terms of displacement on a case-by-case basis. (*See recommendations 112 and 113 of the Guide.*)

89. The debtor-in-possession approach may not be appropriate in some cases, for example where the MSE debtor was responsible for misappropriation or concealment of property or where its management is so inadequate or incompetent as to be incapable of improvement or correction. It may also be inappropriate in involuntary commencement where the MSE debtor could be expected to be hostile to creditors or where the reorganization plan was imposed on the MSE debtor by creditors. In such cases, the competent authority may appoint a third party, such as an independent professional, to displace the MSE debtor as regards some or all functions related to the day-to-day operation of the business. The decision on limited or total displacement of the debtor-in-possession may be made at the outset or at a later stage of the simplified reorganization proceeding. The MSE Insolvency Guide recommends that the competent authority should be authorized to decide on displacement and terms of displacement on a case-by-case basis but circumstances justifying limited or total displacement and persons who may displace the debtor-in-possession should be specified in the law itself to avoid abuses, including unfair and discriminatory treatment of the debtor.

5. Possible involvement of the debtor in the liquidation of the insolvency estate

Recommendation 17: Possible involvement of the debtor in the liquidation of the insolvency estate

17. The insolvency law providing for a simplified insolvency regime may specify circumstances under which the competent authority may allow the debtor's involvement in the liquidation of the insolvency estate and the extent of such involvement.

90. Specifics of the MSE debtor's business as well as the MSE debtor's special skills or unique knowledge about its business and market may require the debtor's involvement in the liquidation of the insolvency estate. For these reasons, the MSE Insolvency Guide envisages a possibility of involving the MSE debtor in the liquidation of the insolvency estate. The extent of such involvement may vary. The competent authority should be allowed to determine the need for the MSE debtor's involvement and the extent of such involvement on a case-by-case basis. It may request the debtor, for example, to advise on the organization of the sale of certain assets or assist in preparation of the liquidation schedule or particular aspects thereof (e.g. the list of claims and their amounts in the light of the debtor's envisaged role in preparing such list under recommendation 50).

6. Deemed approval

Recommendation 18: Deemed approval

18. The insolvency law providing for a simplified insolvency regime should specify the matters which require approval of creditors and establish the relevant approval requirements. (*See recommendation 127 of the Guide.*) It should also specify that approvals on those matters are deemed to be obtained where:

(a) Those matters have been notified by the competent authority to relevant creditors in accordance with procedures and time periods established for such purpose in the insolvency law providing for a simplified insolvency regime or by the competent authority; and

(b) Neither objection nor sufficient opposition as regards those matters is communicated to the competent authority in accordance with procedures and time periods established for such purpose in the insolvency law providing for a simplified insolvency regime or by the competent authority.

91. Despite the envisaged active role of the competent authority in administration of simplified insolvency proceedings, the MSE Insolvency Guide recognizes that some matters (such as the reorganization plan) will require creditor approval. It recommends specifying such matters in the law together with the relevant approval requirements.

92. The insolvency law generally provides that creditors whose rights are not modified or affected by a particular step (e.g. a reorganization plan) are not entitled to participate in the approval of that step (see e.g. recommendation 147 of the Guide in that respect). Creditors whose rights or interests are affected will be so entitled. The MSE Insolvency Guide balances the exercise of such entitlement against the need for efficient administration of simplified insolvency proceedings. It does so in particular by recommending deemed approval as the default mechanism for creditor approval of matters that require their approval.

93. Under that mechanism: *(a)* the matter requiring creditor approval is notified to creditors in accordance with the procedures and time periods established for such purpose by law or the competent authority; *(b)* creditors are made aware of the procedure and time period for expressing their views to the competent authority as regards that matter; *(c)* they are also made aware of consequences of abstention (see e.g. recommendation 74); and *(d)* the approval is deemed to be obtained from creditors that did not communicate objection or opposition to the competent authority in accordance with the procedure and within the time period notified to them.

94. The procedures and the time period for notifying matters to creditors and for communicating creditor views to the competent authority may be established in law or by the competent authority. For example, the insolvency law may provide for the minimum and maximum time periods and give the competent authority discretion to fix a specific time within that range, depending on the situation and keeping in mind that all time periods in simplified insolvency proceedings are expected to be short (See recommendation 12).

95. The general insolvency law will determine how compliance with deadlines would be assessed, that is whether it is with reference to the time of dispatch or the time of receipt of communications, and will provide the consequences for lateness of communications. Approaches to such determination differ from jurisdiction to jurisdiction and may produce a significant legal impact (e.g. an objection or expression of opposition received late may not be counted). To expedite proceedings, standard forms may be provided for expressing objection or opposition and the use of electronic means of communication may be enabled. The latter may raise some issues for receipt and dispatch of communications not found in paper-based communications (issues with retrieval of information properly dispatched because of security measures (firewalls, etc.)).

96. Creditor(s) may be required to represent a certain number of creditors or percentage of the debt for approval of some matters. The deemed approval mechanism does not replace those requirements. It only provides a means alternative to traditional formal voting for implementing them. By allowing to count the silence as an approval, it effectively addresses obstacles to holding simplified insolvency proceedings expeditiously that arise from creditor disengagement. By dispensing with all procedural steps involved in the organization of a formal voting, it considerably reduces formalities for obtaining the approval.

97. The term "objection" is used in the MSE Insolvency Guide to refer to rejection of the proposed course of action on any legal grounds (e.g. a mistaken allocation of priority to a particular claim or violation of the pari passu principle established in the insolvency law for distribution of proceeds in simplified liquidation). The term "opposition" is used in the MSE Insolvency Guide to refer to rejection of any aspects of the proposed course of action for extralegal reasons (e.g. on private sale as opposed to a public auction where both options are permitted by the insolvency law). An objecting party might be expected to provide legal arguments for objection, while a simple dissatisfaction with the proposed course of action might be sufficient to convey opposition. An objection by one creditor might be sufficient to prevent the approval of a proposed course of action, while one creditor's opposition may not produce such effect if a threshold for approval is otherwise met. (See further paras. 288–308 below.)

E. Participants

1. Rights and obligations of parties in interest

Recommendation 19: Rights and obligations of parties in interest

19. The insolvency law providing for a simplified insolvency regime should specify rights and obligations of the MSE debtor, of the creditors and of other parties in interest, including employees where applicable under national law, such as:

(a) The right to be heard and request review on any issue in the simplified insolvency proceedings that affects their rights, obligations or interests; (*See recommendations 137 and 138 of the Guide.*)

(b) The right to participate in the simplified insolvency proceedings and to obtain information relating to the proceeding from the competent authority subject to appropriate protection of information that is commercially sensitive, confidential or private; (*See recommendations 108, 111 and 126 of the Guide.*)

(c) Where the debtor is an individual entrepreneur, the right of the debtor to retain the assets excluded from the insolvency estate by law. (*See recommendation 109 of the Guide.*)

98. For certainty and the protection of different parties in interest involved in simplified insolvency proceedings, the MSE Insolvency Guide recommends specifying the rights and obligations of the MSE debtor, creditors and other parties in interest, including employees where applicable under national law, in the law providing for a simplified insolvency regime. It illustrates some common rights of all parties in interest such as the right to participate in proceedings, to be heard, to request review and to obtain information, subject to certain restrictions under applicable law concerning protection of some information (e.g. commercially sensitive, confidential and private information). In addition, the MSE Insolvency Guide, building on recommendation 109 of the Guide, recognizes that individual entrepreneurs will be entitled to retain certain assets excluded from the insolvency estate by law. Common obligations include the obligation not to act fraudulently or commit wilful misconduct (examples of wilful misconduct would include deliberately not disclosing certain information of relevance to the proceeding, recklessly handling insolvency estate assets or taking advantage of confidential information received as a party in interest in the proceeding).

99. In addition to those common rights and obligations, the debtor and creditors will have some distinct rights and obligations. Specific obligations of the debtor in simplified insolvency proceedings are listed in recommendation 20. That recommendation is supplemented by recommendation 102 that lists some key insolvency prevention obligations of persons exercising control over MSEs, and by recommendations 14 to 16 on the debtor-in-possession in simplified reorganization proceedings. Specific rights and obligations of creditors are found throughout the text, in particular in provisions for approval of matters that require creditor approval.

2. Obligations of the debtor

Recommendation 20: Obligations of the debtor

20. The insolvency law providing for a simplified insolvency regime should specify the obligations of the MSE debtor that should arise on the commencement of, and continue throughout, the proceedings. The obligations should include the following:

(a) To cooperate with and assist the competent authority to perform its functions, including, where applicable, to take effective control of the estate, wherever located, and of business records, and to facilitate or cooperate in the recovery of the assets;

(b) To provide accurate, reliable and complete information relating to its financial position and business affairs, subject to allowing the debtor the time necessary to collect the relevant information, with the assistance of the competent authority where required, including an independent professional where appointed, and subject to appropriate protection of commercially sensitive, confidential and private information;

(c) To provide notice of the change of a habitual place of residence or place of business;

(d) To adhere to the terms of the liquidation schedule or reorganization plan; and

(e) In the day-to-day operation of the business, to have otherwise due regard to the interests of creditors and other parties in interest.

(*See recommendations 110 and 111 of the Guide.*)

100. To ensure that simplified insolvency proceedings can be conducted effectively and efficiently, the MSE Insolvency Guide provides that, on the commencement of a proceeding and throughout the proceeding, the MSE debtor should assume a general obligation to cooperate with and assist the competent authority in performing its functions and to refrain from taking actions that might be injurious to the conduct of the proceedings. An essential part of the obligation to cooperate is to enable the competent authority to take effective control of the insolvency estate where required, by surrendering control of assets and handing over any business records and books. The debtor is also expected to adhere to the terms of the liquidation schedule or reorganization plan.

101. The MSE Insolvency Guide also recommends that the insolvency law may impose obligations that are ancillary to the MSE debtor's obligation to cooperate, assist and provide necessary information during simplified insolvency proceedings, including the duty to inform the competent authority about any change of the place of business or residence. Such ancillary obligations may be automatically applicable or may be ordered at the discretion of the competent authority where necessary for the administration of the estate or other purpose of the proceedings. These obligations should be proportionate to their underlying purpose and to the overall purpose of the general duty to cooperate, assist and provide necessary information. Human rights norms will be applicable to some of them (e.g. the requirement to disclose correspondence or other requirements that may infringe on privacy or personal freedom). The competent authority may need to be specifically authorized to issue orders that apply limitations on individual entrepreneurs.

102. In the debtor-in-possession approach, which is envisaged as the default in the MSE Insolvency Guide in simplified reorganization proceedings, the debtor will have additional rights and obligations, in particular as regards the day-to-day operation of the business referred to in recommendation 20 *(e)*. They are addressed in recommendation 15 and its accompanying commentary.

103. Where the MSE debtor fails to comply with its obligations, the insolvency law should address how that failure should be treated and the legal consequences of actions taken in violation of the obligations, taking into account the nature of different obligations and appropriate sanctions. Where the MSE debtor fails to observe the restrictions and enters into contracts requiring consent of the competent authority without first obtaining that consent, the insolvency law should address the validity of such transactions and provide appropriate sanctions for the MSE debtor's behaviour, including displacement from operation of the business, harsher terms for discharge and conversion to liquidation, provided that it is in the best interests of creditors. Such sanctions may also be imposed where the MSE debtor withholds information. In more serious cases of withholding information, criminal sanctions may be imposed on the person in control of the MSE debtor.

3. Protection of employees' rights and interests in simplified insolvency proceedings

Recommendation 21: Protection of employees' rights and interests in simplified insolvency proceedings

21. The insolvency law providing for a simplified insolvency regime should require the competent authority to ensure that all requirements of insolvency law and other laws applicable within insolvency proceedings relating to the protection of employees' rights and interests in insolvency are complied with in simplified insolvency proceedings. Those requirements may include, in particular, the requirement to keep the MSE debtor's employees properly informed, either directly or through their representatives, about the commencement of a simplified insolvency proceeding and all matters arising from that proceeding affecting their employment status and entitlements.

104. The MSE Insolvency Guide includes employees in the circle of parties in interest (See recommendation 1 *(d)* and paragraph 25 *(h)* above) to reflect that employees can be affected by insolvency beyond their role as creditors and that they might be subject to additional protection under domestic law. In accordance with recommendation 19, their rights and obligations in insolvency proceedings

would be specified in the insolvency law providing for a simplified insolvency regime. Such rights may include, as and where applicable under national law, the right to be heard and request review on any issue in the simplified insolvency proceedings that affects their rights, obligations or interests and the right to participate in the simplified insolvency proceedings and to obtain information relating to the proceeding from the competent authority subject to appropriate protection of information that is commercially sensitive, confidential or private.

105. The appropriate level of protection of employees is for States to determine. The simplified insolvency proceedings recommended in the MSE Insolvency Guide do not intend to abolish or diminish such protection or discourage States from providing it. To the extent that MSEs eligible to apply for simplified insolvency proceedings have employees, the obligations under domestic law concerning employees remain applicable in the simplified insolvency context.

106. Recommendation 21 envisages that the law providing for a simplified insolvency regime should require the competent authority to ensure that all requirements relating to the protection of employees' rights and interests in insolvency are complied with in simplified insolvency proceedings. Those requirements may be set out in the law providing for a simplified insolvency regime itself or may be found in the general insolvency law or in other laws applicable within insolvency proceedings, such as labour law.

107. In many jurisdictions, employees or trade unions enjoy special protection in relation to the commencement and the conduct of insolvency proceedings. This protection is dual. It can firstly be an obligation for the employer entering the insolvency proceedings to inform the employees or their representatives about that fact. Secondly, it could materialize during the insolvency proceeding itself, by the right given to the employees or their representatives, as and where applicable under national law, to be consulted, to provide an opinion or to agree on the type of the proceeding to be commenced (e.g. reorganization as opposed to liquidation) and measures leading to changes in the work arrangements and contractual relations with employees.

108. Recommendation 21 singles out notification and information requirements in the light of their importance for fulfilling other employees' rights. At a minimum, MSE employees should be expected to receive, directly from the competent authority or an independent professional or through their representatives, timely and adequate information about the commencement of simplified insolvency proceedings, plans related to their employment contracts (whether they will be terminated and if so when, or maintained and if so, for how long) and the status of payments due to them under domestic law.

109. The safeguards as regards protection of employees' rights in simplified insolvency proceedings found in recommendation 21 are supplemented by safeguards found in other recommendations of the MSE Insolvency Guide, some of which, like recommendation 21, specifically refer to employees, among other stakeholders. For example, in accordance with recommendation 6 *(i)*, one of the envisaged functions of the competent authority is to provide oversight of compliance by the parties with their obligations under the simplified insolvency regime, including any obligations owed to employees under the insolvency law and other laws applicable within insolvency proceedings. Recommendation 23 *(c)* envisages establishing specific safeguards to protect employees, among other parties in interest, from abuse of the application procedure.

110. Furthermore, the MSE Insolvency Guide recognizes that the need for employees' protection may arise at the pre-commencement stage. For that reason, it recommends that the State may consider providing appropriate incentives for the participation of different relevant stakeholders, in particular employees, in informal debt restructuring negotiations (See recommendation 105). The need to protect interests of various stakeholders is recognized also in recommendation 102 in the context of the obligation of persons exercising control over MSEs in the period approaching insolvency. Although no explicit reference to employees is made in that context, reference in that recommendation to "other stakeholders" is intended to encompass employees.

F. Eligibility, application and commencement

1. Eligibility

Recommendation 22: Eligibility

22. The insolvency law providing for a simplified insolvency regime should establish the criteria that debtors must meet in order to be eligible for simplified insolvency proceedings, minimizing the number of such criteria, and specify under what conditions creditors of the eligible debtors may also apply for commencement of simplified insolvency proceedings with respect to those debtors.

(*See recommendations 8, 9 and 14–16 of the Guide.*)

111. Eligibility will be closely linked to the definition of MSEs adopted in a particular jurisdiction. As noted above, practices with defining MSEs vary greatly across jurisdictions. Thresholds and other criteria may be used for such purpose

(e.g. the amount of total debt or liabilities being equal to or less than a specified maximum, the maximum number of employees or assets and income not exceeding a certain level prescribed by law). In addition, certain types of business activity (e.g. involving real estate) may not be eligible for simplified insolvency proceedings. For this reason, the MSE Insolvency Guide defers these matters to States but recommends minimizing the number of eligibility criteria for MSE debtors. States should also specify in their legislation at which point in time the determination that the applicant meets the eligibility criteria should be made.

112. The MSE Insolvency Guide provides that creditors of the eligible debtors may also apply for commencement of simplified insolvency proceedings with respect to those debtors under conditions to be specified in the insolvency law. A main reason for allowing creditor applications is that there will be cases where the MSE debtor will not or cannot apply for commencement, and this may cause further impairment of creditors' rights and dissipation of insolvency estate assets unless creditors can seek appropriate measures, including the imposition of a stay on the MSE debtor's actions as regards its assets. In the light of a limited creditor base and the high probability of creditor disengagement in the MSE insolvency context, it may often be the case that only one creditor may be interested in pursuing an MSE insolvency case. The MSE Insolvency Guide therefore does not recommend requiring that a minimum number of creditors apply for commencement of a simplified insolvency proceeding for the proceeding to commence. Such requirement is applicable in some jurisdictions in situations where the number of the debtor's creditors exceeds an established threshold, to minimize risks that a single creditor will use simplified insolvency proceedings as a substitute for a debt enforcement mechanism.

2. Commencement criteria and procedures

Recommendation 23: Commencement criteria and procedures

23. The insolvency law providing for a simplified insolvency regime should:

(a) Establish transparent, certain and simple criteria and procedures for commencement of simplified insolvency proceedings;

(b) Enable applications for simplified insolvency proceedings to be made and dealt with in a speedy, efficient and cost-effective manner; and

(c) Establish safeguards to protect debtors, creditors and other parties in interest, including employees, from abuse of the application procedure.

(*See the text preceding recommendation 14 of the Guide.*)

113. Making simplified insolvency proceedings available and easily accessible to MSEs is listed in recommendation 1 of the MSE Insolvency Guide as one of the key objectives of a simplified insolvency regime. The commencement criteria and procedures play an important role in achieving that objective. The MSE Insolvency Guide recommends that the commencement criteria and procedures should be transparent and certain, facilitating access to simplified insolvency proceedings conveniently, cost-effectively and quickly. This is essential in order to encourage MSEs to voluntarily commence proceedings at an early stage of their financial distress. The commencement criteria and procedures should also be simple and straightforward. The more elements are added to the commencement criteria and procedures, the more difficult they will be to satisfy, especially where the elements included are subjective. This may lead to applications for commencement of simplified insolvency proceedings being contested, causing delay, uncertainty and expense.

114. The MSE Insolvency Guide recognizes that ease of access needs to be balanced against proper and adequate safeguards to prevent abuse of proceedings, for example where a single creditor wishes to use a simplified insolvency proceeding as a substitute for a debt enforcement mechanism or where an MSE wishes to take advantage of a stay of proceedings against it. In addition, a simplified reorganization proceeding may be commenced by the debtor in order to delay unavoidable liquidation.

115. Countries that fear substantial abuse of a simplified insolvency regime, for instance during an economic depression or high inflation, may be inclined to introduce more stringent criteria or make existing criteria cumulative. While acknowledging those concerns, the MSE Insolvency Guide considers however that they are better addressed by putting in place appropriate safeguards to prevent abuses and to address them effectively and in a timely manner where they occur, rather than by devising complex commencement criteria and procedures. Safeguards against abuses by either a creditor or the debtor are found throughout the MSE Insolvency Guide, including in the powers of the competent authority to decide on whether to commence the proceeding and, if it is automatically commenced upon application by the debtor, whether to dismiss the commenced proceeding (See recommendations 26, 28 and 36). An important safeguard consists of the power of the competent authority to decide on application of a stay (See recommendation 47). Provisions on recovery of damages caused by the improper commencement of a simplified insolvency proceeding could also be effective against the improper commencement of simplified insolvency proceedings. They may envisage recovery of costs and expenses, including because of disruption of a business (See recommendations 31 and 39).

116. The MSE Insolvency Guide thus recommends that applications for simplified insolvency proceedings should be dealt with in a speedy, efficient and cost-effective manner. To achieve that, conditions that would likely place a burden on

the competent authority, such as investigations of the financial state of the debtor, should be avoided on the understanding that there will be opportunity for such assessments after commencement. An application by a debtor may function as an acknowledgement of financial difficulties of the debtor and lead to commencement of proceedings unless it can be shown that the insolvency law is being abused by the debtor (See recommendation 24 and its accompanying commentary). In contrast, in the case of an application by a creditor contested by the debtor, the competent authority would be expected to take steps to determine whether the proceeding should be commenced and if so, which type of proceeding to commence that would be appropriate to the particular circumstances of the debtor (See recommendation 27 and its accompanying commentary). Those safeguards are essential to avoid possible abuse by creditors and in the light of a fundamental right of the debtor to be heard.

3. Commencement on debtor application

Recommendation 24: Application

24. The insolvency law providing for a simplified insolvency regime should allow eligible debtors to apply for commencement of a simplified insolvency proceeding at an early stage of financial distress without the need to prove insolvency. (*See recommendation 15 of the Guide.*)

117. The cessation of payments test and the balance sheet test are two usual standards for commencement of insolvency proceedings. Where the insolvency law adopts a single test, the Guide recommends that the cessation of payments test and not the balance sheet test should be used. Where the insolvency law contains both tests, the Guide states that the proceedings can be commenced if one of the tests can be satisfied (See recommendation 15 of the Guide and a footnote thereto).

118. The balance sheet test may be impractical for MSE debtors because they often do not maintain proper records. Moreover, personal assets and liabilities are likely to be mingled with business assets and liabilities, particularly where the MSE debtor is an individual entrepreneur. The cessation of payments test may be more workable in comparison. The law may accept a declaration from the MSE debtor that it is unable to pay its debts and specify the indicators of the MSE debtor's inability to pay its debts or establish a presumption to that effect when the debtor suspends payment of its debts.

119. The MSE Insolvency Guide recommends not requiring a MSE debtor to prove insolvency. Recommendation 24 envisages that a MSE should be allowed to apply for simplified insolvency proceedings at an "early stage of financial distress". It is left to States to define an "early stage of financial distress" and means to prove it. An "early stage of financial distress" may be understood as an earlier stage of financial difficulty than when the MSE debtor could meet the insolvency and likelihood of insolvency tests covered by recommendation 15 of the Guide. States may decide to leave it to the competent authority to determine whether an applicant fulfils that criterion for application.

120. In defining means to prove an "early stage of financial distress", States should be mindful of one of the objectives of the simplified insolvency regime stated in recommendation 1, namely to make simplified insolvency proceedings easily accessible to MSEs. Imposing on MSEs cumbersome means of proving an "early stage of financial distress" would run counter that objective. Also, as stated in paragraph 116 above, it is advisable to avoid conditions that would likely place a burden on the competent authority, such as investigations of the financial state of the debtor, on the understanding that there will be opportunity for such assessments after commencement. An application by a debtor may function as an acknowledgement of financial difficulties of the debtor and lead to commencement of proceedings unless it can be shown that the insolvency law is being abused by the debtor. Inclusion of some minimal information showing an "early stage of financial distress" in the debtor's application might nevertheless be helpful for the consideration of the debtor's application by the competent authority. MSEs could be assisted in that respect by: *(a)* early rescue mechanisms addressed in recommendation 103, including mechanisms for providing early signals of financial distress to MSEs and easy access by MSEs to professional advice (see the commentary to that recommendation below), through which an early stage of financial distress could be certified by a third-party professional (e.g. an accountant or a tax adviser); *(b)* an independent professional's support with filing the application (see paras. 48 and 49 above); and *(c)* other measures aimed at providing support with the use of a simplified insolvency regime (See recommendation 9 and its accompanying commentary).

121. The recommended approach of not requiring a MSE debtor to prove insolvency removes the need to collect and file extensive financial documents to prove insolvency or financial distress. It may incentivize and facilitate early access by MSEs to the simplified insolvency regime and alleviate concerns over the stigma of insolvency. The MSE Insolvency Guide similarly does not recommend imposing a requirement for the debtor to demonstrate "good faith" at the entry point. The administrative efficiency of simplified insolvency proceedings would not be achieved if demonstrating good faith is made a condition of access by MSEs to a simplified insolvency proceeding since proving and verifying good faith may be time- and record-consuming. At the same time, it is envisaged that negative

consequences may follow at later stages of the proceeding if the debtor fails to act in good faith before or at any stage of the proceeding (e.g. discharge may be denied or revoked (See recommendations 90 and 91)).

122. The MSE Insolvency Guide takes the approach that, where the competent authority is required to make the commencement decision, it will have the opportunity to review the application and allow time for creditors to object to the commencement of simplified insolvency proceedings or a particular type thereof (See recommendation 34). The application may be denied for reasons of ineligibility of the debtor or an improper use of a simplified insolvency regime as provided for in recommendation 28. Where the application functions to automatically commence proceedings, the competent authority will have the opportunity to review the application and hear creditors' views after the commencement of proceedings. If at that stage, the competent authority finds that the eligibility criteria were not met or the information submitted with the application was false or constituted a misrepresentation, or the debtor by filing the application otherwise abused a simplified insolvency regime, the competent authority may dismiss the proceeding and impose sanctions as provided for in recommendations 36 and 39. In both cases, attempts to misuse the application procedure can thus be reviewed. At a later stage, if it is shown that the proceeding to which the debtor applied cannot or should not proceed, the competent authority may decide to convert it to another type (e.g. a simplified reorganization proceeding to liquidation or vice versa or a simplified insolvency proceeding to a standard one) or terminate the proceedings (e.g. where reorganization of the solvent debtor failed).

Recommendation 25: *Information to be included in the application*

25. The insolvency law providing for a simplified insolvency regime should specify information that the debtor must include in its application for commencement of a simplified insolvency proceeding, keeping the disclosure obligation at the stage of application to the minimum. It should require that information to be accurate, reliable and complete.

123. In line with the objectives of a simplified insolvency regime to provide for expeditious, simple, flexible and low-cost insolvency proceedings and to make such proceedings available and easily accessible, the MSE Insolvency Guide recommends that the disclosure obligation upon application should be kept to an essential minimum. Recognizing that under the MSE Insolvency Guide the debtor will be under the general obligation to cooperate and provide information to the

competent authority throughout the proceeding (See recommendation 20), the information provided upon application may be supplemented with additional information at later stages of the proceeding, if necessary. Otherwise, conditions for entry into a simplified insolvency regime will become burdensome for MSEs.

124. The information to be provided upon application should be sufficient to allow the competent authority to assess the eligibility of the debtor for commencement of a simplified insolvency proceeding. That information would vary depending on eligibility requirements of States. In addition, the debtor may be expected to submit a list of its assets, liabilities and creditors. For an application for a simplified reorganization proceeding, some minimal additional information may be required.

125. After commencement, the competent authority on its own motion or upon a creditor's request may request the debtor to present additional information, in particular to assess any need for commencement of avoidance proceedings or for conversion of the commenced proceeding to another type. In some cases, information about the MSE's financial position may need to be supplemented by information about the MSE's business affairs, such as specifics of profession, contracts and customer lists. Such information will be particularly relevant in the context of simplified reorganization proceedings in order to identify the business's prospects and chances of successful reorganization, but it may also be useful in the context of simplified liquidation proceedings, for example for the organization of an asset sale. The extent of additional disclosure may depend on the situation. It may be more extensive where objections are raised by creditors to the commencement of simplified insolvency proceedings or a particular type thereof or where the application gives rise to suspicion of fraud, misrepresentation or doubts regarding the real financial situation of the applicant.

126. Sufficient time should be allowed to the debtor to collect all the requested information. The duration would vary depending on the requested information and the state of the debtor's records. Standard forms that set out the specific information required from the debtor may assist MSEs in complying with disclosure obligations. In addition, assistance of an independent professional may be required to gather the requested information and ensure that such information is up to date, complete, accurate and reliable, including by evaluating the debtor's assets, financial situation and business affairs. The ability of the debtor to meet disclosure obligations would favourably impact the terms of discharge and, in a simplified reorganization context, may serve to enhance the confidence of creditors and the competent authority in the ability of the debtor to continue managing the business.

Recommendation 26: *Effective date of commencement*

26. The insolvency law providing for a simplified insolvency regime should specify that where the application for commencement is made by the debtor:

(a) The application for commencement will automatically commence a simplified insolvency proceeding; or

(b) The competent authority will promptly determine its jurisdiction and whether the debtor is eligible and, if so, commence a simplified insolvency proceeding.

(*See recommendation 18 of the Guide.*)

127. The MSE Insolvency Guide, like the Guide, provides that simplified insolvency proceedings of the type to which the debtor applied will commence automatically upon application of the debtor or promptly upon a decision of the competent authority, depending on domestic law requirements. Not requiring the MSE debtor to prove insolvency and allowing the competent authority to take a decision ex parte, on the basis of a preliminary examination of the application, would help to avoid delays between the application and commencement where a decision of the competent authority is required for commencement of the proceeding. (For other issues raised by this recommendation, see the commentary to recommendation 18 of the Guide).

4. Commencement on creditor application

Recommendation 27: Commencement on creditor application

27. The insolvency law providing for a simplified insolvency regime should specify that a simplified insolvency proceeding may be commenced on the application of a creditor of a debtor which is eligible for simplified insolvency proceedings, provided that:

(a) Notice of application is promptly given to the debtor;

(b) The debtor is given the opportunity to respond to the application, by contesting the application, consenting to the application or requesting the commencement of a proceeding different from the one applied for by the creditor; and

(c) A simplified insolvency proceeding of the type to be determined by the competent authority commences without agreement of the debtor only after it is established that the debtor is insolvent.

(*See recommendation 19 of the Guide.*)

128. As provided for in recommendation 22 of the MSE Insolvency Guide, creditors of eligible debtors should have the right to apply for the commencement of simplified insolvency proceedings, including both simplified liquidation and simplified reorganization proceedings, under conditions to be specified in the law. The MSE Insolvency Guide recommends that certain safeguards should be in place when a simplified insolvency proceeding is initiated by application of a creditor. First, in the event of a creditor application for commencement of insolvency proceedings, the MSE debtor should have a fundamental right to immediate notice of the application. Where the MSE debtor has disappeared or is avoiding receipt of personal notice, public notice might suffice or notice could be served at the last known address of the MSE debtor.

129. Second, the MSE debtor should be given an opportunity to respond to the application, contest the application, consent to the application or request the commencement of a proceeding different from the one requested in the creditor application. The deadline for a response from the MSE debtor, as established by the competent authority, must be short and strictly enforced to protect the rights of creditors. MSEs should be able to avail themselves of an independent professional's assistance when responding to a creditor application for commencement of insolvency proceedings (see paras. 48–49 above).

130. If the MSE debtor agrees to the creditor application, simplified insolvency proceedings of the type specified by the creditor(s) will commence unless the competent authority decides otherwise. The competent authority should also decide which type of proceedings to commence if the MSE debtor agrees to enter the insolvency process but prefers a different type of proceeding than that specified in the creditor application. For example, the MSE debtor may request the commencement of simplified reorganization instead of liquidation. In such cases, the law may set forth the maximum period and other conditions under which simplified reorganization requested by the MSE debtor could be continued against the will of the creditors. Where reorganization of the insolvent MSE debtor is not likely to, or cannot, succeed, the competent authority should commence simplified liquidation proceedings.

131. The third safeguard applies where the MSE debtor does not agree with the commencement of insolvency proceedings on the basis that it is solvent or where the MSE debtor fails to respond to the creditor application. In such cases, the

simplified insolvency proceedings should not proceed without establishing the debtor's insolvency. While the MSE Insolvency Guide allows an MSE to enter simplified insolvency proceedings before a state of insolvency, safeguards should be in place to prevent a solvent MSE from involuntarily doing so. The requirement to prove insolvency unless the debtor is explicitly agreeing to enter the insolvency process provides an essential check against abuse by the creditor(s).

132. The State may specify the test that would need to be met to prove the MSE debtor's insolvency. In MSE insolvency, it would most likely be the cessation of payments test, for example creditor(s) may be required to prove to the competent authority that their rights have already been impaired because a demand for debt repayment has been made but it has not been satisfied by the debtor after a certain time period fixed in the law has expired (see also the commentary to recommendation 24 above).

133. In that context, States may refer to recommendation 17 of the Guide, entitled "Presumption that the debtor is unable to pay", reading: "The insolvency law may establish a presumption that, if the debtor fails to pay one or more of its mature debts, and the whole of the debt is not subject to a legitimate dispute or offset in an amount equal to or greater than the amount of the debt claimed, the debtor is generally unable to pay its debts." That recommendation is accompanied by a footnote reading: "Where the debtor has not paid a mature debt and the creditor has obtained a judgment 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. The debtor could rebut the presumption by showing, for example, that it was able to pay its debts; that the debt was subject to a legitimate dispute or offset; or that the debt was not mature. The recommendations on notice of commencement provide protection for the debtor by requiring notice of the application for commencement of proceedings to be given to the debtor and providing the debtor with an opportunity to rebut the presumption."

134. The competent authority will need to determine whether to commence simplified insolvency proceedings and, if so, which one, taking into consideration all the information supplied by the MSE debtor and creditor(s) and the rights of both creditor(s) and the MSE debtor. Where insolvency is not proved, the proceedings should be terminated. The competent authority's decision should be promptly notified to the MSE debtor and the applicant to allow them to challenge that decision in a timely fashion if they so choose.

5. Denial of application

Recommendation 28: *Possible grounds for denial of application*

28. The insolvency law providing for a simplified insolvency regime should specify that, where the decision to commence a simplified insolvency proceeding is to be made by the competent authority, the competent authority should deny the application if it finds that:

(a) It does not have jurisdiction;

(b) The applicant is ineligible; or

(c) The application is an improper use of the simplified insolvency regime.

(*See recommendation 20 of the Guide.*)

Recommendation 29: *Prompt notice of denial of application*

29. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly give notice of its decision to deny the application to the applicant, and where the application was made by a creditor, also to the debtor. (*See recommendation 21 of the Guide.*)

Recommendation 30: *Possible consequences of denial of application*

30. The insolvency law providing for a simplified insolvency regime should set out possible consequences of denial of application, including that a different type of insolvency proceeding may commence if criteria set out in the insolvency law for the commencement of that other type of insolvency proceeding are met.

Recommendation 31: *Possible imposition of costs and sanctions against the applicant*

31. The insolvency law providing for a simplified insolvency regime should allow the competent authority, where it has denied an application to commence a simplified insolvency proceeding under recommendation 28, to impose costs or sanctions, where appropriate, against the applicant for submitting the application. (*See recommendation 20 of the Guide.*)

135. The MSE Insolvency Guide recommends that, in those cases where the competent authority is required to make the commencement decision, the competent authority should have the power to deny the application for commencement

either because it does not have jurisdiction, because of an improper use of a simplified insolvency regime or for technical reasons relating to satisfaction of the eligibility standard. The competent authority's jurisdiction over MSE insolvency cases will be established in the law providing for a simplified insolvency regime in accordance with recommendation 5 *(a)* that recommends clearly indicating in that law a body that will fulfil functions of the competent authority envisaged in the MSE Insolvency Guide. In accordance with recommendation 22, the law providing for a simplified insolvency regime should also specify the persons eligible to apply for commencement of simplified insolvency proceedings. In particular, debtors would be expected to meet certain criteria set out in domestic law to be eligible to apply for simplified insolvency proceedings (for example, statutory limits may be imposed on the amount of debt, the number of employees or the value of assets that the eligible debtors may have (see the commentary to recommendation 22 above)) and creditors of the eligible debtors would be expected to meet certain conditions set out in domestic law in order to be able to apply for commencement of simplified insolvency proceedings with respect to those debtors (e.g. that their demands for debt repayment remained unanswered within a fixed statutory period (see the commentary to recommendation 27 above)).

136. Examples of an improper use might include those cases where the debtor uses an application for simplified insolvency proceedings as a means of prevaricating and unjustifiably depriving creditors of prompt payment of debts or of obtaining relief from onerous obligations, such as labour contracts. In the case of a creditor application, it might include those cases where a creditor uses simplified insolvency proceedings as an inappropriate substitute for debt enforcement procedures (which may not be well developed); attempts to force a viable business out of the market place; or attempts to obtain preferential payments by coercing the debtor (where such preferential payments have been made and the debtor is insolvent, investigation would be a key function of insolvency proceedings).

137. Where there is evidence of an improper use of a simplified insolvency regime by either the debtor or creditor(s), the law may provide, in addition to denial of the application, that sanctions can be imposed on the party improperly using the proceedings or that that party should pay costs and possibly damages to the other party for any harm caused. Remedies may also be available under non-insolvency law. They should however be appropriate and proportionate, taking into account the objectives of the simplified insolvency regime and the expected low sophistication of MSEs. (See section P and its accompanying commentary.)

138. In all cases, the notice of denial of the application should be given to the applicant and, where the applicant is the creditor, also to the debtor (See recommendation 29). If the application were to be denied because of the applicant's failure to meet the eligibility criteria for entry into a simplified insolvency regime,

it would be desirable to refer the case to the standard business insolvency proceeding upon the applicant's consent if the requirements for commencement of such standard business insolvency proceedings were met.

6. Notice of commencement of proceedings

Recommendation 32: Notice of commencement of proceedings

32. The insolvency law providing for a simplified insolvency regime should require that:

(a) The competent authority should give the notice of the commencement of the simplified insolvency proceeding using the means appropriate to ensure that the information is likely to come to the attention of parties in interest; and

(b) The debtor and all known creditors should be individually notified by the competent authority of the commencement of the simplified insolvency proceeding unless the competent authority considers that, under the circumstances, some other form of notice would be more appropriate.

(*See recommendations 23 and 24 of the Guide.*)

139. Giving notice of commencement of a simplified insolvency proceeding is central to several key objectives of a simplified insolvency regime. It ensures the transparency of the proceeding and that all parties in interest are equally well informed and can challenge the commencement of the proceeding in a timely fashion. For those reasons, the MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency regime should require the competent authority to give notice of commencement of a simplified insolvency proceeding.

140. Two forms of such a notice are envisaged: a general notice (subparagraph *(a)* of recommendation 32); and individual notices to the debtor and all known creditors (subparagraph *(b)* of that recommendation).

141. The aim of the general notice is to ensure that the information is likely to come to the attention of all parties in interest. As explained in paragraph 25 *(h)* above, which draws on the explanation of the term "parties in interest" found in the Glossary of the Guide, "parties in interest" is a broad concept and encompasses all persons whose rights, obligations and interests are affected by simplified insolvency proceedings or particular matters in the proceeding. The group of such affected

persons is not limited to the debtor and creditors and may include for example a government authority that might have been involved in facilitating informal debtor restructuring negotiations or an independent professional that was appointed by the competent authority to assist the debtor with application for commencement of a simplified insolvency proceeding or preparation of a response to the application for commencement of a simplified insolvency proceeding filed by a creditor or group of creditors.

142. The MSE Insolvency Guide recommends the use for such purpose of any appropriate means of notification without specifying them. What would be considered appropriate depends on situations. Both electronic and paper-based means could be used depending on legislation concerning giving public notices in a particular jurisdiction as well as the circumstance of a particular case. It could be public notice through publication in an official government gazette or a commercial or widely circulated newspaper, which does not need to be national or regional but could be local. Electronic platforms used for posting information on simplified insolvency proceedings or for hosting relevant public registries may be used for such purpose as well. This form of notification presupposes that the same content is communicated to an indefinite and unidentified group of people.

143. However, the public notice will not always be appropriate. For example, concerns over stigmatization because of insolvency and possible negative impact of stigmatization on the debtor and its family members, costs of publication, personal data protection requirements, protection of the insolvency estate from dissipation, a very limited creditor base and localized nature of the debtor's business and other considerations may justify making exceptions to the public notice. As long as such exceptions are permitted by law, the public notice may be replaced, for example, by circulation of the notice of commencement of proceeding by electronic means to all known parties in interest or by granting all known parties in interest a restricted access to a secure web page of the proceeding.

144. In addition to that general notice, the MSE Insolvency Guide recommends that the law providing for simplified insolvency proceedings should require the individual notification of the commencement of the proceeding to be given to the key parties to the simplified insolvency proceeding – the debtor and all known creditors. The individual notice is recommended as the primary form of notification with respect to that group of stakeholders because of their direct interest in receiving the notice of commencement of the proceeding and because they may need to receive an individualized content.

145. All creditors will have an interest in being individually notified of commencement of the proceeding in order to be able to participate and protect their interests or object to the commencement of the simplified insolvency proceeding

or a particular type thereof (e.g. simplified reorganization as opposed to simplified liquidation or vice versa) or to the commencement of any insolvency proceeding with respect to the debtor, as envisaged in recommendation 34 of the MSE Insolvency Guide (see below). In addition, certain creditors (such as suppliers) need to be notified of the commencement of the simplified insolvency proceeding in order to enable them to make an informed decision in a timely fashion concerning continuing provision of goods and services to the MSE debtor to avoid the accumulation of further debt. Where the proceeding commences upon application of the debtor, the requirement of individual notification of creditors is relevant with respect to all known creditors; where the proceeding commences upon application of creditor(s), that requirement is relevant with respect to any known creditors in addition to the applicant(s).

146. The MSE Insolvency Guide refers to all known creditors on the understanding that at the time of commencement of the proceeding all creditors of the debtor may not be known to the competent authority. The list of all creditors relevant to the proceeding may become known later, after procedures with respect to admission of claims have been completed (see in that respect section I below). At the time of commencement, the competent authority may have a list of creditors included in the application prepared by the debtor. Depending on the state of the debtor's records, that list may be inaccurate or incomplete but the facts of inaccuracies or incompleteness may be discovered later in the proceeding. Where the proceeding is commenced upon application of a creditor or creditors, the competent authority may only learn about those creditors that submitted the application.

147. The contents of the individual notice of commencement of the proceeding to the debtor will depend on situations, in particular whether the proceeding has been commenced upon the debtor's or creditor's application. As noted in paragraphs 128–134 above, where the proceeding commences upon creditor's application, the debtor is expected under the MSE Insolvency Guide to be individually notified of the application (See recommendation 27 *(a)*) and be provided with the opportunity to contest, consent or request commencement of a different proceeding than that applied for by the creditor. The individual notice of commencement of the proceeding to the debtor would refer in such cases to the creditor's application and any debtor's response and contain the competent authority's decision to commence a simplified liquidation or reorganization proceeding. Where the proceeding commences without agreement of the debtor, to reflect the requirement of recommendation 27 *(c)*, the individual notice of commencement of the proceeding to the debtor should also include information that led the competent authority to conclude that the debtor is insolvent. On the basis of all that information, the debtor may decide to seek review of the competent authority's decision to commence the proceeding or of its particular type.

148. While recommending the individual notification of the commencement of the simplified insolvency proceeding to the debtor and all known creditors, the MSE Insolvency Guide recognizes that under some circumstances, some other form of notice would be more appropriate. For example, an intended addressee may not be reachable or may be avoiding receiving an individual notice either by post or electronic means of communication. The notice may be delivered to immediate family members or a general notice given under subparagraph *(a)* of recommendation 32 of the MSE Insolvency Guide (either public or more restricted general; see paras. 141–143 above) may be considered sufficient.

149. Where electronic means of notification are used, parties in interest who own more than one electronic address should designate a particular one for the receipt of communications from the competent authority and refrain from providing an electronic address they rarely use. Although many facts may impact the capacity of an addressee to retrieve communication at a designated electronic address (e.g. security measures such as filters or firewalls that might prevent the addressee to retrieve electronic communications from unknown originators), the addressee will be presumed in receipt of communication at the time when an electronic communication reaches its designated electronic address; this presumption may be rebutted by evidence showing that the addressee had in fact no means of retrieving the communication.

150. The competent authority may be considered fulfilling its notification obligations from the time of "dispatch" of notices, understood as the time when communication leaves the sphere of control of the competent authority. In paper-based communication, this will be the time when communication is placed in the mailbox or handed in to a post officer for dispatch; in electronic communication, it will be the time when communication leaves an information system under the control of the competent authority.[4]

[4] See article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). Although applicable to the use of electronic communications in connection with the formation or performance of a contract, the provisions of the Convention may be also relevant to the use of electronic means of communication in insolvency proceedings if they were used for enactment of national laws establishing standards for the use of electronic means of communication generally.

7. Content of the notice of commencement of a simplified insolvency proceeding

Recommendation 33: Content of the notice of commencement of a simplified insolvency proceeding

33. The insolvency law providing for a simplified insolvency regime should specify that the notice of commencement of a simplified insolvency proceeding is to include:

(a) The effective date of the commencement of the simplified insolvency proceeding;

(b) Information concerning the application of the stay and its effects;

(c) Information concerning submission of claims or that the list of claims prepared by the debtor will be used for verification;

(d) Where submission of claims by creditors is required, the procedures and time period for submission and proof of claims and the consequences of failure to do so (See recommendation 51 below); and

(e) Time period for expressing objection to the commencement of a simplified insolvency proceeding (See recommendation 34 below).

(*See recommendation 25 of the Guide.*)

151. The MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency regime should require the notice of commencement of a simplified insolvency proceeding to include the following information: the effective date of the commencement of the simplified insolvency proceeding; information concerning the application of the stay and its effects; whether the list of claims prepared by the debtor will be used in the proceeding for verification or creditors are required to submit their claims; if the latter, the procedures and time period for submission and proof of claims and consequences of failure to do so in the prescribed manner; and the time period for expressing objection to the commencement of the proceeding.

152. The information listed should be considered the minimum needed to ensure clarity and certainty as regards the status of the debtor's business, the insolvency estate and creditor's actions against the debtor and its assets as well as next steps in the proceeding. It may need to be supplemented by information on the type of the simplified insolvency proceeding commenced and on the appointment of an independent professional specifying function(s) for which it was appointed. Where

a simplified reorganization proceeding is commenced, the notice should inform whether the debtor stays in possession of business or is displaced and if so, by whom and the extent of displacement (limited or total; See recommendation 16). As noted in the context of recommendation 32, the debtor may be expected to receive additional information concerning the assessment of its insolvency if the proceeding is commenced without its agreement.

153. Information about the time period for expressing objection to the commencement of a simplified insolvency proceeding referred to in subparagraph *(e)* will be relevant for both the debtor and creditors since the MSE Insolvency Guide envisages the right of both to seek review of competent authority's decisions. In addition, a possibility of creditors raising the objection to the commencement of the proceeding is specifically envisaged in recommendation 34 of the MSE Insolvency Guide (see below). In line with the goal of putting in place expeditious simplified insolvency proceedings, the time period for expressing objection is expected to be short (See recommendation 12).

154. Giving an accurate and comprehensive notice is important to avoid problems at subsequent stages in the proceeding. Standard forms may considerably simplify the notification process (See recommendation 9).

8. Creditor objection to the commencement of a simplified insolvency proceeding

Recommendation 34: Creditor objection to the commencement of a simplified insolvency proceeding

34. The insolvency law providing for a simplified insolvency regime should specify that creditors may object to the commencement of a simplified insolvency proceeding or a particular type thereof or to the commencement of any insolvency proceeding with respect to the debtor, provided they do so within the time period established in the insolvency law as notified to them by the competent authority in the notice of the commencement of the simplified insolvency proceeding (See recommendations 32 and 33 above).

155. Recommendation 34 of the MSE Insolvency Guide explicitly envisages a possibility for creditors to raise objections to the commencement of a simplified insolvency proceedings. Such recommendation, for which no corresponding provision is found in the Guide, was included in the MSE Insolvency Guide because of

specific features of a simplified insolvency regime, in particular the recommended expeditious commencement of simplified insolvency proceedings on debtor application (See recommendation 24 and the commentary thereto). Recommendation 26 of the MSE Insolvency Guide envisages that simplified insolvency proceedings are commenced automatically or promptly upon application of the debtor by a decision of the competent authority. The expeditious commencement may make it impossible for creditors to learn about the debtor's application and raise objection to the commencement before the commencement.

156. Creditors may object to the commencement of a simplified insolvency proceeding alleging, for example, that the debtor is in a good standing (i.e. not insolvent and not at an early stage of financial distress), wishes to avoid its debt repayment obligations by taking advantage of a stay and other benefits of a simplified insolvency regime and thus the application constitutes an abuse by the debtor of the simplified insolvency regime. In other cases, creditors may argue that the debtor, although insolvent, is ineligible for simplified insolvency proceedings. They may argue that the value of the debtor's assets exceeds the established threshold for simplified insolvency proceedings asserting that some assets might have been undisclosed, concealed or transferred to related persons before the application. Creditors may insist that a standard business insolvency proceeding should be commenced instead that would allow proper investigation of the debtor's assets and operations during the period approaching the application. Creditors may also challenge eligibility on the basis of the amount of claims and debt. In some other cases, creditors may oppose the commencement of a particular type of simplified insolvency proceeding, for example a simplified reorganization proceeding as opposed to a simplified liquidation proceeding and vice versa.

157. The MSE Insolvency Guide recommends that a possibility for raising objections to the commencement of a simplified insolvency proceedings should be time bound, and that the applicable time period for raising objections should be specified in the notice of the commencement of a simplified insolvency proceeding (see subparagraph *(e)* of recommendation 33). In line with recommendation 12, this time period should be short.

158. Different options will be available to the competent authority depending on the grounds for the objection and whether it is found substantiated or not. The competent authority may decide to dismiss the proceeding after its commencement and impose, where appropriate, costs and sanctions on the applicant (See recommendations 36–39). Alternatively, it may decide to initiate avoidance proceedings within the commenced simplified insolvency proceeding or it may decide to convert the commenced simplified insolvency proceeding to another type or to a standard business insolvency proceeding where reasons for such conversion exist. The competent authority may also decide to dismiss the objection and impose sanctions and

costs on the creditor filing an objection not in good faith and causing delays to the proceeding (See recommendation 101 and commentary thereto in that context).

9. Possible consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding

Recommendation 35: Possible consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding

35. The insolvency law providing for a simplified insolvency regime should specify consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding.

159. Recommendation 35 of the MSE Insolvency Guide envisages that there could be consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding and that the insolvency law providing for a simplified insolvency regime would specify them. For example, the law may provide that the claims of such creditors would be unaffected by the simplified insolvency proceeding and excluded from any discharge that may result from that proceeding. In such case, recommendation 49 referring to claims affected and not affected by simplified insolvency proceedings and recommendation 89 envisaging possible exclusions from discharge would be relevant. Alternatively, the law may provide that the claims of creditors not notified of the commencement of the simplified insolvency proceeding are nevertheless affected by the simplified insolvency proceeding but those creditors should not be worse off than when they would have been so notified.

160. Recommendation 35 is intended to address situations where neither individual nor general notice of the commenced proceeding envisaged in recommendation 32 reaches creditors. As such, it should be read together with recommendations of the MSE Insolvency Guide on notices and notifications, including recommendation 40 that envisages the competent authority's responsibility to give notices related to simplified insolvency proceedings. Such notices would encompass general and individual notices of commencement of the simplified insolvency proceeding under recommendation 32. Recommendation 35 should also be read together with provisions on treatment of creditor claims, in particular recommendation 50 envisaging communication of the list of creditors and claims prepared by the debtor to creditors for verification and recommendation 51 envisaging that, under certain

conditions, creditors may be invited to submit their claims to the competent authority themselves. In the light of all those provisions in the MSE Insolvency Guide, the situations intended to be covered by recommendation 35 should rarely arise. Nevertheless, the aim of recommendation 35 is to supplement measures to disincentivize deliberate omissions of creditor claims by the debtor. At the same time, to balance creditors' rights to due process and protection of their legitimate interests with other objectives of the simplified insolvency regime, such as promoting the MSE debtor's fresh start and providing effective measures to address creditor disengagement, measures should be in place also to prevent unsubstantiated allegations by creditors that they were not notified of the commenced proceeding and of subsequent stages thereof. One such measure could be a presumption of the proper notification of creditors about the commenced simplified insolvency proceeding unless the party asserting the contrary proves otherwise.

10. Dismissal of a simplified insolvency proceeding after its commencement

Recommendation 36: *Possible grounds for dismissal of the proceeding*

36. The insolvency law providing for a simplified insolvency regime should permit the competent authority to dismiss the proceeding if, after its commencement, the competent authority determines, for example, that:

(a) The proceeding constitutes an improper use of the simplified insolvency regime; or

(b) The applicant is ineligible.

(*See recommendation 27 of the Guide.*)

Recommendation 37: *Prompt notice of the dismissal of the proceeding*

37. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly give notice of its decision to dismiss the proceeding using the procedure that was used for giving notice of the commencement of the simplified insolvency proceeding. (*See recommendation 29 of the Guide.*)

Recommendation 38: *Possible consequences of dismissal of the proceeding*

38. The insolvency law providing for a simplified insolvency regime should set out possible consequences of the dismissal of the proceeding, including that a different type of insolvency proceeding may commence if criteria set out in the insolvency law for the commencement of that other type of insolvency proceeding are met.

Recommendation 39: *Possible imposition of costs and sanctions against the applicant*

39. Where the proceeding is dismissed, the insolvency law providing for a simplified insolvency regime should allow the competent authority to impose costs or sanctions, where appropriate, against the applicant for commencement of the proceeding. (*See recommendation 28 of the Guide.*)

161. Recommendation 36 allows the competent authority to dismiss the already commenced proceeding. It is applicable to both situations: when the proceeding commences upon the decision of the competent authority and when it commences automatically upon application by the debtor. In both cases, after the proceeding has commenced, information relevant to dismissal may become available or circumstances may change. The list of grounds for dismissal is not exhaustive as the phrase "for example" in the chapeau of the recommendation indicates. The grounds for dismissal would essentially be the same as those for denial of application (See recommendation 28), that is, that there was improper use of a simplified insolvency regime, either by the debtor or creditor(s), or the applicant was ineligible. Where the debtor's application automatically commences a simplified insolvency proceeding in accordance with recommendation 26 *(a)*, the proceeding may be dismissed also, for example, on the grounds of the lack of jurisdiction.

162. Under recommendation 37, the requirement to promptly give notice of the decision to dismiss the proceeding intends to protect interests of the debtor and creditors that may be jeopardized by the commencement of the proceeding, in particular by a stay that, as a general rule, applies upon commencement (See recommendation 47). Such notice is to be given using the procedure that was used for giving notice of the commencement of the simplified insolvency proceeding, on the understanding that the same notification procedure would effectively ensure that all stakeholders that were notified of the commencement of the proceeding would also be notified of its subsequent dismissal.

163. As in the case with the denial of application (See recommendation 30), recommendation 38 envisages that the insolvency law providing for a simplified insolvency regime should set out possible consequences of the dismissal of proceedings. Those consequences would depend on the grounds for the dismissal. For example, where the debtor turns out to be ineligible for simplified insolvency proceedings, following the dismissal of the simplified insolvency proceeding, a different type of insolvency proceeding may commence if criteria set out in the insolvency law for the commencement of that other type of insolvency proceeding are met.

164. Another possible consequence of the dismissal is addressed in recommendation 39 that provides for the general power of the competent authority to impose costs or sanctions, where appropriate, against the applicant for commencing the proceeding that was dismissed. In considering the imposition of such measures, due account should be paid to the low sophistication of MSEs that may apply for commencement of a simplified insolvency proceeding either as the debtor or creditor(s) and may not know that their application may constitute an improper use of a simplified insolvency regime. In particular, they may not know about changes that might have been introduced in legislation (e.g. as regards a number of employees, the amount of debt or other quantitative or qualitative thresholds) making them no longer eligible to use a simplified insolvency regime. Facing risks of sanctions and of paying costs and possibly also damages to the other party for any harm caused by commencing the proceeding, MSEs may be discouraged to apply for simplified insolvency proceedings at all, which would defeat the main purpose of establishing a simplified insolvency regime.

G. Notices and notifications

1. Procedures for giving notices

Recommendation 40: Procedures for giving notices

40. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notices related to simplified insolvency proceedings and use simplified and cost-effective procedures for such purpose. (*See recommendations 22 and 23 of the Guide.*)

165. The MSE Insolvency Guide recommends that in simplified insolvency proceedings it should be the responsibility of the competent authority to give notices required to be given under the insolvency law providing for a simplified insolvency regime. Such notices may be required to be given to the public, only to the debtor, only to the creditors, only to employees or all parties in interest together. Procedures, means and form of giving notices may vary depending on the intended addressees and other factors, including the content of the notice.

166. Consistent with the objective of establishing a cost-effective simplified insolvency regime, the MSE Insolvency Guide recommends that the competent authority should use simplified and cost-effective procedures for giving notices. Procedures for giving notices refer to a series of actions involved in giving notices. Some of them may be established by law and there might be no possibility of deviating from them (e.g. the use of a standard form for a notice of commencement of an insolvency proceeding to be published in the medium specified in the law (e.g. an official government gazette published on paper or online)). With respect to other steps, the competent authority may enjoy discretion as long as the objective is achieved (e.g. the law may require obtaining receipt of the debtor's confirmation that it was notified about creditors' application to commence a simplified insolvency proceeding but leave it to the competent authority to define means of obtaining such receipt and its form). Where there is discretion, the competent authority should use simple and cost-effective procedures in implementing provisions of law relating to giving notices. To avoid the need to define applicable procedures in each case, sets of standard forms and steps may be established for different circumstances.

2. Individual notification

Recommendation 41: Individual notification

41. The insolvency law providing for a simplified insolvency regime should require that the debtor and any known creditor should be individually notified by the competent authority of all matters on which their approval is required, unless the competent authority considers that, under the circumstances, some other form of notification would be more appropriate. (*See recommendation 24 of the Guide.*)

167. The MSE Insolvency Guide recommends that, as a default rule, the debtor and any known creditor should be individually notified about matters that require their approval. Those matters include for example, as far as creditors are concerned, a reorganization plan or amendments thereto (See recommendations 74–77 and 80).

In addition to that general requirement of individual notification of the debtor and known creditors about matters requiring their approval, the MSE Insolvency Guide recommends that the notices of commencement of a simplified insolvency proceeding be given individually to the debtor and known creditors (See recommendation 32 *(b)*). Individual notification is implicit in several other recommendations throughout the MSE Insolvency Guide envisaging communication of the individualized content to intended addressees, for example a notice of a creditor application to the debtor (See recommendation 27 *(a)*) or a notice of adverse actions as regards creditor claims (See recommendation 53).

168. The competent authority may decide that the circumstances of a particular case justify the use of another form of notification. For example, where delivery failure reports are received when an individual notice is sent to the debtor at its designated or last known electronic address or the debtor no longer lives at its habitual residence and its whereabouts are unknown, giving public notice may be considered appropriate. In simplified reorganization proceedings, the competent authority may decide to make the reorganization plan available for approval on the web portal of the relevant insolvency proceeding instead of sending a separate individual communication with the attached reorganization plan to each known creditor.

169. What will be considered receipt and dispatch and the time point of receipt and dispatch of individual notifications should be addressed in domestic laws, rules, regulations and procedures applicable to the use of various means of communication in public administration and judiciary. Certainty would need to be provided on those matters in the light of the significance attached to the individual notices and notifications in the MSE Insolvency Guide. In particular, the time points from which deadlines will run for creditors to express objections or opposition, and for the competent authority to pronounce that creditor approval was or was not obtained, would need to be clearly established.

3. Appropriate means of giving notice

Recommendation 42: Appropriate means of giving notice

42. The insolvency law providing for a simplified insolvency regime should specify that the means of giving notice must be appropriate to ensure that the information is likely to come to the attention of the intended party in interest. (*See recommendation 23 of the Guide.*)

170. The MSE Insolvency Guide leaves discretion to the competent authority as regards the choice of means of giving notices. It does not require the chosen means of communication to ensure that the intended party or parties in interest take cognizance of the information. As long as the information is made available to them (e.g. is capable of being retrieved by the intended party or parties in interest in paperless communications), the chosen means of giving notice should be considered appropriate. Depending on circumstances, either paper-based (post) or electronic means of giving notice or the combination of both might be appropriate.

171. Where the law requires notices relevant to insolvency proceedings to be published in an official government gazette printed on paper, exceptions to that requirement should be allowed in a simplified insolvency regime if paper-based publication is expensive and the debtor is expected to cover costs of such publication. In addition, it may be unnecessary to publish notices in a newspaper of wide circulation in simplified insolvency proceedings that involve no assets and one or very few creditors. Such requirement would not only defeat the objective of putting in place simple, expeditious and low-cost insolvency proceedings but also would not be instrumental to facilitating access of MSEs to simplified insolvency proceedings and removing concerns over stigmatization because of insolvency. While the importance of transparency and accountability for protection of parties in interest and facilitation of their participation in simplified insolvency proceedings should not be underestimated, different means could be explored to achieve those goals, including through the use of relevant public registries, local publications and electronic means.

172. Some notices may be required to be in writing while others could be orally delivered as long as the means used for oral communication provide a record of the communication (its content, to whom, by whom and when it was delivered, etc.) and that record remains accessible so as to be usable for subsequent reference. A recorded online meeting or videoconference may, for example, provide such a record, as long as it secures authenticity and integrity of the record and measures are put in place to ensure that such record is accessible and usable for subsequent reference over time.

H. Constitution, protection and preservation of the insolvency estate

1. Constitution of the insolvency estate

Recommendation 43: Constitution of the insolvency estate

43. The insolvency law providing for a simplified insolvency regime should identify:

(a) Assets that will constitute the insolvency estate, including assets of the debtor, assets acquired after commencement of the simplified insolvency proceeding and assets recovered through avoidance or other actions; (*See recommendation 35 of the Guide.*)

(b) Where the MSE debtor is an individual entrepreneur, assets excluded from the estate that the MSE debtor is entitled to retain (See recommendation 19 *(c)* above). (*See recommendations 38 and 109 of the Guide.*)

Recommendation 44: Undisclosed or concealed assets

44. The insolvency law providing for a simplified insolvency regime should specify that any undisclosed or concealed assets form part of the insolvency estate.

Recommendation 45: Date from which the insolvency estate is to be constituted

45. The insolvency law providing for a simplified insolvency regime should specify the effective date of commencement of a simplified insolvency proceeding as the date from which the estate is to be constituted. (*See recommendation 37 of the Guide.*)

173. The MSE Insolvency Guide recommends identifying in the law assets that will constitute the insolvency estate (recommendation 43 *(a)*) and assets that will be excluded from the insolvency estate (recommendation 43 *(b)*). In the latter context, the MSE Insolvency Guide, with a cross reference to recommendation 19 *(c)*, refers specifically to assets that the MSE debtor who is an individual entrepreneur will be entitled to retain in accordance with provisions of law applicable within insolvency proceedings. Such provisions may be found in particular in family law and human rights instruments that aim at ensuring adequate standards of living.

174. The scope of assets excluded from the insolvency estate of MSE debtors would impact the achievement of the objectives of a simplified insolvency regime.

The exclusion of two particular categories of assets, the family home and tools of the trade, is especially relevant for reducing stigmatization, the impact of insolvency on the entire household of an individual entrepreneur and the prospects of his or her fresh start.

175. Different approaches may be taken to the manner of constituting the insolvency estate. In particular, in case of an individual entrepreneur, all assets may be included in the insolvency estate, and the MSE debtor may be allowed to request exclusion of some assets up to a specified value limit. Alternatively, assets could be excluded subject to specific ceilings or categories, or across-the-board exclusion of all assets of the MSE debtor could be permitted subject to challenge by creditors. The adoption of one approach over another has significant ramifications for efficiency and the costs of administration of insolvency proceedings. The approach based on the exemption of particular assets by the MSE debtor can be more costly than where a creditor seeks to reclaim items of very high value.

176. The MSE Insolvency Law recommends specifying in the law that the insolvency estate is to be constituted from the effective date of commencement of the proceeding (recommendation 45). Nevertheless, the assets acquired after commencement of the simplified insolvency proceeding and assets recovered through avoidance or other actions will form part of the insolvency estate as provided for in recommendation 43 *(a)*. Recommendation 44 supplements that provision by stating that any undisclosed or concealed assets of the MSE debtor would form part of the insolvency estate of the MSE debtor. It should be read together with recommendation 20 in accordance with which the debtor would be required to cooperate with and assist the competent authority to take effective control of the estate, wherever located, and to facilitate or cooperate in the recovery of the assets.

177. Non-disclosure or concealment of assets by the debtor, when discovered by creditors early, could trigger the creditor objection to the commencement of a simplified insolvency proceeding (See recommendation 34) and dismissal of the proceeding (See recommendations 36–39). Discovery of such facts at subsequent stages of the proceedings may trigger avoidance (See recommendation 46), objections to the application of the procedures envisaged under recommendations 65–67, denial of discharge (See recommendation 90), conversion of one proceeding to another (See e.g. recommendations 67 and 83) and imposition of costs and sanctions, including under criminal law and on persons exercising control over the MSE business. Discovery of such facts after the closure of the proceeding may lead to the reopening of the proceeding, revocation of a discharge granted (See recommendation 91) and imposition of sanctions.

2. Avoidance in simplified insolvency proceedings

Recommendation 46: Avoidance in simplified insolvency proceedings

46. The insolvency law providing for a simplified insolvency regime should ensure that avoidance mechanisms available under the insolvency law[4] can be used in a timely and effective manner to maximize returns in simplified insolvency proceedings. The competent authority should be allowed to convert a simplified insolvency proceeding to a different type of insolvency proceeding where the conduct of avoidance proceedings necessitates doing so.

[4] See recommendations 87–99 of the Guide.

178. Recommendations 87–99 and the accompanying commentary in the Guide address avoidance proceedings. They are generally applicable in a simplified insolvency regime with necessary adjustments dictated by the features of the simplified insolvency regime. In particular, under the Guide, the insolvency representative has the main responsibility to commence avoidance proceedings; creditors may be permitted to do so with the agreement of the insolvency representative or, in the absence of such agreement, with the leave of the court. Taking different approaches to avoidance proceedings in a simplified insolvency regime would be necessary to ensure simple, expeditious and low-cost procedures, and also because of the likelihood of no funds in the insolvency estate to finance avoidance proceedings, the debtor-in-possession as the default in simplified reorganization proceedings and a possibility of commencement of a simplified insolvency proceeding by an MSE debtor at an early stage of financial distress. In the light of those features, the MSE Insolvency Guide recommends ensuring that avoidance mechanisms available under the insolvency law can be used in a simplified insolvency regime in a timely and effective manner to maximize returns.

179. The competent authority should have the principal responsibility to commence avoidance proceedings in a simplified insolvency regime. This approach might be justified in particular in simplified reorganization proceedings where the debtor-in-possession is envisaged as the default approach: unless the debtor-in-possession is displaced, it might not be realistic to expect that persons responsible for concluding a voidable transaction would handle avoidance of that transaction effectively.

180. Where no independent professional was appointed, the competent authority may appoint an independent professional specifically for avoidance proceedings. Where an independent professional was appointed, the competent authority may appoint the same independent professional to handle also avoidance proceedings or appoint a different independent professional for that specific purpose.

181. The competent authority should be able to decide to commence avoidance proceedings on its own motion or upon application of an independent professional where one was appointed or creditors. In taking that decision, the competent authority will have to weigh various considerations, including the likely cost, duration and complexity of avoidance proceedings, the availability of funds to finance them, the time frame involved in avoidance steps, the likelihood of the successful recovery of assets and expected benefits to all creditors. In addition to the objective of the simplified insolvency regime, broader social benefits would need to be taken into account, such as the need to address risks of fraud (e.g. actions may be taken by the debtor before the commencement of a simplified insolvency proceeding to hide assets for the benefit of the debtor or a related person).

182. Mechanisms for covering costs of administering simplified insolvency proceedings discussed in the context of recommendation 10 are relevant for financing avoidance proceedings. Public funds may need to be made available to the competent authority to commence avoidance proceedings in appropriate situations, for example with respect to transactions involving intentionally wrongful behaviour. In other cases, costs of avoidance proceedings may be imposed on creditors that request them. Where sufficient funds do exist but were removed from the estate with the specific intention of leaving the estate with few or no assets, the proceeds from the realization of the assets recovered through avoidance proceedings may eventually be used to compensate for the funds advanced from the public fund or by creditors. Incentives may be created for third party funding (e.g. by granting first priority on these funds or tax deduction).

183. The time limit for commencement of avoidance proceedings in simplified insolvency proceedings may need to be adjusted in the light of recommendation 12 that recommends short time periods for all procedural steps in simplified insolvency proceedings. There might exist grounds for their extension. For example, with respect to transactions that have been concealed and that the competent authority could not be expected to discover, the time period for commencement of avoidance proceedings may commence at the time of discovery.

184. Certain transactions may be exempt from avoidance actions by insolvency and other laws such as that dealing with marital property in case of individual entrepreneurs. In addition, the law may exempt from avoidance actions those transactions that occur in the course of informal debt restructuring negotiations (see section Q.3 and 4 below) or in the course of implementing a reorganization plan where the implementation of the plan fails and the simplified reorganization proceeding is subsequently converted to liquidation. Simplified insolvency proceedings initiated with respect to a solvent debtor at an early stage of financial distress

(See recommendation 24) may raise additional issues as regards determination of avoidable transactions, in particular a suspect period.[5]

185. Where avoidance mechanisms available under the insolvency law cannot be used in a timely and effective manner to maximize returns in simplified insolvency proceedings, the MSE Insolvency Guide recommends that the competent authority should be allowed to decide on conversion of a simplified insolvency proceeding to a standard business insolvency proceeding.

186. The refusal to commence avoidance proceedings in the simplified insolvency proceeding, or to convert the simplified insolvency proceeding to a standard business insolvency proceeding where the conduct of avoidance proceedings calls for that, may be challenged by creditors before the relevant review body, as any other decision of the competent authority (See recommendation 5 *(c)*). In case of a successful challenge, the competent authority may be directed by a review body to initiate avoidance proceedings within the same proceeding or convert the simplified insolvency proceeding to a standard business insolvency proceeding for such purpose.

3. Stay of proceedings

Recommendation 47: *Scope and duration of the stay*

47. The insolvency law providing for a simplified insolvency regime should specify that the stay of proceedings applies on commencement and throughout simplified insolvency proceedings unless: *(a)* it is lifted or suspended by the competent authority on its own motion or upon request of any party in interest; or *(b)* the relief from the stay is granted by the competent authority upon request of any party in interest. Any exceptions to the application of the stay should be clearly stated in the law. (*See recommendations 46, 47, 49 and 51 of the Guide.*)

Recommendation 48: *Rights not affected by the stay*

48. The insolvency law providing for a simplified insolvency regime should specify that the stay does not affect:

(a) The right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor;

[5] Explained in term *(ss)* of the Glossary in the Introduction to the Guide as "the period of time by reference to which certain transactions may be subject to avoidance. The period is generally calculated retroactively from the date of the application for commencement of insolvency proceedings or from the date of commencement."

(b) The right of a secured creditor, upon application to the competent authority, to protection of the value of the asset(s) in which it has a security interest;

(c) The right of a third party, upon application to the competent authority, to protection of the value of its asset(s) in the possession of the debtor; and

(d) The right of any party in interest to request the competent authority to grant relief from the stay. (*See recommendations 47, 50, 51 and 54 of the Guide.*)

187. Like the Guide (See recommendation 46), the MSE Insolvency Guide provides for the stay of any proceedings against the debtor and its assets upon commencement of a simplified insolvency proceeding. The stay has many objectives, including: *(a)* protection of all creditors against an individual action by one of them; *(b)* preservation and maximization of the value of the insolvency estate by protecting the insolvency estate from individual actions by creditors as well as actions by the debtor; and *(c)* fair and orderly administration of the proceedings. The stay could in particular allow the competent authority to take stock of the MSE debtor's situation and decide on the right course of action, including on conversion of one type of proceedings to another where necessary and on appropriateness of the continued application of the stay and its scope. In a simplified liquidation proceeding, the stay could allow arranging a sale that would give the highest return for the benefit of all creditors and avoid making forced sales that would fail to maximize the value of the assets being liquidated. In a simplified reorganization proceeding, the stay could allow all parties concerned to carefully assess chances of business survival and ways of successful reorganization of viable business.

188. To achieve those objectives and to promote transparency and predictability, the MSE Insolvency Guide suggests the broadest scope of the stay of proceedings against the debtor or in relation to its assets, subject to very narrowly defined exceptions. Exceptions usually include actions against the debtor for personal injury or family law claims and those taken to protect public policy interests, to prevent abuse (such as the use of insolvency proceedings as a shield for illegal activities) or to preserve a claim against the debtor as well as actions that do not affect the insolvency estate.

189. Recommendations 47 and 48 build on the relevant recommendations of the Guide. In particular, the types of action or acts that are usually stayed are listed in recommendation 46 of the Guide while recommendations 47, 50, 51 and 54 of the Guide refer to exceptions to the application of the stay. The commentary to those recommendations in the Guide is thus applicable in the simplified insolvency context as well.

190. The overall design of a simplified insolvency regime is aimed at ensuring speedy and efficient proceedings. It is therefore expected that short time periods

envisaged for all steps, including the approval of the liquidation schedule and reorganization plan, would shorten the duration of the stay in simplified insolvency proceedings, including upon conversion of one type of a simplified insolvency proceeding to another. Nevertheless, the MSE Insolvency Guide recognizes that the immediate benefits that accrue by having a broad stay quickly imposed upon commencement of simplified insolvency proceedings will need to be balanced against the longer-term benefits. A broad stay, for example, may interfere with the continued operation of business and contractual relations between the debtor and creditors. There may also be a desire by the MSE debtor to ensure limited publicity of financial distress, which the imposition of a broad stay will not ensure. The MSE Insolvency Guide therefore envisages the possibility of lifting or suspending the stay or tailoring it to the needs of the specific case upon request of any party in interest or by the competent authority on its own motion. It also allows any party in interest to request relief from the application of the stay.

191. The Guide discusses competing interests that need to be balanced in considering whether to include actions by secured creditors within the scope of the stay (see part two, chapter II, section B.8). At the same time, it points out that a growing number of States accept that in many cases permitting secured creditors to freely enforce their rights against the encumbered asset can frustrate the basic objectives of the insolvency proceedings. Including encumbered assets in the estate and thus limiting the exercise of rights by secured creditors on commencement of proceedings may be crucial to the proceedings where the encumbered asset is essential to the business, which is often the case in the MSE insolvency context. There may be a need not to separate assets before it can be determined how they should be treated in insolvency. The MSE Insolvency Guide has therefore been drafted on the understanding that actions by secured creditors should be included within the scope of the stay in simplified insolvency proceedings. Unlike the Guide (See recommendation 49 *(c)* of the Guide), the MSE Insolvency Guide does not envisage a limited duration of the stay for secured creditors in liquidation on the understanding that the entire duration of a simplified liquidation proceeding is intended to be very short.

192. Secured creditors negatively affected by the stay are entitled to certain protections, in particular protection of the value of their encumbered asset and the right to seek relief from a stay where such protection is not ensured. Measures to protect the value of the encumbered asset itself or the value of the secured portion of the claim typically include providing additional or substitute assets, making periodic cash payments corresponding to the amount of the diminution in value or paying interest.

193. The competent authority would be expected to assess the desirability of such measures on a case-by-case basis. In the simplified insolvency context, the

provision of adequate protection to a secured creditor may rarely be feasible or would be overly burdensome to the estate, especially in simplified liquidation proceedings. The provision of protection may also necessitate making time-consuming and complex decisions on the questions of protection (e.g. which type of protection to accord in which case) and valuation (e.g. the basis and date for determining value, the cost of valuation and the party to undertake the valuation, and the party to bear the cost of valuation).

194. Relief from the stay may be a viable alternative in the simplified insolvency context, especially in simplified liquidation proceedings. It may be granted if it can be demonstrated that the secured creditor is not receiving protection for the diminution in the value of the encumbered asset and the provision of such protection may not be feasible or would be overly burdensome to the estate; where the encumbered asset is not needed for the liquidation or reorganization of the business; or where relief is required to protect or preserve the value of assets, such as perishable goods. Where such relief is granted, the asset ceases to be part of the estate. To minimize cost implications for the estate, the competent authority may relinquish the asset and place the costs of its removal on the creditor. In addition, the interests of secured creditors can be protected by other means, for example in a simplified liquidation proceeding, by consulting them on the sale of the encumbered asset and allowing them to take over the asset where the asset is worth less than the secured claim.

Provisional measures

195. The MSE Insolvency Guide, unlike the Guide, does not include recommendations on provisional measures on the understanding that the need for them, in particular against creditors, may rarely arise in the simplified insolvency context because no or very little time should elapse between the filing of the application and the commencement of simplified insolvency proceedings and also because the stay will be effective immediately upon commencement of the proceedings unless other arrangements are made by the competent authority. When the need for provisional measures arises to cover the period between the filing of the application and the commencement of proceedings, the application of provisional measures would not raise any distinct issues from those covered in recommendations 39–45 of the Guide. Such need may in particular arise upon application by creditors for involuntary commencement of a simplified insolvency proceeding, in order to prevent dissipation of the debtor's assets. Provisional measures in the simplified insolvency context may in particular include appointing an independent professional to supervise the debtor's disposal of assets before the proceedings have been commenced or to take control of some or all of the debtor's assets.

196. Some form of security for costs, fees or damages, such as the posting of a bond, may be required in case insolvency proceedings are not subsequently commenced or the measure sought results in some harm to the debtor's business. Where provisional measures are improperly obtained, it may be appropriate to permit the competent authority to assess costs, fees and damages against the applicant for the measure.

197. Other measures may also be relevant for prevention of dissipation of the debtor's assets before commencement of a simplified insolvency proceeding. In particular, some jurisdictions recognize sellers' right to reclaim goods sold on credit from the buyer that subsequently enters insolvency proceedings, usually subject to certain conditions and limitations (e.g. demand must be made within a certain time period, it may not be enforceable against someone who purchased the goods from the buyer in good faith and without notice, goods to be physically returned to the reclaiming seller must be properly identified by that seller). Actions to reclaim goods in the debtor's possession may also be denied or avoided in subsequently commenced insolvency proceedings.

I. Treatment of creditor claims

1. Claims affected by simplified insolvency proceedings

Recommendation 49: Claims affected by simplified insolvency proceedings

49. The insolvency law providing for a simplified insolvency regime should specify claims that will be affected by simplified insolvency proceedings, which should include claims of secured creditors, and claims that will not be affected by simplified insolvency proceedings. (*See recommendations 171 and 172 of the Guide.*)

198. The MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency regime should specify claims that will be affected by simplified insolvency proceedings. It recommends including claims of secured creditors in the light of their significance in a simplified insolvency context, in particular for successful reorganization of the MSE debtor's business where simplified reorganization proceeding has been commenced.

199. Creditor claims may be of two types: liquidated claims and unliquidated claims. The latter include claims where the amount owed by the debtor has not been determined at the time the claim is to be submitted or cannot at present be determined (e.g. because it is the subject of a court action that has not been finalized at the time of commencement and may be subject to the stay). Such claims may be either contractual or non-contractual in nature and may arise in respect of both secured and unsecured claims. Claims may also be conditional, contingent and not mature at the time of commencement (the latter would generally be subject to a deduction for the unexpired period of time before maturity).

200. In accordance with recommendation 171 of the Guide, claims include all rights to payment that arise from acts or omissions of the debtor prior to commencement of the insolvency proceedings, whether mature or not, whether liquidated or unliquidated, whether fixed or contingent. This would include claims by third parties or a guarantor for payment arising from acts or omissions of the debtor.

201. The MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency regime should specify claims that will not be affected by simplified insolvency proceedings. Some insolvency laws provide, for example, that claims such as fines and penalties and taxes will not be affected by the insolvency proceedings. (See also the relevant commentary to recommendation 35 above that discusses possible consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding). Where a claim is to be unaffected by the simplified insolvency proceedings, it would continue to exist and would not be included in any discharge.

2. Admission of claims on the basis of the list of creditors and claims prepared by the debtor

Recommendation 50: Admission of claims on the basis of the list of creditors and claims prepared by the debtor

50. The insolvency law providing for a simplified insolvency regime may require the debtor to prepare the list of creditors and claims, with the assistance of the competent authority or an independent professional where necessary, unless the circumstances justify that the competent authority prepares the list itself with the assistance of the debtor or entrusts an independent professional with that task. It should specify that:

(a) The list so prepared should be circulated by the competent authority to all listed creditors for verification, indicating the time period for communicating any objection or concern as regards the list to the competent authority;

(b) In the absence of any objection or concern communicated to the competent authority or the independent professional as applicable within the established time period, the claims are deemed to be undisputed and admitted as listed;

(c) In case of objection or concern, the competent authority takes action with respect to disputed claim(s) (See recommendation 54 below).

(*See recommendations 110* (b)*(v) and 170 of the Guide.*)

202. Formalities associated with verification and admission of claims, coupled with rights of review and appeal and the difficulties associated with processing types of claim requiring valuation, have the potential to significantly interrupt the conduct of the proceedings and cause delay that will affect other steps in the proceedings. For these reasons, it is highly desirable that those formalities should be minimized and that decision-making with respect to admission and verification of claims should be as streamlined as possible in simplified insolvency proceedings. The MSE Insolvency Guide recommends two methods of admission of claims: one, addressed in recommendation 50, does not involve submission of claims by creditors; and the other, addressed in recommendation 51, involves such submission.

203. As noted in the context of the commencement of simplified insolvency proceedings by the debtor, an MSE debtor would be expected to include a list of its assets, liabilities and creditors in its application for commencement of a simplified insolvency proceeding. Preparation of such a list by the debtor takes advantage of the debtor's knowledge about its creditors and their claims and can give the competent authority an early indication of the financial state of the business. For these reasons, one method of admission of claims recommended in the MSE Insolvency Guide is on the basis of a list of claims prepared by the debtor. Such list may be prepared with the assistance of the competent authority or an independent professional whom the competent authority may decide to involve at a pre-commencement stage to ensure the accuracy and reliability of the list.

204. Where the books and records of the debtor are not completely reliable, the list prepared by the debtor with or without assistance of the competent authority or an independent professional may be used as the starting point for verifying creditor claims. That list could be revised and updated at subsequent stages of the proceeding to provide a more accurate indication of the level of the debtor's indebtedness.

205. There could be cases when the competent authority may decide to prepare the list of claims itself or assign that task to an independent professional. That course of action would in particular be justified where a simplified insolvency proceeding commences upon a creditor's application against the will of the MSE

debtor. This approach may however add to costs and delay since it relies upon the competent authority or an independent professional's ability to obtain accurate and relevant information from the debtor. Although under recommendation 20 the debtor would be expected to cooperate with and assist the competent authority and an independent professional to take effective control of business records, business records may be non-existent or be in a state that would make it impossible for any person not involved in the day-to-day operation of the business to use them.

206. Ensuring the accuracy of the list of creditor claims, indicating clearly the amount and class of each claim, is essential for subsequent steps in simplified insolvency proceedings since challenges to the list may considerably delay other stages in proceedings. For those reasons, the MSE Insolvency Guide envisages that the list of claims, regardless of whether it was prepared by the debtor, the competent authority or an independent professional, should in all cases be circulated to all listed creditors for verification.

207. As with all other procedural steps in simplified insolvency proceedings, a time period for communicating any objection or concern with respect to the list of claims should be short. The means for communicating the list of claims to creditors for verification and means of communicating objections or concerns by creditors should be efficient and effective to allow the communication to reach the intended recipient within a short period of time with minimal costs (e.g. electronic means of communication). In the absence of any objection or concern to the list of claims on the basis of the debtor's books and records, all listed claims would be automatically admitted as listed.

208. This method of claim admission does not completely mitigate risks of delays in the claim admission procedure since objections and concerns may still be raised by creditors and such objections and concerns would need to be addressed in the proceeding. Where those objections or concerns cannot be resolved, disputed claims would need to be adjudicated by the competent authority or another competent State body that may have jurisdiction over disputed claims (See recommendation 54 in that respect). Nevertheless, this method of admission minimizes the risks that the debtor itself – in addition to creditors – may challenge claims, since it is highly unlikely that the debtor would challenge claims listed on the basis of its own books and records or knowledge of its business operations. This method also eliminates an extra step in the proceeding – the need for creditors to submit their claims and proof of claims. The formalities associated with that latter step may slow down the proceedings considerably.

3. Submission of claims by creditors

Recommendation 51: Submission of claims by creditors

51. The insolvency law providing for a simplified insolvency regime should allow the competent authority, when circumstances of the case so justify, to require creditors to submit their claims to the competent authority, specifying the basis and amount of the claim. It should require in such case that:

(a) The procedures and the time period for submission of the claims and consequences of failure to submit a claim in accordance with those procedures and time period should be specified by the competent authority in the notice of commencement of the simplified insolvency proceeding (See recommendations 32 and 33 above) or in a separate notice;

(b) A reasonable period of time should be given to creditors to submit their claims expeditiously;

(c) Formalities associated with submission of claims should be minimized and the use of electronic means for such purpose should be enabled where information and communication technology in the State so permits and in accordance with other applicable law of that State.

(*See recommendations 169, 170, 174 and 175 of the Guide.*)

209. The MSE Insolvency Guide recognizes that there could be situations when the competent authority may need to require creditors to submit their claims to the competent authority, for example where the MSE debtor's books and records do not exist or they are in such a poor state that the competent authority or an independent professional is unable to ascertain from them creditors that are entitled to payment and the amount of the debt. Requiring creditors to submit their claims to the competent authority may be a more efficient way to compile and ensure the accuracy of the list of creditor claims in those cases.

210. In addition, the list of claims prepared by the debtor, the competent authority or an independent professional on the basis of the debtor's records may also indicate: *(a)* which creditor claims could be admitted without formal proof; and *(b)* which creditors should be invited to make their claims to the competent authority for purposes of verification, which would also serve the purposes of ensuring that all relevant creditors have been considered in the claims process. Claims submitted by creditors would update the earlier list of creditors prepared on the basis of the debtor's records, and the updated list would form the basis of verification and admission of claims.

211. An important issue that arises when the competent authority requires creditors to submit their claims is whether secured creditors should also be required to submit claims. Such question will not arise in relation to unsecured creditors, which are generally required to submit claims. Where secured creditors are required to submit a claim, the procedures for submission and verification should be generally the same as for unsecured creditors.

212. The rationale of requiring secured creditors to submit claims is to provide information to the competent authority as to the existence of all claims, the extent of the secured debt and the assets that might be subject to a security interest, as well as the total amount of the outstanding debt. However, under those insolvency laws that do not include encumbered assets in the insolvency estate and allow secured creditors to freely enforce their security interest against the encumbered assets, secured creditors may be exempted from the requirements to submit a claim, to the extent that their claim will be met from the value of the sale of the encumbered asset. To the extent that the value of the encumbered asset is less than the amount of the secured creditor's claim, the creditor may be required to submit a claim for the unsecured portion as an ordinary unsecured creditor. The value of the unsecured claim thus depends upon the value of the encumbered asset and how it is determined, as well as the time at which it is determined. Valuation raises some complex issues, and clear rules are required to reduce possible uncertainties.

213. Another approach is to require secured creditors to submit a claim for the total value of their security interest irrespective of whether any part of the claim is unsecured. The insolvency law may also permit secured creditors to surrender their security interest and submit a claim for its total value. Whichever approach is chosen, it is desirable that the insolvency law providing for a simplified insolvency regime includes clear rules on the treatment of secured creditors for the purposes of submission of claims.

214. The request to submit claims would be contained either in the notice of commencement of the proceeding (See recommendation 33) or in a separate notice. The notice should indicate the procedures and the time period for submission of the claims and consequences of failure to submit a claim. The procedures for submission of claims and the supporting evidence should be streamlined in simplified insolvency proceedings, for example, by reducing evidentiary requirements for proof of claims, by dispensing with the requirement that the claims must be certified and by allowing presentation of evidence online.

215. To ensure that claims are submitted as expeditiously as possible, a flexible approach to the submission of claims is desirable, allowing creditors to make their claims not only by mail, but also email and other appropriate means. Generally, creditors will be required to specify the basis and the amount of the claim. The use of a

standard claim form may simplify and expedite the submission. However, making the use of standard claim forms mandatory and requiring filling in all entries in those forms may remove flexibility – one of the objectives of a simplified insolvency regime – and should be avoided. Where necessary, the competent authority may request information or documentation to prove any claim additional to that contained in the form.

216. The MSE Insolvency Guide does not recommend that the insolvency law should fix a particular time frame for submission of claims since deadlines may depend on various factors, for example the method of notification and whether foreign creditors are involved. Where creditors are known and receive an individual notice of submission of claims, the time limit may be shorter than where creditors have to rely on public notification of the commencement of simplified insolvency proceedings and the submission of claims. Where foreign creditors are involved, the deadline for submission of claims may need to take into account that those creditors may not be able to meet the same short deadline as domestic creditors (because of language barriers, possibly different claim submission requirements, time difference, a different workdays and days-off schedule, etc.).

217. For those reasons, the MSE Insolvency Guide recommends leaving it to the competent authority to establish a specific deadline in the light of the circumstances of the case. It also recommends that the deadline for submission of claims should be reasonable but at the same time sufficiently short to ensure that claims are submitted expeditiously. The deadline should be specified in the notice by which the competent authority requests the submission of claims.

218. While creditors should be given the widest possible opportunity to submit their claims in simplified insolvency proceedings and must therefore receive timely and appropriate notice of claim submission, the proceedings should not be delayed by creditors who are aware of the need to submit claims and of the applicable deadline, but nevertheless fail to submit claims in a timely manner. This has the potential to increase the costs of the proceedings and disadvantages other creditors.

219. The consequences of failure to submit a claim should therefore be clearly specified and creditors made aware of them at the time when they are notified of the deadlines for submission. The general insolvency law would address the effect of claims submitted late (See recommendation 175 of the Guide) or that have not been properly proved. It may provide that in those instances the debt may be extinguished or security rights may be waived or forfeited or the creditor may lose its priority in the distribution of proceeds. Those consequences may vary from jurisdiction to jurisdiction in particular as regards secured claims. For instance, under some insolvency laws, a secured creditor who files a claim is deemed to have waived the security interest or some of the privileges attached to the credit, while under other laws failure to submit a claim on time has that result.

4. Admission or denial of claims

Recommendation 52: Admission or denial of claims

52. The insolvency law providing for a simplified insolvency regime should allow the competent authority to:

(a) Admit or deny any claim, in full or in part;

(b) Subject claims by related persons to a special scrutiny and treatment, in full or in part; and

(c) Determine the portion of a secured creditor's claim that is secured and the portion that is unsecured by valuing the encumbered asset.

(*See recommendations 177, 179 and 184 of the Guide.*)

220. Regardless of the method used for admission of claims, the competent authority should be allowed to verify the claims and decide whether or not they should be admitted, in whole or in part. Verification involves not only an assessment of the underlying legitimacy and amount of the claim, but also the classification of a claim for purposes of approval and distribution (e.g. secured or unsecured claims, priority claims and so on).

221. A category of creditors that may require special consideration is those persons related to the debtor, whether in a familial or business capacity (so called "related persons" as this term is explained in paragraph 25 *(i)* above, drawing on the explanation of that term found in the Glossary of the Guide). The MSE Insolvency Guide recommends that the competent authority should be able to subject claims by related persons to special scrutiny and, if necessary, also special treatment, as may be permitted by the insolvency law. Special scrutiny and treatment of the claims of related persons is often justified because related persons are more likely than other creditors to have been favoured and to have had early knowledge of the financial difficulties of the debtor.

222. The mere fact of a special relationship with the debtor, however, may not be sufficient in all cases to justify special treatment of a related person's claim. In some cases, related persons' claims will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons; in other cases, they may give rise to suspicion and will deserve special attention (e.g. where there is evidence of self-dealing, which may take the form, for example, of a compensation package before commencement of a simplified insolvency proceeding or a loan to the debtor knowing that it is already insolvent). In those cases, the amount of the claim that is admitted may be reduced, the claim

can be subordinated to the claims of other classes of creditors or the rights to approve certain matters can be restricted.

223. For a secured creditor's claim, the MSE Insolvency Guide recommends that the competent authority should be able to determine the portion of such claim that is secured and the portion that is unsecured by valuing the encumbered asset.

224. Valuation is a potentially complex issue, for instance as regards: the basis on which the valuation should be made (e.g. going concern value or liquidation value); the party that undertakes the valuation; the relevant date for determining value; and the cost of valuation and the party that should bear that cost. Different approaches for the valuation may exist; not all of them would be suitable in the simplified insolvency context. A pragmatic approach in simplified insolvency proceedings would be for the competent authority, following an initial estimate or appraisal of value by an independent professional, to determine the value on the basis of evidence, which might include market conditions and expert testimony.

225. Where the amount of the claim cannot be, or has not been, determined at the time the claim is to be submitted, many insolvency laws allow a claim to be admitted provisionally. This approach may however complicate simplified insolvency proceedings and may be unnecessary in most cases. A provisionally admitted claim would need to receive some notional value. Although the creditor whose claim has been provisionally admitted will be able to participate in the proceedings, it will not be entitled to participate in distributions until the value of the claim is finally fixed and the claim admitted. As noted above, valuation is not such a straightforward process in all cases and resorting to that process in order to establish first a notional value and then the final value of the claim may not be justified in simplified insolvency proceedings.

226. Furthermore, an important reason for permitting provisional admission is to allow creditors holding provisionally admitted claims to express their views on issues requiring creditor approval, such as on approval of the reorganization plan. Complications may arise where a provisionally admitted claim is subsequently denied or admitted only in part. The competent authority in those cases will have to decide how to treat decisions in which that creditor has participated. This will cause additional delays in the conduct of the simplified insolvency proceedings.

227. Some laws may require creditors to physically appear before the competent authority for the purpose of considering claims in order for their claims to be admitted. Such a requirement has the potential to cause delays and frustrate the objectives of a simplified insolvency regime. In simplified insolvency proceedings it may be desirable to permit admission of claims on the basis of documentary evidence and, where physical appearance is considered important, for example, for registering the time for submission of claims and identification and authentication

of creditors and submitted records, other means may be used for such purposes, including electronic timestamps, electronic means of identification and authentication, online meetings and online cross-check with public registries' records.

228. Consistent with the objective of a simplified insolvency regime to put in place expeditious simplified insolvency proceedings, it is desirable that the decision on admission or denial should be made in a timely manner. This will also be consistent with recommendation 12 that recommends short time periods for all procedural steps in simplified insolvency proceedings. That recommendation should be read as equally applicable to actions by creditors as well as by the competent authority and an independent professional.

229. For reasons of transparency and certainty, it is also desirable to notify the final list of admitted claims to all parties in interest. The timing and form of notification of the final list of admitted claims may be different depending on the method of admission of claims used. For example, where no objection or concern is raised with respect to the list prepared on the basis of the debtor's records (See recommendation 50), the competent authority may be expected to notify all parties in interest after expiry of the deadline for submission of objections or concerns that the list notified to them earlier is the final list of all admitted claims. Where submission of claims by creditors is required (See recommendation 51), the competent authority may give notice of the list of admitted claims after the deadline for submission of claims. Where objections and concerns are received and disputes over claims are adjudicated either by the competent authority or another State body with jurisdiction over such disputes, the list of admitted claims may need to be notified to all parties in interest on a continuing basis. Maintaining an online list of claims updated in real time to reflect outcomes of admission and adjudication procedures could allow the competent authority to comply with the requirement of such continuous notification in a cost-efficient manner.

5. Prompt notice of denial of claims or subjecting them to a special scrutiny or treatment

Recommendation 53: Prompt notice of denial of claims or subjecting them to a special scrutiny or treatment

53. Where the claim is to be denied or subjected to a special scrutiny or treatment, the insolvency law providing for a simplified insolvency regime should require the competent authority to give prompt notice of the decision and the reasons for the decision to the creditor concerned, indicating the time period within which the creditor can request review of that decision. (*See recommendations 177 and 181 of the Guide.*)

230. The MSE Insolvency Guide recommends that the competent authority should be required to notify the creditor concerned about the competent authority's decision to deny the claim, admit it only in part or subject it to special scrutiny or treatment. This individual notification requirement will be in addition to the requirement that may exist under applicable insolvency law to notify the results of the admission of claims to all parties in interest. It is included in the MSE Insolvency Guide in the light of the importance of such individual notification for creditors whose claims are not admitted under general terms and who may decide to seek review of the competent authority's decision.

231. The MSE Insolvency Guide recommends stating the reasons for the decision in the notification. A requirement to provide reasons will enhance the transparency of the procedure, as well as, potentially, its predictability and, where the competent authority's decision is contested, will facilitate review of the contested decision by a review body.

232. For review of the competent authority's decision, an aggrieved creditor would be expected to trigger mechanisms specified in the insolvency law providing for a simplified insolvency regime, as recommended in recommendation 5 *(c)*, within the time period indicated by the competent authority in its notice of the decision. As discussed in the context of recommendation 5 *(c)*, a period of time that should be allowed for review of the competent authority's decisions should be short in simplified insolvency proceedings. Time periods for review of the competent authority's decisions may however be established in laws other than the insolvency law. Where, following the notification of its decision to admit or deny the claim or subject it to a special scrutiny or treatment, the competent authority does not hear on the matter from the creditor concerned or from a review body, its decision should be deemed to be accepted by that creditor.

6. Treatment of disputed claims

Recommendation 54: Treatment of disputed claims

54. The insolvency law providing for a simplified insolvency regime should permit a party in interest to dispute any claim, either before or after admission, and request review of that claim. It should authorize the competent authority or another competent State body to review a disputed claim and decide on its treatment, including by allowing the proceeding to continue with respect to undisputed claims. (*See recommendation 180 of the Guide.*)

233. The MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency regime should permit any party in interest to dispute any claim, either before or after admission, and request review of that claim. The value, priority or basis of the claim may be disputed under recommendation 54.

234. To enable parties in interest to exercise that right, many insolvency laws provide that all identified and identifiable parties in interest are entitled to receive notice of all claims that have been made in the insolvency proceeding (before or after admission) and of their value and priority. Means of giving such notice may be different: individual notification, publication in appropriate commercial publications or making the list available online or in the competent authority's office. The means of achieving the required publicity should be appropriate for a given case, taking into account, among other factors, concerns over stigmatization because of insolvency.

235. The MSE Insolvency Guide recommends addressing notification of claims before their admission in the context of procedures for admission of claims under recommendations 50 and 51. Notification of the admitted claims is addressed in the context of recommendation 52 on admission or denial of claims and also in the context of the contents of the liquidation schedule and the reorganization plan. The MSE Insolvency Guide in particular recommends that amounts and priorities of the admitted claims should be listed in the liquidation schedule (See recommendation 59 *(d)*) that is expected to be notified to all known parties in interest (See recommendation 60). The MSE Insolvency Guide also recommends that the list of creditors and the treatment provided for each creditor by the reorganization plan should be included in the plan (See recommendation 73 *(c)*) and notified to all known parties in interest (See recommendation 74). Any modifications or amendments to that information would be expected to be notified to all known parties in interest as well (See recommendations 77 *(c)* and 80 *(c)*).

236. Most insolvency laws provide for disputes over claims to be resolved by a judicial body to ensure the finality of the decision. Such a judicial body would not necessarily be the competent authority in the meaning given to that term in paragraph 25 *(b)* above. In addition, a claim that may be submitted in the simplified insolvency proceeding may already be the subject of a dispute resolution proceeding outside the simplified insolvency proceeding. Depending on the application of the stay and its scope in the simplified insolvency proceeding, the dispute resolution proceeding outside the simplified insolvency proceeding may or may not be stayed. The MSE Insolvency Guide thus recognizes that a State body other than the competent authority may have jurisdiction over review of a disputed claim and its treatment. Regardless of which State body adjudicates the dispute, it should be mindful of the need to minimize disruption to the commenced simplified insolvency proceeding.

237. The MSE Insolvency Guide suggests that disputed claims could be treated differently. For example, a disputed claim may be admitted provisionally (see the commentary to recommendation 52 above for the implications of such an option) or, while the dispute is being resolved by the competent authority or another State body, the proceeding may be allowed to continue with respect to undisputed claims.

238. A mechanism for the quick resolution of disputed claims is essential to ensure efficient and orderly progress of the simplified insolvency proceedings. If disputed claims cannot be quickly and efficiently resolved, the ability to dispute a claim may be used to frustrate the proceedings and create unnecessary delays. The insolvency law should thus address, on the one hand, the question of false claims that may give rise to justified disputes and, on the other hand, the question of vexatious disputes. Under recommendation 101, sanctions and costs may be imposed on creditors that lodge false claims and on parties in interest disputing legitimate claims in bad faith.

7. Effects of admission

Recommendation 55: Effects of admission

55. The insolvency law providing for a simplified insolvency regime should specify the effects of admission of a claim, including entitling the creditor whose claim has been admitted to participate in the simplified insolvency proceeding, to be heard, to participate in a distribution and to be counted according to the amount and class of the claim for determining sufficient opposition and establishing the priority to which the creditor's claim is entitled. (*See recommendation 183 of the Guide.*)

239. The MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency regime should specify the effects of admission of a creditor's claim. According to recommendation 55, those effects should at least include the entitlements of the creditors, whose claims were admitted, to participate in the proceeding, to be heard, to participate in a distribution and to be counted according to the amount and class of the claim for determining sufficient opposition and establishing the priority to which the creditor's claim is entitled. Those entitlements are in addition to the general rights of parties in interest listed in recommendation 19, including the rights to request review and obtain information, and to other specific rights of the creditors, for example to be notified of all matters requiring their approval (See recommendation 18). In the simplified reorganization proceedings, the admitted creditors, in addition to their rights in relation to the approval of the plan (See recommendations 74–77), may also be entitled to present an

alternative reorganization plan (See recommendation 72) or suggest amendments to the confirmed plan (See recommendation 80).

240. Upon admission, the amount and priority of the admitted claims are expected to be fixed. That fixed amount and priority would be taken into account in the distribution of proceeds from the realization of the insolvency estate assets in simplified liquidation proceedings. In that context, recommendation 59 *(d)* of the MSE Insolvency Guide, listing among the minimum contents of the liquidation schedule amounts and priorities of the admitted claims, is relevant. In the simplified reorganization proceedings, recommendation 78 envisages that creditors may specifically agree to receive lesser treatment than they would have received in liquidation. Such an agreement would have to be reflected in the reorganization plan (See recommendation 73 referring to the list of creditors and the treatment provided for each creditor by the plan (e.g. how much they will receive and the timing of payment, if any)).

J. Features of simplified liquidation proceedings

1. Decision on a procedure to be used

Recommendation 56: Decision on a procedure to be used

56. The insolvency law providing for a simplified insolvency regime should require that the competent authority, after commencement of a simplified liquidation proceeding, should promptly determine whether the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will take place in the proceeding:

(a) Where it is determined that the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will take place, the insolvency law providing for a simplified insolvency regime should require the preparation, notification and approval of the liquidation schedule (See recommendations 57–64 below);

(b) Where it is determined that the sale and disposal of the assets of the insolvency estate and distribution of proceeds to creditors will not take place, the insolvency law providing for a simplified insolvency regime should require the competent authority to close the simplified liquidation proceeding (*See recommendations 65–67 below*).

241. The Guide refers to "liquidation" as proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law (see the Glossary,

subpara. *(w)*). Liquidation in the context of MSEs that are legal entities usually leads to dissolution and the disappearance of the legal entity. Owners of limited liability MSEs will not be liable for residual claims while owners of unlimited liability MSEs will be so liable. Liquidation in the context of individual entrepreneurs would mean the liquidation of the insolvency estate and discharge of individual entrepreneurs from unsatisfied claims.

242. Where there are assets in the insolvency estate, the MSE Insolvency Guide recommends the preparation, notification and approval of a liquidation schedule and realization of assets expeditiously and effectively so as to give the highest return for the benefit of all creditors. The objective of "prompt distribution" should not however preclude taking all necessary steps to ensure thorough verification of the value of the assets, including of any encumbered assets and the amount owed by the debtor to any secured creditor(s), and the commercial reasonableness of the intended method of the realization of the assets. Where no distribution to creditors is possible due to the lack of (sufficient) assets in the insolvency estate, the MSE Insolvency Guide recommends the closure of the simplified liquidation proceeding by the competent authority, subject to appropriate safeguards, such as giving an opportunity to creditors to object to the closure of proceedings and an opportunity to the competent authority to verify grounds for objection and, following such verification, to revoke its decision to proceed with the closure of the proceeding where necessary.

243. The recommendation does not suggest that discretion is given to the competent authority to decide whether to sell or not the assets of the insolvency estate. Where there are assets to realize and proceeds to distribute, the sale and disposal of assets and distribution of proceeds must take place as envisaged in recommendations 57–64 of the MSE Insolvency Guide. It is where there are no assets to sell and no proceeds to distribute to creditors that recommendations 65–67 will apply.

2. Procedure involving the sale and disposal of assets and distribution of proceeds

Recommendation 57: *Preparation of the liquidation schedule*

57. The insolvency law providing for a simplified insolvency regime may require the competent authority to prepare the liquidation schedule unless circumstances of the case justify entrusting the preparation of the liquidation schedule to the debtor, an independent professional or another person.

244. Although preparation of the liquidation schedule may not be known in some jurisdictions, the MSE Insolvency Guide recommends introducing such a requirement in simplified insolvency proceedings as an essential transparency, accountability and efficiency safeguard. The liquidation schedule, by setting out all relevant information about the liquidation process for the benefit of all known parties in interest, could considerably expedite simplified insolvency proceedings, in particular by ensuring that the liquidation process is better organized. In addition, preparing an accurate and exhaustive liquidation schedule and notifying it to all parties in interest early in the proceeding may facilitate timely identification and resolution of grievances, which would avoid the need to handle later challenges in the proceeding as regards steps already taken and perhaps even attempts to undo those steps. In the light of its expected content, as recommended in recommendation 59, the liquidation schedule may become a helpful reference document where a simplified liquidation proceeding is converted to a simplified reorganization proceeding (see in that context recommendation 73 that sets out the minimum contents of a reorganization plan, some of which mirror the minimum contents of the liquidation schedule (such as the list of assets of the debtor, specifying those that are subject to security interests) while other contents of the plan may helpfully build on the contents of the liquidation schedule (such as a comparison of the treatment afforded to creditors by the plan and what they would otherwise receive in liquidation)).

245. In most MSE liquidation cases, the competent authority will be in a position to liquidate the MSE debtor's estate and distribute the proceeds among the creditors itself. In those cases, the MSE Insolvency Guide recommends that the competent authority itself will prepare the liquidation schedule. In other cases, the MSE Insolvency Guide recognizes that it might be more efficient to entrust liquidation and preparation of the liquidation schedule to an independent professional or another person. The insolvency law providing for a simplified insolvency regime may require that decisions on certain issues, such as the time period, form and conditions of sale, be taken exclusively by the competent authority (See recommendation 6 and its accompanying commentary). In addition, it may be desirable to allow the competent authority to step in the shoes of the liquidator at any time where such course of action is necessary for the expeditious and cost-effective realization of assets and preservation and maximization of the value of the insolvency estate. With the advice of an independent professional where necessary, the competent authority should be allowed to determine the method(s) for the realization of assets it deems most appropriate. This may in particular be required for urgent sales (perishable assets, etc.).

246. Recommendation 17 envisages that, in certain situations, the involvement of the debtor in the implementation of some steps in simplified liquidation proceedings may be desirable. The extent of such involvement may be limited and will be determined by the competent authority on a case-by-case basis. Under recommendation 57, that involvement may translate into the preparation of a liquidation

schedule, when the circumstances of the case justify entrusting the preparation of the liquidation schedule to the debtor. As noted in the commentary to recommendation 17, the debtor's involvement in liquidation may in particular be valuable where the debtor's market, business and assets are unique. Although modern means of communication and electronic commerce platforms may expand options for the realization of assets, in some cases they will not be able to effectively and efficiently substitute the insider knowledge, skills and network of the debtor, especially where there may be no established market for the debtor's assets. Any debtor involvement in liquidation would be expected to be closely supervised by the competent authority, an independent professional or creditors to avoid abuses.

Recommendation 58: *Time period for preparing a liquidation schedule*

58. The insolvency law providing for a simplified insolvency regime should specify the maximum time period for preparing a liquidation schedule after commencement of a simplified liquidation proceeding, keeping it short, and authorize the competent authority to establish a shorter time period where the circumstances of the case so justify. It should also specify that any time period established by the competent authority must be notified to the person responsible for preparing the liquidation schedule and to (other) known parties in interest.

247. The MSE Insolvency Guide recommends that the competent authority should be authorized to fix the time period for preparing the liquidation schedule up to the maximum period to be specified in the law. The maximum allowable period should be short in the light of the general recommendation in the MSE Insolvency Guide to keep all time periods in simplified insolvency proceedings short (See recommendation 12). The time period fixed by the competent authority may be shorter where the circumstances of the case so justify (e.g. in very simple liquidation cases where there could be only one or very few assets for realization and the method(s) for their realization are not expected to be complex). The party responsible for liquidation would be expected to be notified of, and to comply with, that deadline. Since the period will run from the date of the commencement of the simplified liquidation proceeding, a prompt notification will be necessary as otherwise the decision to fix a shorter time period and the failure to notify promptly may trigger complaints and a review of decisions by the competent authority. In addition, to ensure transparency, accountability, predictability and certainty, the MSE Insolvency Guide recommends that all known parties in interest should also be notified of the deadline.

248. If, for whatever reason, the liquidation schedule is not prepared on time, default provisions on the realization of assets under the domestic law (e.g. insolvency law or civil procedure law) may apply. They may specify a preferred method of sale. The law may also require or authorize the competent authority to take over the task of liquidation, including preparation of the schedule, in those cases so as to ensure that the realization of assets can take place in the most expeditious manner (see the relevant commentary to recommendation 57 above).

Recommendation 59: *Minimum contents of the liquidation schedule*

59. The insolvency law providing for a simplified insolvency regime should specify the contents of a liquidation schedule, keeping it to the minimum, including that the liquidation schedule should:

(a) Identify the party responsible for the realization of the assets of the insolvency estate;

(b) List assets of the debtor, specifying those that are subject to security interests;

(c) Specify the means of realization of the assets (public auction or private sale or other means);

(d) List amounts and priorities of the admitted claims; and

(e) Indicate the timing and method of distribution of proceeds from the realization of the assets.

249. Recommendation 59 suggests information that should be included in the liquidation schedule and recommends that its content should be kept to the minimum in order to avoid complicating its preparation. At the same time, the MSE Insolvency Guide aims to ensure that the liquidation schedule is meaningful and useful for the intended purpose – to serve as a plan for liquidation and as a reference document for parties in interest to ascertain that the plan is indeed implemented by the liquidator as announced. The minimum content of the liquidation schedule should thus include information about the party responsible for the realization of the insolvency estate, the list of assets of the debtor, specifying those that are subject to security interests as well as information about the means to be used for realization of the assets (public or private auction or other means), amounts and priorities of the admitted claims and the timing and method of distribution of proceeds from the realization of the insolvency estate. A checklist, template or standard form, including online, may be made available to simplify the task of

preparing a liquidation schedule in compliance with any applicable minimum content requirements. Making a template or a standard form mandatory may however remove flexibility – one of the objectives of a simplified insolvency regime – and should therefore be avoided.

250. The specific recommendation to include the lists of amounts and priorities of the admitted claims and of the assets of the debtor in the liquidation schedule may at first sight seem to be inconsistent with the general recommendation to keep the content of that schedule to a minimum. Nevertheless, in simplified insolvency proceedings where such information is readily available and undisputed, such information may be helpful to creditors in their participation in the insolvency process. Inclusion of the list of amounts and priorities of the admitted claims in the liquidation schedule, while helpful, should not suggest that approval of the liquidation schedule, which is the focus of this section of the MSE Insolvency Guide, depends on the resolution of disputed claims (which is addressed in section I on treatment of creditor claims (see in particular recommendation 54)). Including information on claims in a liquidation schedule should also not be read as conferring standing on creditors to object to other creditors' claims.

251. In simplified insolvency proceedings where acquisition and compilation of information on the admitted claims or assets could unduly delay the notification and approval of the liquidation schedule, the schedule's contents should restrict itself to information about the liquidation procedures sufficient to allow creditors to make an informed decision on their acceptability. Information about the admitted claims or assets may be circulated separately (in that respect, see the relevant commentary in section I above).

Recommendation 60: *Notification of the liquidation schedule to all known parties in interest*

60. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notice of the liquidation schedule to all known parties in interest, specifying a short period for expressing any objection to the liquidation schedule.

252. The MSE Insolvency Guide recommends that the liquidation schedule should be notified by the competent authority to all known parties in interest. The required publicity may be achieved either by making the document available on the relevant web page of the proceeding, which for confidentiality and privacy reasons or concerns over stigmatization because of insolvency may be restricted

for access only by those parties in interest, or by transmitting it by electronic means of communication to those parties in interest. General notice and notification requirements would apply (See recommendations and accompanying commentary in section G above). This notification requirement enables the content of the liquidation schedule to be reviewed by any party in interest and challenged, if necessary, by way of objection (for example, if certain provisions are found contrary to law). As in other cases where matters are notified to creditors, the MSE Insolvency Guide recommends specifying in the notice a short time period for objections. Although the notification will not have such specific purpose, it may help to disseminate information about the upcoming sale of assets so that the maximum price can be achieved.

Recommendation 61: *Prior review of the liquidation schedule by the competent authority*

61. Where the liquidation schedule is prepared by a person other than the competent authority, the insolvency law providing for a simplified insolvency regime should require the competent authority, before giving notice of the liquidation schedule, to review the liquidation schedule to ascertain its compliance with the law and when it is not so compliant, to make any required modifications to the liquidation schedule to ensure that it is compliant.

253. The MSE Insolvency Guide provides for an additional safeguard in situations where the liquidation schedule is prepared by a person other than the competent authority (See recommendation 57). It recommends that the competent authority in those cases should be required to review the prepared liquidation schedule to ascertain its compliance with the law, before it notifies the liquidation schedule to all known parties in interest. It also recommends that the competent authority should be authorized to modify the proposed liquidation schedule in order to rectify irregularities or fill in any missing information required to ensure its compliance with the law.

254. As noted in the commentary to recommendation 59 above, making available, including online, a checklist, template or standard form for a liquidation schedule may considerably simplify the task of preparing a complete, accurate and legally compliant liquidation schedule. This in turn will help to avoid delays in simplified liquidation proceedings that may be caused by the need for the competent authority to modify the liquidation schedule.

Recommendation 62: *Approval of the liquidation schedule*

62. The insolvency law providing for a simplified insolvency regime should require the competent authority to approve the liquidation schedule if it receives no objection within the established time period and there are no other grounds for the competent authority to reject the liquidation schedule.

255. The MSE Insolvency Guide does not recommend that the liquidation schedule should be approved by creditors. While giving creditors the opportunity to object, the MSE Insolvency Guide recommends that it should be left to the competent authority to approve or reject the liquidation schedule (See recommendation 63). In the absence of any objection within a time period specified in the notification of the liquidations schedule, the MSE Insolvency Guide recommends that the competent authority should approve the liquidation schedule unless it discovers grounds that would prevent it from doing so. Those grounds may relate to the content of the liquidation schedule (e.g. the need to change the party responsible for realization of the assets or means of sale). They may also relate to the status of the debtor, its business and proceedings (e.g. the debtor may succeed in raising post-commencement finance for reorganization of business, necessitating conversion of the simplified liquidation proceeding to a simplified reorganization proceeding). In the absence of objections and grounds for rejection of the liquidation schedule as notified to all known parties in interest, the liquidation should proceed as stated in the notified liquidation schedule.

Recommendation 63: *Treatment of objections*

63. Where there is objection, the insolvency law providing for a simplified insolvency regime should allow the competent authority either to modify the liquidation schedule, approve it unmodified or convert the proceeding to a different type of insolvency proceeding.

256. The MSE Insolvency Guide provides several options for the competent authority if objections to the notified liquidation schedule are received. The choice among those options will depend on the nature of objection. First, the competent authority may decide to modify the liquidation schedule itself or ask the party that was responsible for preparing the liquidation schedule to do so. Alternatively, it may allow a short time period for the contesting party to submit an alternative liquidation schedule to the competent authority. The failure of the contesting party

to submit it within the deadline may lead to a different course of action (e.g. the approval by the competent authority of the originally notified liquidation schedule or modification of that schedule). Any modified or alternative schedule would be expected to be notified to all known parties in interest before its approval by the competent authority. Where an objection is raised to the modified or alternative liquidation schedule, the competent authority should decide on the course of action that will bring the finality to the process.

257. Second, the competent authority may approve the liquidation schedule unmodified despite the objection, leaving any unsatisfied party to exercise its right of review of the competent authority's decision according to the domestic law. The third option may be a conversion of the simplified liquidation proceeding to a different type of proceeding. The objection to the original or modified liquidation schedule may be accompanied by a proposal for converting a simplified liquidation proceeding to a simplified reorganization proceeding or to a standard business insolvency proceeding (either liquidation or reorganization) or the competent authority itself may decide on such conversion, especially where objections are raised to the liquidation schedule after its modification.

Recommendation 64: *Prompt distribution of proceeds in accordance with the insolvency law*

64. The insolvency law providing for a simplified insolvency regime should require distributions to be made promptly and in accordance with the insolvency law. (*See recommendation 193 of the Guide.*)

258. The MSE Insolvency Guide does not recommend establishing any special rules for distribution of proceeds in simplified insolvency proceedings. The distribution of proceeds in simplified insolvency proceedings is thus expected to take place in accordance with the generally applicable insolvency law, including rules for ranking claims. Recommendations 185–193 and the accompanying commentary in the Guide addressing priorities and the distribution of proceeds are thus applicable in a simplified insolvency regime.

259. Those recommendations and the accompanying commentary, among other issues, address the method of distribution to secured creditors, which depends on the method used to protect security interests during the proceedings. In particular, if the security interest was protected by preserving the value of the encumbered asset, the secured creditor will generally have a priority claim on the proceeds of the sale of that asset to the extent of the value of its secured claim. Alternatively, if

the security interest was protected by fixing the value of the secured portion of the claim at the time of the commencement of the proceedings, the secured 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 encumbered 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.

260. In accordance with recommendation 59, the liquidation schedule is expected to set out the amounts and priorities of claims and the timing and method of distribution, which would help any disputes regarding those matters be resolved early in the process. Section I of the MSE Insolvency Guide on treatment of creditor claims, in particular provisions on disputed claims, is also relevant in that context.

261. The MSE Insolvency Guide emphasizes the need to distribute proceeds promptly. This requirement is essential for the fair and efficient administration of insolvency proceedings, for the protection of the interests of creditors, the debtor and other parties in interest and for achieving other objectives of an effective insolvency law, including the provision of certainty and predictability in the market. It is also a corollary of the objective of preservation and maximization of the value of the debtor's assets.

3. Procedure not involving the sale and disposal of assets and distribution of proceeds

General

262. The MSE Insolvency Guide recommends that the competent authority should be required to close the simplified liquidation proceeding after its commencement where it is determined that the sale and disposal of the insolvency estate assets and distribution of proceeds to creditors will not take place (See recommendation 56 *(b)*). That may be the case where the insolvency estate of the MSE debtor has no assets or has assets but of such low value that the sale and distribution of proceeds would not justify the costs, time and other resources involved in organizing the sale and distribution. Some States may impose conditions for access to this type of procedure (e.g. the total amount of debt and the value of the insolvency estate assets may need to be below a certain threshold specified in the law). All conditions for access to this type of procedure should be clearly set out in the law.

263. The competent authority may determine that the debtor meets the conditions for commencement of this type of procedure from the outset of a proceeding on the basis of the debtor's application. Alternatively, it may determine at

subsequent stages of the proceeding that this procedure should be used if, for example, the competent authority discovers that certain assets should have been excluded from the insolvency estate and, as a result of their exclusion, there are no assets to realize and no proceeds to distribute.

264. In some jurisdictions, a debtor with encumbered assets may not be eligible for this type of procedure on the understanding that the competent authority would be expected, as a minimum, to verify the value of the encumbered assets. Where that value exceeds the amount owed by the debtor to the secured creditor, the competent authority may be expected to organize the sale of the encumbered asset and distribution of the proceeds. In some cases, a debtor with encumbered assets may nevertheless become eligible for that procedure. For example, where it was determined that the encumbered asset is worth less than the amount owed by the debtor to the secured creditor, the competent authority may allow the secured creditor to take over the asset with the result that the insolvency estate might have no asset for realization. It may also be determined that, upon the distribution of proceeds from the sale of the encumbered asset to the secured creditor(s), the remaining value of the insolvency estate would be below an established threshold to justify distribution to other creditors.

Recommendation 65: *Notice of a decision to proceed with the closure of the proceeding*

65. The insolvency law providing for a simplified insolvency regime should require the competent authority to promptly notify the debtor, all known creditors and other known parties in interest about its determination that no sale and disposal of the assets of the insolvency estate and no distribution of proceeds to creditors will take place in the proceeding and its decision therefore to proceed with the closure of the proceeding. It should require the notice: *(a)* to include reasons for that determination and the list of creditors, assets and liabilities of the debtor; and *(b)* to specify a short time period for expressing any objection to that decision.

265. The MSE Insolvency Guide recommends that the competent authority should be required to notify all known parties in interest about its decision to proceed with the closure of the proceedings where it is determined that the sale and disposal of the insolvency estate assets and distribution of proceeds to creditors will not take place. Such notice has to be given promptly in the light of the objective of a simplified insolvency regime to ensure expeditious proceedings. The grounds for the decision and supporting information, such as the list of creditors, assets and liabilities of the debtor, should be included in the notice to allow the notified parties in interest to verify whether the decision is justified.

266. On the basis of that information, parties in interest may decide to object to that decision. As with other procedural steps in simplified insolvency proceedings, the MSE Insolvency Guide recommends allowing only a short time period for expressing objections, consistent with recommendation 12 and the objective to ensure expeditious proceedings. Providing complete and detailed information on the basis of which the decision was taken may reduce risks of unsubstantiated challenges resulting in unnecessary delays. Sanctions and costs may also be imposed on parties objecting to the decision in bad faith.

Recommendation 66: *Decision to close the proceeding in the absence of objection*

66. The insolvency law providing for a simplified insolvency regime should require the competent authority, in the absence of any objection to its decision to proceed with the closure of the proceeding, to close the proceeding.[5]

[5] The competent authority would be expected to take a decision on discharge not later than at the time of the closure of the proceeding even if discharge itself may take effect later, for example, after expiration of the monitoring period or implementation of a debt repayment plan. See section L of this text for related recommendations on discharge.

267. Where no objection is raised, the MSE Insolvency Guide recommends that the competent authority should be required to proceed with the closure of the proceeding. Although the closure of the proceeding and discharge of debts would not necessarily take place simultaneously, decisions on discharge of debts, specifying any conditions for discharge, debts discharged and debts excluded from discharge, should be taken by the competent authority before or at the time of the closure of the proceedings. (For issues related to discharge, see section L).

Recommendation 67: *Treatment of objections*

67. Where the competent authority receives an objection to its decision to proceed with the closure of the proceeding, the insolvency law providing for a simplified insolvency regime should permit the competent authority to commence verification of reasons for the objection, following which the competent authority may decide:

(a) To revoke its decision and commence a simplified liquidation proceeding involving the sale and disposal of assets and distribution of proceeds;

(b) To convert a simplified liquidation proceeding to a different type of insolvency proceeding; or

(c) To close the proceeding.[6]

[6] The competent authority would be expected to take a decision on discharge not later than at the time of the closure of the proceeding even if discharge itself may take effect later, for example, after expiration of the monitoring period or implementation of a debt repayment plan. See section L of this text for related recommendations on discharge.

268. When an objection to the decision to proceed with the closure of the proceedings is raised, the MSE Insolvency Guide recommends that the competent authority should be allowed to evaluate the grounds for the objection and decide whether to revoke its decision to proceed with the closure of the proceeding. Where it finds that there indeed exist grounds to revoke its decision to close the proceeding, the competent authority is provided with options: *(a)* to commence the procedure involving the sale and disposal of assets and distribution of proceeds (where for example certain assets were excluded erroneously from the insolvency estate); or *(b)* to convert a simplified liquidation proceeding into a different type of insolvency proceeding (that course of action may be required, for example, where there is a need to commence avoidance proceedings and the conduct of avoidance proceedings necessitates such conversion (see in that context recommendation 46)).

269. Generally, the debtor should cease to be eligible for the procedure envisaged in recommendations 65–67 when there appear to be grounds to commence avoidance proceedings or to engage the services of an independent professional for additional verification or investigation. Those grounds may be brought to the attention of the competent authority by creditors or discovered by the competent authority itself upon examination of additional information obtained from the debtor or other sources. Where it is proven that sufficient assets do exist or where the sale of an encumbered asset and the distribution of proceeds from that sale have to be organized by the competent authority, the competent authority would be expected to proceed with the procedure involving the sale and disposal of assets and distribution of proceeds described in recommendations 57–64 or convert a simplified liquidation proceeding to a standard business insolvency proceeding. In other cases, the competent authority might be expected to proceed with the closure of the proceeding after taking a decision on discharge (see a footnote to recommendations 66 and 67) and notifying of its final decision to the objecting creditor.

270. Although this procedure may further reduce the cost of simplified insolvency proceedings, it should be accompanied by additional safeguards and an effective sanctions system to mitigate risks of perverse incentives and systematic abuse, including fraud and collusion between debtors and creditors. In particular, the procedure should not encourage debtors to bring the value of their estate, before application

for an insolvency proceeding, to below any threshold that may be established by law for this type of procedure or to strategically time the filing of the application to escape from debt obligations while benefiting later from post-discharge income.

271. In addition to the ex ante safeguards in the form of verifications and notification of all known parties in interest about the decision to use this procedure, there should be ex post safeguards. Creditors and other parties in interest should be allowed to request reopening of bad faith cases, and the competent authority should be able to revoke any discharge granted and retroactively collect assets and distribute the proceeds to creditors (in that respect, See recommendation 91). Sanctions, including criminal ones, may be imposed in certain cases of abuse of this procedure (see section P below).

K. Features of simplified reorganization proceedings

1. General

272. The Guide refers to "reorganization" as the process by which the financial well-being and viability of a debtor's business can be restored using various means (e.g. debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern) and the business can continue to operate (see the Glossary, subpara. *(kk)*). Reorganization in MSE cases will likely translate into debt forgiveness or debt rescheduling for which complex reorganization steps usually envisaged for larger enterprises will not be necessary. For those reasons, putting in place simplified reorganization proceedings for MSEs will be justified.

273. Many systems that provide for a simplified insolvency regime recognize that expedient liquidation of non-viable MSEs may be personally, societally and economically more desirable than rehabilitation of non-viable MSEs with no prospects for recovery. For those reasons, conversion of a simplified reorganization proceeding to a simplified liquidation proceeding should be envisaged where it is clear to the competent authority after commencement of a simplified reorganization proceeding that the financial well-being and viability of the MSE debtor's business cannot be restored and the business cannot continue. Such conversion should also be envisaged where an insolvent MSE debtor cannot reach agreement with its creditors on a reorganization plan or fails to implement the agreed plan. (See further recommendation 83 and the accompanying commentary below.)

2. Preparation of a reorganization plan

Recommendation 68: Preparation of a reorganization plan

68. The insolvency law providing for a simplified insolvency regime should allow the competent authority to appoint, where necessary, an independent professional to assist the debtor with the preparation of the reorganization plan or decide that circumstances of the case justify entrusting the preparation of the plan to an independent professional.

274. Consistent with the debtor-in-possession approach recommended in this text as the default for simplified reorganization proceedings (See recommendation 14), the MSE Insolvency Guide envisages first that the MSE debtor should be allowed to prepare a reorganization plan with the assistance of an independent professional where necessary. Comprehensive checklists for reorganization plans, adapted to the needs and specificities of MSEs, may assist the MSE debtor in that task. At the same time, procedural rigidity, including by requiring the use of standard forms and templates, should be avoided since this might create an obstacle for access to simplified reorganization proceedings, in particular if standard forms and templates do not cater for individual circumstances of the debtor.

275. Assistance of an independent professional may in particular be required in negotiating the plan with creditors and ensuring that the plan complies with applicable law requirements, including as regards treatment of employees. Where it is clear that the MSE debtor will not be able to propose a plan, the MSE Insolvency Guide recommends that the competent authority should be allowed, on its own motion or at the request of the debtor, to entrust the preparation of a plan to an independent professional.

3. Proposal of the reorganization plan

Recommendation 69: Time period for the proposal of a reorganization plan

69. The insolvency law providing for a simplified insolvency regime should fix the maximum time period for the proposal of a reorganization plan after commencement of a simplified reorganization proceeding and authorize the competent authority, where the circumstances of the case so justify, to establish a shorter time period subject to its possible extension up to the maximum period specified in the law. (*See recommendation 139 of the Guide.*)

Recommendation 70: Notice of the time period established for the proposal of a reorganization plan

70. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notice of the time period that it established for the proposal of a reorganization plan to the person responsible for preparing the reorganization plan and to (other) parties in interest.

Recommendation 71: Consequences of not submitting the reorganization plan within the established time period

71. The insolvency law providing for a simplified insolvency regime should specify that, if the reorganization plan is not submitted within the established time period, an insolvent debtor is deemed to enter the liquidation proceeding while, for a solvent debtor, the reorganization proceeding will terminate. (*See recommendation 158* (a) *of the Guide.*)

276. The reorganization plan may be filed with the application for simplified reorganization proceeding or after the commencement of a simplified insolvency proceeding. The latter may be the most likely scenario in a simplified insolvency regime since the MSE debtor may require not only time but also assistance with the preparation of the plan as envisaged in recommendation 68.

277. The MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency regime should establish the maximum period of time for the proposal of a reorganization plan after commencement. Recognizing that in some cases such maximum time might be too long, the MSE Insolvency Guide recommends that the competent authority should be allowed to establish a time period shorter than the maximum period in appropriate circumstances. Such circumstances may include where for example a reorganization plan might have already been prepared and negotiated with creditors at a pre-commencement stage (e.g. during informal debt restructuring negotiations) and is submitted with the application for commencement of simplified reorganization proceedings. They may also include simple reorganization cases involving straightforward debt forgiveness or sale of the business as a going concern as opposed to more complex cases of debt rescheduling, debt-equity conversions and other reorganization arrangements or a combination thereof.

278. Recognizing that circumstances may arise that would justify extension of the original deadline, the MSE Insolvency Guide recommends that the competent authority should be allowed to extend a shortened period in appropriate circumstances but

up to the maximum established by law. For example, such circumstances may arise if a reorganization plan negotiated with creditors during informal debt restructuring negotiations is challenged by creditors that did not participate in negotiation of that plan but joined the simplified insolvency proceeding.

279. Allowing the competent authority both to establish a shorter period than the established maximum and extend such shortened period up to the maximum is consistent with the goal of a simplified insolvency regime to put in place expeditious and flexible simplified insolvency proceedings. The MSE Insolvency Guide recommends accompanying that discretion with a safeguard – notification of the established time period for the proposal of the plan to the person responsible for preparing the plan and all other parties in interest.

280. At the same time, the MSE Insolvency Guide, unlike the Guide (See recommendation 139), does not envisage extension of the maximum period established by law for the proposal of a reorganization plan in simplified insolvency proceedings since providing for such possibility might defeat the purpose of establishing a simplified insolvency regime and its goal of putting in place expeditious proceedings. It is therefore recommended in the MSE Insolvency Guide that the failure to propose the plan by the established deadline should lead to conversion of the proceeding to liquidation (simplified or standard) or, where the debtor is solvent, to the termination of the proceeding. The failure to propose a plan on time would thus be one of the conditions for conversion envisaged in recommendations 83 and 97. Recommendations 99 and 100 address issues that may arise during conversion, including as regards deadlines, a stay and post-commencement finance.

4. Alternative plan

Recommendation 72: Alternative plan

72. The insolvency law providing for a simplified insolvency regime may envisage the possibility for creditors to file an alternative plan. Where it does so, it should specify the conditions and the time period for exercising such an option.

281. The MSE Insolvency Guide notes that the insolvency law providing for a simplified insolvency regime may envisage the possibility for creditors to file an alternative plan. Where such option is envisaged, the plan filed by creditors will be alternative to the one prepared by the debtor or an independent professional as the case may be under recommendation 68. The law providing for such an option would need to specify the conditions and the time period for presenting the alternative plan. In

other respects, the alternative plan is subject to the same treatment as the original plan prepared by the debtor or an independent professional. In particular, recommendation 73 would apply to the content of the alternative plan, recommendation 74 would apply to the review and notification of the alternative plan by the competent authority to all known parties in interest, recommendations 76 and 77 would apply to the approval of the plan by creditors, recommendation 78 would apply to the confirmation of the plan by the competent authority and recommendations 79 and 80 would apply to possible challenges and amendments to the alternative plan.

282. The alternative plan may be submitted simultaneously with the original plan if, for example, some creditors that participated in the negotiation and preparation of the original plan became unsatisfied with outcomes of the negotiation and decided to prepare an alternative plan. The alternative plan may also be submitted sequentially, that is, after the original plan was presented. Depending on situations, creditors may be in a position to submit their alternative plan to the competent authority within the time period established for the proposal of the original plan or request extension of that period. Recommendation 69 envisages the possibility of extension up to the maximum period established by law for the proposal of a reorganization plan.

283. Where the law allows the submission of an alternative plan sequentially, it should address the situation where the original plan may be submitted by the maximum deadline specified in law or not submitted at all. In those cases, creditors should be allowed some time, beyond the maximum period established by law for the proposal of a reorganization plan, to propose their alternative plan. Otherwise, under recommendation 71, an insolvent debtor would be deemed to enter the liquidation proceeding and for the solvent debtor the reorganization proceeding would terminate.

284. Although allowing creditors to file an alternative plan may in the end help all parties in interest to find the mutually acceptable and most viable plan, it may complicate the proceedings and lead to confusion, inefficiency and delay, especially if the competent authority ends up with a number of competing plans proposed simultaneously, including by various creditors. For those reasons, the insolvency law may permit creditors to submit only one alternative plan and only in cases where, in the assessment of the competent authority, this course of action is likely to be beneficial in a particular case (e.g. to provide the leverage necessary to reach compromise between the negotiating parties).

5. Content of the reorganization plan

Recommendation 73: Content of the reorganization plan

73. The insolvency law providing for a simplified insolvency regime should specify the minimum contents of a plan, including:

(a) The list of assets of the debtor, specifying those that are subject to security interests;

(b) The terms and conditions of the plan;

(c) The list of creditors and the treatment provided for each creditor by the plan (e.g. how much they will receive and the timing of payment, if any);

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

(e) Proposed ways of implementing the plan.

(*See recommendations 143 (d) and 144 of the Guide.*)

285. The MSE Insolvency Guide does not recommend requiring the preparation and submission of a disclosure statement in simplified reorganization proceedings (See recommendations 141–143 of the Guide for comparison). In the light of expected straightforward reorganization options for MSE debtors, such a requirement may unnecessarily complicate the proceedings. The MSE Insolvency Guide envisages that a reorganization plan itself should contain sufficient information to enable assessment of its viability. Consequently, recommendation 73 draws on both recommendation 143 of the Guide that sets out the minimum requirements for the contents of a disclosure statement and recommendation 144 of the Guide that sets out the minimum requirements for the content of a reorganization plan. Since not all of those requirements would always be applicable in a simplified insolvency regime, recommendation 73 deducts from them only those requirements that are expected to be always relevant in simplified reorganization proceedings. They are the list of assets, specifying those that are subject to security interests, the terms and conditions of business reorganization, ways of implementing the plan, the list of creditors and the treatment to be accorded to each creditor, in particular how much each of them is expected to receive and the timing of payment, if any. In addition, in simplified reorganization proceedings a reorganization plan is expected to include a comparison of the treatment afforded to creditors by the plan and what they would otherwise receive in liquidation.

286. The reorganization plan may modify the priority of claims as may be permitted by the insolvency law (e.g. key suppliers that themselves could be MSEs heavily

dependent on payments by the debtor may receive priority in payment during the implementation of the plan to avoid their insolvency). The plan should also address the protection of interests of secured creditors and third parties whose assets may need to remain in the possession of the debtor during the implementation of the plan (e.g. third-party-owned equipment or a leased office space may be central to the debtor's business operations). In some cases, it may be in the best interests of the estate to sell encumbered assets to provide needed working capital or to further encumber the already encumbered asset to raise finance. Recommendations 52 to 68 of the Guide provide essential protections for creditors in those instances. They are relevant in a simplified insolvency regime as well.

287. Including information listed in recommendation 73 in a reorganization plan would aim, first of all, to assist the competent authority and creditors to assess the feasibility of implementing the plan. That information would also be relevant for ascertainment by the competent authority or an independent professional, as the case may be, of compliance of the reorganization plan with requirements of law and for confirmation of the plan by the competent authority (See recommendations 74 and 78). Having such information readily available may also be helpful if the simplified reorganization proceeding needs to be converted to liquidation.

6. Notification of the reorganization plan to all known parties in interest

Recommendation 74: Notification of the reorganization plan to all known parties in interest

74. The insolvency law providing for a simplified insolvency regime could require the competent authority or an independent professional to ascertain compliance of the reorganization plan with the procedural requirements as provided in the law, and upon making any required modification to ensure that it is so compliant, to notify the plan to all known parties in interest to enable them to object or express opposition to the proposed plan. The notice should explain the consequences of any abstention and specify the time period for expressing any objection or opposition to the plan.

288. The MSE Insolvency Guide envisages that the competent authority or an independent professional, as the case may be, upon receipt of the plan and before notifying the plan to all known parties in interest, could be required to ascertain compliance of the plan with the procedural requirements of law. If any irregularities are discovered, the competent authority or an independent professional would be expected to rectify them before notifying the plan to all known parties in interest.

289. Reference in recommendation 74 to the "procedural requirements as provided in the law" limits the scope of possible modifications to the plan at this stage: unlike modifications envisaged under recommendation 77, modifications under recommendation 74 should not extend to business, financial or other substantive aspects of the proposed plan. For transparency and other reasons, the person who prepared the plan (which, under recommendation 68, could be the debtor or an independent professional), if that person is not the one introducing the modifications, may need to be informed about introduced modifications before the plan is notified to all known parties in interest. In case of disagreement with the modifications introduced by the competent authority or an independent professional, review under recommendation 5 *(c)* may be triggered. The envisaged limited purpose and scope of possible modifications, namely, to ensure that the plan is compliant with the procedural requirements as provided in the law, should reduce risks of possible disagreements about the introduced modifications.

290. The MSE Insolvency Guide envisages that the competent authority or an independent professional could be required to notify the plan to all known parties in interest to enable them to object or express opposition to the proposed plan. Under recommendations 18, 40 and 41, the competent authority would be required to notify the debtor and any known creditor of all matters that require their approval individually unless the competent authority considers that, under the circumstances, some other form of notification would be more appropriate (See recommendation 41). As discussed in the context of provisions on notification (see section G above), a reorganization plan may, for example, be made available on the web page of the proceeding with a notice of the plan generated automatically by the system to the intended parties in interest. The MSE Insolvency Guide recommends using simplified and cost-efficient procedures and appropriate means for giving notices to ensure that the information is likely to come to the attention of the intended party in interest (See recommendations 40 and 42).

291. The notification of the plan enables the notified parties in interest to express objection or opposition to the proposed plan. This step in the simplified reorganization proceedings should be regarded as essential for ensuring that creditors and other parties in interest can exercise their rights and protect their legitimate interests in the proceeding. The importance of proper notification is highlighted throughout the MSE Insolvency Guide, in particular in the context of the deemed approval mechanism (see e.g. the commentary to recommendations 18, 76 and 77) and the effect of the plan on unnotified creditors (See recommendation 75 and the commentary thereto highlighting that notification of the plan is instrumental in giving the opportunity to all known creditors to express opposition on the approval of the plan).

292. The MSE Insolvency Guide recommends explaining in the notice the consequences of silence (or abstention). In accordance with recommendation 18 (see the accompanying commentary to that recommendation and to recommendations 76 and 77), silence within the established time period following the notification of the plan would be treated as the absence of an objection and counted as an approval. This would be relevant for ascertaining whether the plan is undisputed and hence deemed to be approved by creditors under recommendation 76 or, conversely, whether the plan is disputed and thus necessitating taking steps listed in recommendation 77.

293. The notice should specify the deadline by which any objection or opposition to the plan should be expressed. The recommendation itself does not establish any minimum or maximum time frame for expressing objection or opposition and does not recommend that the insolvency law providing for a simplified insolvency regime should fix those limits since they could be case specific and depend in particular on means of communication expected to be used and location of creditors, some of which could be foreign or remote creditors with no or low access to electronic means of communication. In addition, the time frame given for expressing objection or opposition should depend on the complexity of the plan and take into account that parties in interest would need some time: *(a)* to examine the reorganization plan; *(b)* to ascertain whether any grounds for raising an objection or opposition exists; *(c)* if such grounds do exist, to formulate an objection or opposition; and *(d)* to communicate such an objection or opposition to the competent authority. In line with recommendation 12 that envisages that time periods for all procedural steps in simplified insolvency proceedings should be short, the time period for expressing objection or opposition to the plan should thus be short but sufficient to express objection or opposition to the plan.

7. Effect of the plan on unnotified creditors

Recommendation 75: Effect of the plan on unnotified creditors

75. The insolvency law providing for a simplified insolvency regime should specify that a creditor whose rights are modified or affected by the plan should not be bound by the terms of the plan unless that creditor has been given the opportunity to express opposition on the approval of the plan. (*See recommendation 146 of the Guide.*)

294. One of the underlying principles of the insolvency law is that creditors whose rights are modified or affected by the plan, including secured creditors, can only be bound by the plan if they have been given the opportunity to express their views on that plan. This principle is reflected in recommendation 75. The MSE

Insolvency Guide envisages that the opportunity to express views on the plan would be provided to all known creditors under recommendations 18, 40–42 and 74, that is, through the notification of the plan to creditors, sufficient time allocated for expressing any objection or opposition, any communication that may ensue between the creditors and the competent authority as regards the contents of the plan and the deemed approval mechanism.

295. A number of other recommendations in the MSE Insolvency Guide are relevant for ensuring that all known creditors of the debtor are given the opportunity to express their views on a reorganization plan. For example, creditors are expected first to be properly notified of the commencement of the simplified insolvency proceeding (See recommendations 32 and 33) and are to be given opportunity either to submit their claims or review the list of creditors and claims prepared by the debtor, the competent authority or an independent professional, as the case may be (See recommendations 50 and 51). Recommendation 35 envisages that the insolvency law providing for a simplified insolvency regime will specify the consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding, including that they may be unaffected by insolvency proceedings and excluded from discharge. Alternatively, they may be affected by the proceedings but on the condition that creditors would not be worse off than when they would have been notified. All admitted creditors are expected subsequently to be individually notified by the competent authority of all matters on which their approval is required, which in addition to the plan, would include, for example, modifications and amendments to the plan (See recommendations 77 *(c)* and 80 *(c)*). The MSE Insolvency Guide recommends that the competent authority should be required to duly consider any opposition received (See recommendation 77) and that creditors unsatisfied with the competent authority's decisions, including with the confirmation of the reorganization plan, should be given an opportunity to seek review of those decisions in a relevant review body (See recommendations 5 *(c)* and 79).

296. In addition, consistent with the objective of a simplified insolvency regime to provide for effective measures to facilitate participation by creditors and to address creditor disengagement (See recommendation 1 *(e)*), assistance and support with the use of simplified insolvency proceedings should be made readily available and easily accessible not only to the debtor but also to creditors that themselves could be MSEs and unsophisticated in insolvency proceedings. Such assistance and support could take the form of templates or standard forms, including for expression of opposition, as envisaged in recommendation 9. As noted in the commentary to that recommendation, in order to avoid procedural rigidity, such templates or forms should not be made mandatory.

297. At the same time, the MSE Insolvency Guide ensures that simplified insolvency proceedings will not be delayed or halted because creditors admitted to the proceeding ignore or, decide not to use, the opportunity provided to them to

express their views on the reorganization plan. As explained further below in the context of the approval of the reorganization plan by creditors, the MSE Insolvency Guide recommends counting abstaining or non-participating creditors as creditors that approve the plan (i.e. they are included in the percentage of support for the plan). That consequence of abstention or non-participation is expected to be explained to creditors in the notice of the reorganization plan under recommendation 74. The treatment of abstaining or non-participating creditors recommended in the MSE Insolvency Guide is thus different from systems that treat abstaining or non-participating creditors as creditors that do not accept a plan and from systems that calculate the percentage of support for the plan only on the basis of creditors that express their views on that plan.

8. Approval of the reorganization plan by creditors

General

298. Consistent with the objectives of establishing an expeditious and flexible simplified insolvency regime and providing for effective measures to facilitate creditor participation and address creditor disengagement, the MSE Insolvency Guide recommends reducing formalities for all procedural steps involved in simplified insolvency proceedings (See recommendation 13). This includes steps involved in the approval of the reorganization plan.

299. The MSE Insolvency Guide recommends minimal formalities for the approval of the plan by creditors in a simplified insolvency regime. No provision is made for establishment of a creditor committee and the holding of disclosure statement hearings, creditor meetings or a formal vote. A formal vote requirement is replaced by a mechanism of deemed approval according to which the plan will be deemed approved by creditors entitled to vote on the approval of the plan: *(a)* if they are notified of the plan, of the deadline and procedures for expressing any objection or opposition to the plan and of the consequences of abstention (no objection or opposition is treated as approval); and *(b)* they raise no objection or opposition to the plan within that deadline or the opposition raised is not sufficient to block the approval of the plan according to the threshold for the approval of the plan established in the domestic insolvency law (i.e. the requisite majority).

300. Although this mechanism may be unknown to insolvency law in some jurisdictions and is not envisaged in the Guide, the MSE Insolvency Guide recommends introducing it for simplified insolvency proceedings, including for approval of a reorganization plan in those proceedings. This deviation from the Guide is recommended recognizing that the Guide was prepared primarily for larger enterprises that face complex issues in insolvency, which are expected to be resolved with the involvement of interested creditors, factors that are often absent in MSE insolvency.

301. The deemed approval mechanism does not replace the requisite majority threshold for the approval of the plan established in the domestic insolvency law. It is a different means for ascertaining that such threshold is met. The requisite majority can be calculated in a number of different ways. The insolvency law may require a majority of creditors voting or of all creditors. Creditors may be required to vote in classes and there could be various ways to treat classes in determining the majority. The requisite majority may be fixed by reference to the support of a proportion or a percentage of the value of claims or a number of creditors or a combination of both (e.g. at least two thirds of the total value of the debt and more than one half of creditors). Because of the relatively simple debt structure of MSEs, too complex requisite majority thresholds may need to be adjusted for a simplified insolvency regime.

302. The mechanism of deemed approval does not jeopardize the right of creditors to express their views on the plan since an opportunity is given to them to raise an objection or express opposition. Essential safeguards are also in place to ensure that creditors can in fact use such opportunity effectively and in a timely manner. They are discussed in more detail in the commentary to recommendation 75 above.

303. Bearing in mind the importance of establishing a simplified and efficient insolvency process for MSEs, while at the same time providing for the protection of the rights of all parties in interest, the MSE Insolvency Guide seeks to achieve the proper balance of the competing goals of *(a)* a deemed approval approach which aims both to expedite the reorganization process and to address the issue of the non-participation of creditors and *(b)* the importance of creditor votes on a reorganization plan submitted for approval. While the deemed approval process recommended by this MSE Insolvency Guide includes necessary creditor safeguards, it presumes an institutional capacity and legal infrastructure sufficient to monitor creditor participation appropriately. Where States are concerned that their creditor safeguards or institutional capacity and legal infrastructure may be insufficient to protect the rights of all parties in interest in their jurisdiction, States may consider whether compulsory creditor voting procedures are necessary to protect sufficiently those rights in some or all of their MSE insolvency cases. Such voting procedures are addressed in the recommendations of the revised World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes regarding MSE insolvency.[6] The World Bank Principles recommend that when some form of creditor voting with majority approval is required, States should consider having absent votes or abstentions count as votes in favour of a reorganization plan in a simplified insolvency proceeding. They also recommend that insolvency laws should simplify voting procedures, including using electronic means where appropriate.

[6] The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2021), footnote 25 and Principle C19.7. Footnote 25 of the World Bank Principles provides that Principle C14 applies in simplified MSE insolvency proceedings, and that "acceptance of the plan by a majority of impaired creditors should be required." In addition, Principle C19.7 provides, inter alia, that "creditors silence or lack of negative vote on a duly notified reorganization plan should be considered as acceptance of the plan and counted as an affirmative vote."

Recommendation 76: *Undisputed reorganization plan*

76. The insolvency law providing for a simplified insolvency regime should specify that the plan is deemed to be approved by creditors if the requirements under recommendation 18 are fulfilled.

304. As explained immediately above and in the context of recommendation 18 on deemed approval, under the approach recommended in this text, the plan will be deemed approved by creditors entitled to vote on the approval of the plan if they raise no objection or opposition to the plan within the deadline or the opposition raised is not sufficient to block the approval of the plan according to the threshold for the approval of the plan established in the domestic insolvency law generally or specifically for simplified reorganization proceedings. A single objection is therefore sufficient to block the approval of the plan while an opposition from one creditor may not be sufficient if the requisite majority for approval of the plan is otherwise reached. This is because an objection concerns matters of law (procedural or substantive) and alleges non-compliance with law. It should be sufficient grounds alone to stop the process so that allegations could be investigated and if they are substantiated, the grounds for objection would need to be removed. Sanctions and costs could be imposed for objections raised in bad faith.

305. The nature of opposition is different: it does not concern matters of law but rather alleges prejudice or unfairness against a particular creditor or group of creditors. Since all creditors are likely to be prejudiced to some degree by simplified reorganization proceedings, the level of prejudice or harm should be sufficiently high to enable a creditor or group of creditors expressing opposition to block the approval of the plan. Where the requisite majority for approval of the plan is ascertained (counting abstentions as approval), a minority of creditors expressing opposition to the plan alleging that they are unfairly prejudiced by the plan cannot obstruct its approval. Although they may still challenge the plan in a relevant review body, mechanisms should be in place to prevent undue delays.

Recommendation 77: *Disputed plan*

77. The insolvency law providing for a simplified insolvency regime should:

(a) Allow the modification of the plan to address objection or sufficient opposition to the plan;

(b) Establish a short time period for introducing modifications and transmitting a modified plan to all known parties in interest;

(c) Require the competent authority to transmit any modified plan to all known parties in interest indicating a short time period for expressing any objection or opposition to the modified plan;

(d) Require the competent authority to terminate the simplified reorganization proceedings for a solvent debtor or convert the simplified reorganization proceeding to a simplified liquidation proceeding for an insolvent debtor (i) if modification of the original plan to address objection or sufficient opposition is not possible or (ii) if objection or sufficient opposition to the modified plan is communicated to the competent authority within the established time period; and

(e) Specify that the modified plan is approved by creditors if the competent authority receives no objection and no sufficient opposition to the modified plan within the established time period.

(*See recommendations 155, 156 and 158 of the Guide.*)

306. In case of any objection or opposition to the proposed plan, the MSE Insolvency Guide recommends allowing the modification of the plan. It does not specify which party will be responsible for introducing modifications. It would depend on the nature of the objection and opposition. The competent authority may entrust that function to the party responsible for preparing the plan, to an independent professional specifically appointed for such purpose or to a body of interested parties or it may assume that function itself.

307. In case of opposition, the MSE Insolvency Guide envisages that the competent authority would ascertain whether the plan has received the requisite support, or the opposition expressed is sufficient to block the approval of the plan. Sufficient opposition to the plan may lead to conversion to liquidation. Alternatively, in an effort to achieve a consensual plan, the competent authority may seek views of creditors on how to modify the plan so as to make it acceptable to them. The MSE Insolvency Guide recommends that a short time period should be established for introducing modifications and transmitting a modified plan to all known parties in interest. Failure to achieve a consensual plan should lead to the conversion of the proceeding to liquidation in the case of an insolvent debtor (or termination of the proceeding in the case of a solvent debtor). If parties in interest do not express any objection or sufficient opposition to any modified plan communicated to them by the competent authority, they should be deemed to accept the compromise reached in the modified plan.

308. The MSE Insolvency Guide recommends permitting the imposition of sanctions for abuse or improper use of the simplified insolvency regime (See recommendation 101). In the light of the serious consequences envisaged in the MSE

Insolvency Guide for the debtor and its business if the plan cannot be approved by the established deadline, bad faith opposition to the approval of the plan should trigger the imposition of sanctions. To minimize delays in simplified reorganization proceedings, the competent authority may be authorized to dismiss an objection on purely procedural grounds, by taking into account the extent of the irregularity, the state of the debtor and other circumstances.

9. Confirmation of the plan by the competent authority

Recommendation 78: Confirmation of the plan by the competent authority

78. The insolvency law providing for a simplified insolvency regime should require the competent authority to confirm the plan approved by creditors. It should require the competent authority, before confirming the plan, to ascertain that the creditor approval process was properly conducted, creditors will receive at least as much under the plan as they would have received in liquidation, unless they have specifically agreed to receive lesser treatment, and the plan does not contain provisions contrary to law. (*See recommendation 152 of the Guide.*)

309. In standard business insolvency proceedings, the competent authority is usually not expected to evaluate the economic and financial merits of the plan and may not be required to confirm the plan approved by creditors. It may be expected to simply acknowledge the existence of sufficient support among creditors for the plan. In some jurisdictions, the plan approved by creditors may take effect automatically and be binding on any dissenting party in interest unless it is successfully challenged in a review body.

310. In a simplified insolvency regime, confirmation by the competent authority of the plan deemed approved by creditors may be desirable in all cases in order to mitigate risks that no proper assessment of the fairness and viability of the plan has taken place because the deemed approval of the plan is the result of creditors' disinterest and disengagement. For these reasons, the MSE Insolvency Guide recommends the competent authority's confirmation of the reorganization plan approved by creditors in all cases. Such confirmation will seek: *(a)* to provide additional assurance to the MSE debtor that the plan does not impose undue burden on the debtor; *(b)* to give comfort to those creditors of the debtor that have no means of verifying themselves the viability and fairness of the plan (e.g. employees, MSE creditors) and that they will not be disproportionately affected by the plan; and *(c)* to ascertain, with the assistance of an independent professional

where necessary, that the plan is otherwise fair and ensures the survival of the business. The competent authority may reject a plan approved by creditors where it would not have a reasonable prospect of preventing liquidation of the debtor or ensuring the viability of the business or where it is not feasible or possible to implement the plan from a practical, rather than an economic, point of view.

311. Recommendation 152 of the Guide sets out conditions for the confirmation of the plan by the court, such as: the approval process was properly conducted; creditors will receive at least as much under the plan as they would have received in liquidation, unless each of them has specifically agreed to receive lesser treatment; and the plan does not contain provisions contrary to law. Those requirements will be applicable in a simplified insolvency regime for the confirmation of the plan by the competent authority. The competent authority may decide to engage the services of an independent professional to determine the outcome of an alternative liquidation scenario where necessary.

312. The MSE Insolvency Guide does not explicitly envisage the possibility for the competent authority to impose a reorganization plan on dissenting creditors in the light of the complexities and litigation risks associated with such a solution. Those jurisdictions that enacted insolvency law provisions allowing courts to impose reorganization plans on dissenting creditors in standard insolvency proceedings may wish to assess the appropriateness of applying those provisions in simplified insolvency proceedings in the light of the objectives of a simplified insolvency regime to put in place expeditious and simple insolvency proceedings for MSEs.

10. Challenges to the confirmed plan

Recommendation 79: Challenges to the confirmed plan

79. The insolvency law providing for a simplified insolvency regime should permit the confirmed plan to be challenged on the basis of fraud. It should specify:

(a) A time period for bringing such a challenge calculated by reference to the time the fraud is discovered;

(b) The party that may bring such a challenge;

(c) That the challenge should be heard by the relevant review body; and

(d) That a simplified reorganization proceeding may be converted to a simplified liquidation proceeding or a different type of insolvency proceeding where the confirmed plan is successfully challenged.

(See recommendations 154 and 158 (d) *of the Guide.)*

313. The MSE Insolvency Guide recommends that the insolvency law providing for a simplified insolvency proceeding should allow challenges to the plan after its confirmation by the competent authority only on the basis of fraud and only within a period of time specified in that law. Such period will be calculated by reference to the time the fraud is discovered and, according to recommendation 12, should be short. The MSE Insolvency Guide envisages that the insolvency law providing for a simplified insolvency proceeding may limit a group of persons eligible to bring challenges to the confirmed plan.

314. These restrictions are established in order to avoid disruptions to the implementation of the plan. Other grounds that are usually provided in insolvency law for challenging the confirmed plan in standard reorganization proceedings may not arise in simplified reorganization proceedings because of the high level of control expected to be exercised by the competent authority over simplified reorganization proceedings. In particular, the competent authority itself will be required to give notices and ascertain that requirements for approval of the plan were met and that the plan does not contain any provisions contrary to law.

315. Because of alleged fraud and public interest concerns, the MSE Insolvency Guide recognizes that challenges to the confirmed plan will most likely end up with a judicial body rather than any administrative body that may be entrusted with a review of decisions of the competent authority that is an administrative body as discussed in the context of recommendation 5 *(c)*.

316. Whether a challenge will have suspensive effect on the execution of the plan will depend on domestic rules of civil and criminal procedures. Where the challenge is successful, the MSE Insolvency Guide recommends setting aside the plan and converting the simplified reorganization proceeding to a simplified liquidation proceeding or a different type of insolvency proceeding. Conversion to liquidation may not be an option with respect to a solvent debtor unless the domestic law envisages liquidation on just and equitable grounds such as fraud. The alternative option, often envisaged in cases of a successful challenge to the confirmed plan in standard business insolvency proceedings – dismissal of the proceedings – does not resolve the MSE debtor's financial difficulty and may simply delay commencement of liquidation proceedings, leading to further diminution of the value of the debtor assets before those proceedings are finally commenced.

11. Amendment of a plan

Recommendation 80: Amendment of a plan

80. The insolvency law providing for a simplified insolvency regime should permit the amendment of a plan and specify:

(a) The parties that may propose amendments;

(b) The time at which the plan may be amended, including between submission and approval and during implementation, and a mechanism for communicating amendments to the competent authority; and

(c) The mechanism for approval of amendments of the confirmed plan, which should include a notice by the competent authority of proposed amendments to all parties in interest affected by the amendments, the approval of the amendments by those parties, the confirmation of the amended plan by the competent authority, and the consequences of failure to secure approval of proposed amendments. (*See recommendations 155 and 156 of the Guide.*)

317. As noted in the commentary to recommendation 74, the MSE Insolvency Guide envisages the possibility of introducing modifications to the originally proposed reorganization plan by the competent authority or an independent professional before the plan is notified to all known parties in interest, in order to ensure that the plan is compliant with the procedural requirements as provided in the law. In addition, the MSE Insolvency Guide addresses two other time points at which changes to the reorganization plan may be introduced: after the plan has been notified to all known parties in interest but before its approval and confirmation; and during its implementation. Mechanisms for modifying the plan after its notification to all known parties in interest but before its approval and confirmation and consequences of the failure to secure approval or confirmation of those modifications are addressed in recommendation 77.

318. The focus of recommendation 80 is the possibility of amending the plan after its approval by creditors and confirmation by the competent authority, that is, during its implementation. To ensure predictability and the smooth implementation of the plan, conditions may be imposed for amending the plan at that stage (e.g. circumstances should warrant the amendment; for example, a certain problem arose that makes the implementation of the plan as a whole or in part impossible and unless that problem is remedied, provided that it can be remedied, the implementation of the plan will fail). The parties that may propose amendments at that stage should be identified in the law and may be limited to the MSE debtor and creditors affected by the implementation of the plan.

319. A mechanism for approving an amendment to the plan at the stage of its implementation should ensure transparency and the protection of creditor interests and proper verification of the proposed amendment by the competent authority. To that end, the MSE Insolvency Guide recommends that such a mechanism should resemble the mechanism for the approval and confirmation of the original or modified plan and thus involve: *(a)* notification of proposed amendments by the competent authority to at least all parties in interest affected by the amendments, if not all parties in interest; *(b)* the approval of the amendments by those parties; and *(c)* the confirmation of the amended plan by the competent authority.

320. As in other cases in a simplified insolvency regime where approval of creditors is required, the amendments will be deemed approved by creditors where no objection or sufficient opposition is communicated to the competent authority by the deadline established by the competent authority for such purpose. The law should specify the consequences of failure to secure approval of the amendments, for example implementation of the originally confirmed plan may continue, or where it is impossible to continue the implementation of that plan, liquidation may commence, or if the debtor is solvent, the simplified reorganization proceeding may terminate.

321. Some plans could be self-modifying, for example those that call for fluctuating payments based on the MSE debtor's actual income. The implementation of such plans may require monitoring. Alternatively, debt repayments may be based on projected income and expenses, and the insolvency law should allow parties to modify the plan to reflect the MSE debtor's actual situation as compared to the projections embodied in the plan. There could be systems that permit reductions but not increases in payments.

12. Supervision of the implementation of the plan

Recommendation 81: Supervision of the implementation of the plan

81. The insolvency law providing for a simplified insolvency regime may entrust supervision of the implementation of the plan to the competent authority or an independent professional as applicable. (*See recommendation 157 of the Guide.*)

322. The MSE Insolvency Guide envisages a possibility for the competent authority or an independent professional to supervise the implementation of the plan but it does not recommend requiring that such supervision takes place in all cases, recognizing that it may be unnecessary and costly under certain circumstances. The

debtor may be effectively supervised by persons other than the competent authority or an independent professional (e.g. by creditors) in some cases while in others no supervision may be required at all (e.g. where payments are automatically withheld from the account of the debtor by a bank and transferred to accounts of relevant creditors according to the agreed reorganization plan). Where supervision is necessary, the competent authority may decide to fulfil that function itself or appoint an independent professional for such purpose. In line with the objective of a simplified insolvency regime to establish flexible and low-cost proceedings, different approaches are intended to be captured by recommendation 81.

13. Consequences of the failure to implement the plan

Recommendation 82: Consequences of the failure to implement the plan

82. The insolvency law providing for a simplified insolvency regime should specify that, where there is substantial breach by the debtor of the terms of the plan or inability to implement the plan, the competent authority may on its own motion or at the request of any party in interest:

(a) Convert the simplified reorganization proceeding to a simplified liquidation proceeding or a different type of insolvency proceeding;

(b) Close the simplified reorganization proceeding and parties in interest may exercise their rights at law;

(c) If closed, reopen the simplified reorganization proceeding;

(d) If closed, open a simplified liquidation proceeding; or

(e) Grant any other appropriate type of relief.

(*See recommendations 158* (e) *and 159 of the Guide.*)

323. There could be substantial breach by the debtor of the terms of the plan or the implementation of the plan may break down for other reasons, including the inability of the debtor to perform the plan (because of health reasons or extraordinary circumstances). Recommendation 82 lists several options for the competent authority to consider in those cases, on its own motion or at the request of any party in interest. Depending on the stage reached in the implementation of the plan, the status of the debtor's solvency and reasons for the failure to implement the plan, some options may be more appropriate than others. The applicability of some listed options may also depend on whether the simplified reorganization proceeding is closed or remains open after confirmation of the plan.

324. Insolvency laws adopt different approaches to closing reorganization proceedings. They may be closed when the reorganization plan is confirmed. Another approach is to close proceedings at some later stage in accordance with the terms of the plan or some other contractual agreement between the debtor and creditors. Yet another approach is to close the reorganization proceeding after the full implementation of the plan. In the light of such a divergence and the need to retain flexibility in a simplified insolvency regime, the MSE Insolvency Guide does not recommend any particular approach to closing reorganization proceedings. The matter is left to be addressed in the domestic insolvency law. The latter may envisage that the competent authority itself may be allowed to decide on the most appropriate approach on a case-by-case basis, taking into account all relevant considerations and the objectives of a simplified insolvency regime. In particular, the full implementation of the plan may take years while an earlier closure of the proceeding may help to avoid stigma, enable a fresh start and reduce the costs of administering the proceeding.

325. Where a simplified reorganization proceeding remains open after the confirmation of the plan, the competent authority, on its own motion or at the request of any party in interest, may opt for conversion of the failed simplified reorganization proceeding to a simplified liquidation proceeding or a different type of insolvency proceeding (the option listed in subparagraph *(a)* of recommendation 82). For a solvent debtor, the competent authority would not be able to effectuate such a conversion unless the domestic law envisages liquidation on just and equitable grounds such as fraud. If the latter possibility is not envisaged, the competent authority would have to close the failed reorganization proceeding with the result that the parties will exercise their rights under law other than the insolvency law (the option listed in subparagraph *(b)* of recommendation 82). That option might also be more appropriate for an insolvent debtor where its remaining assets are fully encumbered and no distribution to unsecured creditors is thus expected.

326. Where a simplified reorganization proceeding has been closed upon confirmation of the plan, rights and obligations included in the plan are enforced under non-insolvency law. The insolvency law providing for a simplified insolvency regime may supplement those non-insolvency measures with options given to any party in interest, including the debtor, to petition the competent authority to reopen the simplified reorganization proceeding or open a simplified liquidation proceeding, as envisaged in subparagraphs *(c)* and *(d)* of recommendation 82. As drafted, that recommendation does not exclude a possibility for the competent authority to decide to reopen the simplified reorganization proceeding or open a simplified liquidation proceeding on its own motion. It would be expected to have justifiable grounds to do so.

327. In any ongoing or reopened simplified reorganization proceedings, where the plan cannot be implemented by the debtor for justified reasons, the plan may be amended (See recommendation 80 in that context). Different considerations

would be weighted for such an option to be pursued, including whether that would lead to the best outcome for all parties in interest concerned, the time required to approve an amended plan and the need for expeditious completion of the proceeding. In case of a breach by the debtor of specific terms of the plan, the competent authority may decide to terminate the whole plan or only the part in respect of the specific obligation breached. The termination of the whole plan may lead to the closure of the simplified insolvency proceeding and its conversion to liquidation. In the event of partial termination of the plan, the implementation of the plan as adjusted would continue but the creditor whose obligation is breached will not be bound by the adjusted plan. That creditor may have its claim restored to the full amount if it agreed to receive a lesser amount under the originally approved and confirmed plan unless such option is not permitted under the law. In such case, the creditor will be bound by the amount of the claim included in that plan.

328. In addition to the options listed in recommendation 82, which are non-exhaustive as subparagraph *(e)* drafted as a "catch-all" provision suggests, the reorganization plan itself may specify ways of handling possible failures of the implementation of the plan by the debtor and the rights of creditors in such case. Regardless of the option employed to address consequences of the failure to implement the plan, unless the debtor's wrongful acts caused the failure to implement the plan, the aim should remain to resolve the financial difficulties of the debtor as efficiently and effectively as possible in accordance with the objectives of a simplified insolvency regime.

14. Conversion of a simplified reorganization to a liquidation

Recommendation 83: Conversion of a simplified reorganization to a liquidation

83. The insolvency law providing for a simplified insolvency regime should provide that at any point during a simplified reorganization proceeding, the competent authority may, on its own motion or at the request of a party in interest or an independent professional, where appointed, decide that the proceeding be discontinued and converted to a liquidation, if the competent authority determines that the debtor is insolvent and there is no prospect for viable reorganization. Where the competent authority considers conversion to liquidation before submission of a reorganization plan, the competent authority should be mindful of the time needed to prepare and submit a reorganization plan (See recommendations 69 and 70 above) and may consult the independent professional in making the decision, if one has been appointed.

329. A number of circumstances may arise in the course of a simplified reorganization proceeding when it will be desirable for an insolvency law to allow the proceeding to be converted to liquidation (simplified or standard). The principal grounds for conversion would be: failure to propose a reorganization plan; failure to approve the plan or amendments to the approved and confirmed plan; a successful challenge of the confirmed plan; a material or substantial breach by the debtor of its obligations under the plan; or failure to implement the plan for some other reason. Those reasons for conversion are addressed in recommendations 71, 77 *(d)*, 79 *(d)*, 80 *(c)* and 82.

330. The law may also envisage conversion to liquidation where it is apparent that the debtor is misusing simplified reorganization proceedings either by not fulfilling its obligations as the debtor-in-possession (e.g. acting in bad faith, making fraudulent or unauthorized transfers, not reporting on assets and business affairs to the competent authority or an independent professional as may be required) or not cooperating with the competent authority or an independent professional where it is displaced as the debtor-in-possession (e.g. not enabling them to take effective control of business or withholding information).

331. In addition, the MSE Insolvency Guide envisages conversion of a simplified reorganization proceeding to a liquidation proceeding at any point during a simplified reorganization proceeding where it is determined that the debtor is insolvent and there is no prospect for viable reorganization. This may be evidenced for example by the fact that the business continues to incur losses during the reorganization period. In addition, the law may impose an obligation on the debtor-in-possession or a person that displaces the debtor in the day-to-day management of business to terminate the administration of the reorganization proceedings as soon as it becomes evident that reorganization will not be possible, in order to preserve value for creditors. Sanctions and costs may be imposed for violating that obligation.

332. In considering conversion of a simplified reorganization proceeding to a liquidation before submission of the reorganization plan, the competent authority should allow the time period established for the proposal of the plan to expire unless parties agree to conversion before expiration of that time period. The MSE Insolvency Guide envisages the possibility for the competent authority to consult an independent professional, if one has been appointed, about such conversion.

333. If conversion to liquidation requires a new application for commencement to be made, rather than relying upon the original application as the basis for the converted proceedings, it may lead to further delay and diminution of value of the insolvency estate. Accordingly, consideration may need to be given to the procedural requirements for commencement and conduct of converted proceedings. (See the commentary to recommendation 98).

334. Where simplified reorganization proceedings are converted to liquidation, the law providing for a simplified insolvency regime will also need to consider the status of any actions taken by the debtor-in-possession or a person displacing the debtor in the day-to-day operation of business prior to the approval of the plan; the continued application of the stay; the treatment of payments made in the course of the implementation of the plan prior to a conversion, in particular whether they would be protected from avoidance; and the treatment of creditor claims that have been adjusted in the reorganization, which may be reinstated to full value in any subsequent liquidation or may be enforceable only as adjusted. (See further the commentary to recommendations 99 and 100.)

L. Discharge

1. Discharge in simplified liquidation proceedings

Recommendation 84: *Decision on discharge*

84. The insolvency law providing for a simplified insolvency regime should specify that, in a simplified liquidation proceeding, discharge should be granted expeditiously.

Recommendation 85: *Discharge conditional upon expiration of a monitoring period*

85. Where the insolvency law provides that discharge may not apply until after the expiration of a specified period of time following commencement of insolvency proceedings during which period the debtor is expected to cooperate with the competent authority ("monitoring period"), the insolvency law providing for a simplified insolvency regime should:

(a) Fix the maximum duration of the monitoring period, which should be short;

(b) Allow the competent authority to establish a shorter duration of the monitoring period on a case-by-case basis;

(c) Specify that, after expiration of the monitoring period, the debtor should be discharged upon decision of the competent authority where the debtor has not acted fraudulently and has cooperated with the competent authority in performing its obligations under the insolvency law. (*See recommendation 194 of the Guide.*)

Recommendation 86: *Discharge conditional upon the implementation of a debt repayment plan*

86. The insolvency law providing for a simplified insolvency regime may specify that full discharge may be conditional upon the implementation of a debt repayment plan. In such case, it should allow the competent authority to specify the duration of the debt repayment plan ("discharge period") and require the discharge procedures to include verification by the competent authority:

(a) Before the debt repayment plan becomes effective, that the debt repayment obligations reflect the situation of the individual entrepreneur and are proportionate to his or her disposable income and assets during the discharge period, taking into account the equitable interest of creditors; and

(b) On expiry of the discharge period, that the individual entrepreneur has fulfilled his or her repayment obligations under the debt repayment plan, in which case the individual entrepreneur is discharged upon confirmation by the competent authority of the fulfilment of the debt repayment plan by the debtor.

335. When the MSE debtor is a legal entity, the question of its discharge following liquidation does not arise; generally, the law provides for the disappearance of the legal entity, or alternatively, that it will continue to exist as a shell with no assets. In limited liability MSEs, the owners will not be liable for the residual claims unless they also provide personal guarantees for business debts, in which case a special treatment may be accorded to them (See recommendations and accompanying commentary in section N). In insolvency of individual entrepreneurs and unlimited liability MSEs, the question arises as to whether individual entrepreneurs will still be personally liable for unsatisfied claims following liquidation of the insolvency estate of the debtor.

336. In some jurisdictions, an individual entrepreneur will remain personally liable for debts until they are all fully paid. In other jurisdictions, an individual entrepreneur remains liable for debts during a certain time (referred to in this text as "discharge period") during which the individual entrepreneur is expected to make a good faith effort to repay its debts. Discharge may be possible only after the debt repayment plan is fully implemented unless acceptable grounds exist that justify the failure to implement the plan. The length of the debt repayment period may vary from jurisdiction to jurisdiction, and within the same jurisdiction it may vary depending on circumstances. Some laws provide for a long period (e.g. 10 years), but the emerging trend is to shorten the period to expedite a fresh start. Another approach is to provide incentives to the individual entrepreneur to comply with the debt repayment plan by making the length of the discharge period dependent on the rate of return to

creditors and the individual entrepreneur's compliance with other obligations. At the same time, a predictable and consistent method of assessing disposable income may need to be provided in the debt repayment plan to leave sufficient income for household needs of individual entrepreneurs and their families.

337. The default approach reflected in recommendation 84 is that the discharge in simplified liquidation proceedings should be granted expeditiously. The discharge may take place before realization of assets and distribution of proceeds. Some jurisdictions may allow the competent authority to implement a phased, partial or staggered discharge with the aim of promoting a fresh start for MSEs. In particular, in simplified liquidation proceedings, disputes may arise over some claims, for example not admitted claims. Some jurisdictions may require resolution of all such disputes before a discharge of any claim may take place. Other jurisdictions allow a phased discharge, for example a prompt discharge of undisputed claims and subsequently a discharge of each resolved disputed claim.

338. Recognizing that there are different approaches to discharge in different jurisdictions and that unconditional discharge may produce a negative impact on financial discipline and implementation of contractual obligations (e.g. without any debt repayment plan or prohibition from obtaining a new credit for a specified period (e.g. six months to a year)), the MSE Insolvency Guide envisages various discharge options in simplified liquidation proceedings. In particular, it envisages that, before discharge is granted, the monitoring period may apply during which the competent authority or an independent professional monitors the debtor, its assets and income. The MSE Insolvency Guide recommends that, where such a monitoring period applies, its duration should be short and determined by the competent authority on a case-by-case basis up to the maximum established by law. It also recommends that discharge should follow upon expiration of that period, provided the debtor was cooperative and no fraud was involved (See recommendation 85). The MSE Insolvency Guide also envisages that discharge in simplified liquidation proceedings may be conditional upon the implementation of a debt repayment plan. In those cases, the MSE Insolvency Guide recommends safeguards to protect interests of both the debtor and creditors, in particular that: *(a)* debt repayment obligations reflect the situation of the debtor and are proportionate to the debtor's disposable income and assets during the discharge period; and *(b)* no discharge is granted until the competent authority verifies and confirms that the debt repayment plan was fulfilled (See recommendation 86). The MSE Insolvency Guide recommends that the competent authority should be able to choose the most appropriate discharge option depending on the circumstances of the case and domestic law requirements.

2. Discharge in simplified reorganization proceedings

Recommendation 87: Discharge in simplified reorganization proceedings

87. The insolvency law providing for a simplified insolvency regime may specify that full discharge in simplified reorganization is conditional upon successful implementation of the reorganization plan and it shall take immediate effect upon confirmation by the competent authority of such implementation.

339. The MSE Insolvency Guide envisages that full discharge in simplified reorganization proceedings may take place before the implementation of the plan or be conditional upon successful implementation of the reorganization plan. In the latter case, the MSE Insolvency Guide recommends that full discharge should take immediate effect upon confirmation by the competent authority of successful implementation of the reorganization plan. The domestic insolvency law would address procedures for such confirmation, in particular where the simplified insolvency proceedings closes upon confirmation of the plan. As noted in the context of recommendations 89 and 90, certain debts may be excluded from discharge and, under certain conditions, discharge may be denied.

340. Where the full discharge in simplified reorganization proceedings was granted before the implementation of the plan, and the reorganization plan is subsequently not fully implemented or cannot be implemented or there is a substantial breach of the plan by the MSE debtor, as envisaged in recommendation 80, the insolvency law may provide for amendment of the plan if the simplified reorganization proceeding remains open or is reopened, with the result that any amendments that may need to be made in the terms of discharge would be addressed in that new plan. Where the simplified reorganization proceeding is converted to a liquidation proceeding under recommendation 82 or 83 or a simplified liquidation proceeding is opened under option *(d)* of recommendation 82, any amendments that may need to be made in the terms of discharge would be addressed in the liquidation proceeding. Under recommendation 82, the competent authority may, on its own motion or at the request of any party in interest, grant any other appropriate relief in case the reorganization plan is not fully implemented or cannot be implemented or there is a substantial breach of the plan by the MSE debtor. It may, for example, revoke a discharge granted as envisaged in recommendation 91.

3. General provisions

Recommendation 88: *Conditions for discharge*

88. Where the insolvency law providing for a simplified insolvency regime specifies that conditions may be attached to the MSE debtor's discharge, those conditions should be kept to a minimum and clearly set forth in the insolvency law. (*See recommendation 196 of the Guide.*)

341. A discharge of debt may be accompanied by conditions and restrictions relating to professional, commercial and personal activities, for example to start a new business or carry on the old business, to obtain new credit, to leave the country, to practise in a profession, to hold public office or to act as a company director or manager. They may take effect automatically or upon an order of the competent authority. The period of effectiveness of those conditions and restrictions may be linked to the duration of the debt repayment plan (referred to in this text as the "discharge period", See recommendation 86) and may be extended. It may be longer or even indefinite where for example the individual entrepreneur is a member of a profession to which specific ethical rules apply or where disqualifications were ordered by a court in criminal proceedings. For individual entrepreneurs who manage their own businesses or who become insolvent because of giving personal guarantees, some of those restrictions and conditions may have serious consequences, effectively prohibiting them from being involved in future business. Where the insolvency law provides that conditions may be attached to discharge, the MSE Insolvency Guide recommends that those conditions should be kept to a minimum in order to facilitate the fresh start. It also recommends that those conditions should be clearly set forth in the insolvency law.

Recommendation 89: *Exclusions from discharge*

89. Where the insolvency law providing for a simplified insolvency regime specifies that certain debts are excluded from a discharge, those debts should be kept to a minimum and clearly set forth in the insolvency law. (*See recommendation 195 of the Guide.*)

342. Certain types of debt, such as debts based on some tort claims, family support obligations, fraud, criminal penalties, and taxes, are usually excluded from discharge. In addition, the MSE Insolvency Guide envisages that one of the possible consequences on claims of creditors not notified of the commencement of the

simplified insolvency proceeding might be exclusion of such claims from discharge (See recommendation 35 and its accompanying commentary). Where the insolvency law provides that certain debts are excluded from discharge, the MSE Insolvency Guide recommends that they should be clearly identified in the insolvency law and should be kept to a minimum in order to facilitate the fresh start.

343. The discharge generally affects only debts arising before the commencement of a formal insolvency proceeding. Following discharge, claims that have not been satisfied would be rendered unenforceable. Nevertheless, so called "debt reaffirmation", "debt reinstatement" or "ride-through" arrangements may reinstate those claims. Under them, the debtor reaffirms its obligation to repay a discharged debt usually in exchange for retaining an asset (a car or an office space) or obtaining a new credit following the closure of the insolvency proceeding. Such reaffirmation may occur through conduct (e.g. the debtor continues paying discharged debts) or express agreement concluded before, during or after the insolvency proceeding.

344. In some jurisdictions such arrangements are unenforceable as being against the fresh start principle and the objectives of fairness and predictability since the debtor is allowed to selectively pay one or more, but not all, of its creditors. In other jurisdictions, they are enforceable but only under certain conditions (e.g. a debt reaffirmation agreement must be concluded before the discharge, relate to a secured claim, be disclosed during the insolvency proceeding and there should be no undue hardship on the debtor and its dependants as a result of the repayment of the debt).

Recommendation 90: *Criteria for denying discharge*

90. The insolvency law providing for a simplified insolvency regime should specify criteria for denying a discharge, keeping them to a minimum.

345. A discharge is usually unavailable for the debtor who has acted fraudulently, engaged in criminal activity, actively withheld or concealed information, or concealed or destroyed assets or records before or after the application for commencement of insolvency proceedings. The MSE Insolvency Guide recommends specifying in the insolvency law criteria for denying a discharge. It also recommends that those criteria should be kept to a minimum.

346. Criteria for denying a discharge might be linked to the general obligations that the debtor is expected to assume after the commencement of the proceedings as stipulated in the insolvency law providing for a simplified insolvency regime. They may also be linked to specific obligations imposed on the debtor during the

proceeding by the competent authority on a case-by-case basis (See recommendations 15 and 20). Among general obligations, the MSE Insolvency Guide lists the obligation to provide accurate, reliable and complete information, including as regards assets, creditors and their claims. Failure to disclose the names of creditors may in particular result in denial of discharge in view of the consequences of such a failure for the rights of creditors and the effective and efficient administration of simplified insolvency proceedings.

347. Certain criteria for denying a discharge may be linked to the debtor's activities before the application, for example where the debtor acted in bad faith when filing the application for commencement with the clear intent to abuse the simplified insolvency regime or where the debtor, before filing the application, took steps to put assets beyond the reach of creditors. These facts could be discovered upon creditor objection to the commencement of a simplified insolvency proceeding (See recommendation 34 and its accompanying commentary) or a particular type thereof (See recommendation 67 and its accompanying commentary).

Recommendation 91: *Criteria for revoking a discharge granted*

91. The insolvency law providing for a simplified insolvency regime should specify criteria for revoking a discharge granted. In particular, it may specify that the discharge is to be revoked where it was obtained fraudulently. (*See recommendation 194 of the Guide.*)

348. The MSE Insolvency Guide recommends specifying in the insolvency law criteria for revoking a discharge granted and invites States to consider specifying in particular that a discharge granted should be revoked if it was obtained fraudulently. That latter criterion is thus not intended to be exclusive. Like the criteria for denying discharge (See recommendation 90), criteria for revoking a discharge granted might be linked to the general obligations of the debtor expected to be stipulated in the insolvency law providing for a simplified insolvency regime as well as the debtor's obligations as may be specified by the competent authority on a case-by-case basis (See recommendations 15 and 20).

349. Discharge may for example be revoked retroactively where it was granted before the full implementation of the reorganization plan and the debtor's activities that may give rise to revocation of the discharge granted were discovered during the implementation of the plan (See recommendations 82 and 87 and their accompanying commentary). Examples of such activities are criminal activity in the day-to-day operation of the business or concealment or fraudulent dissipation of assets.

Discharge may also be revoked retroactively upon discovery of fraudulent actions that took place before the application, for example where the value of the estate was fraudulently brought down below an applicable threshold in order to benefit from the expedited discharge. Discharge may also be revoked retroactively upon discovery of fraudulent actions after the closure of the proceeding, for example where it is subsequently discovered that assets were concealed or income that should have been factored in the debt repayment plan was not disclosed. (See recommendations 44 and 67 and their accompanying commentary.)

M. Closure of proceedings

Recommendation 92: Closure of proceedings

92. The insolvency law providing for a simplified insolvency regime should specify minimal and simple procedures by which simplified insolvency proceedings should be closed. (*See recommendations 197 and 198 of the Guide.*)

350. The MSE Insolvency Guide recommends that procedures by which simplified insolvency proceedings are closed should be minimal and simple. Requirements that may apply for the closure of standard business insolvency proceedings may need to be waived or simplified for a simplified insolvency regime. In particular, hearings of a final accounting of the realization of assets and distribution of proceeds or implementation of the reorganization plan, if applicable, may be replaced by written records for the order of the closure of a simplified insolvency proceeding to be issued by the competent authority.

351. In simplified liquidation proceedings, the party responsible for realization of assets and distribution of proceeds (where it is different from the competent authority) may be expected to file to the competent authority a final accounting of realization of assets and distribution of proceeds. The competent authority may communicate that report to all known parties in interest using electronic means where possible. Provided that no objection or opposition is raised, the competent authority may need to file the final accounts and report of the simplified liquidation proceedings with the body responsible for registration of business entities so that the latter could make the necessary entries in the State records. Some laws may however require a formal application to that body for an order of dissolution of a legal entity.

352. As regards the closure of simplified reorganization proceedings, as noted in the commentary to recommendation 82, insolvency laws adopt different approaches

to closing reorganization proceedings. The MSE Insolvency Guide does not recommend any particular approach, leaving the choice to the domestic insolvency law, which does not exclude delegating such a choice to the competent authority itself. In some jurisdictions, reorganization formally ends only with an entry made in relevant State records as regards reorganization of the debtor.

353. The order closing the simplified reorganization proceedings would reflect the approach taken in a particular jurisdiction to closing reorganization proceedings or, if the choice is left for the competent authority, the decision of the competent authority. For example, where the simplified reorganization proceeding is closed when the reorganization plan is confirmed, the closure order might need to reflect the terms of the plan, conditions for its supervision and terms of discharge. Where the simplified reorganization proceeding is closed only after the full implementation of the plan, the closure order may need to include confirmation by the competent authority or an independent professional of the full implementation of the plan and of discharge.

354. Simplified reorganization proceedings may be allowed to automatically close by the order of the competent authority where the competent authority supervised the implementation of the plan and ascertained its full implementation. For transparency and completeness, the competent authority may be required to notify all known parties in interest about its order to close the proceeding and the steps taken by the competent authority to ascertain that the plan was fully implemented. Where the implementation of the plan was supervised by an independent professional, filing a final report by the independent professional confirming the full implementation of the plan may be a prerequisite for the competent authority to take steps to close the reorganization proceeding.

355. There may be other grounds to close a simplified reorganization proceeding (i.e. other than the confirmation of the reorganization plan or its full implementation). They are addressed in other provisions of the MSE Insolvency Guide. Where reorganization failed with respect to a solvent debtor, simplified reorganization proceedings may be allowed to automatically close by the order of the competent authority. Where reorganization failed with respect to an insolvent debtor, the competent authority may have different options depending on the stage where the failure occurred. By default, such options include conversion of the failed simplified reorganization proceeding to a liquidation proceeding.

356. Whether conversion is treated as a continuation of the originally filed proceeding or the closure of the old proceeding and the commencement of a new proceeding would depend on jurisdictions. This aspect as well as possible implications of conversion for the originally filed proceeding are addressed in section O on Conversion below.

357. The decision to close the proceeding may be notified only to parties that participated in the proceeding. Requiring the issuance of a public notice of closure of a simplified insolvency proceeding in all cases may run counter the measures to reduce the stigma of insolvency that might have been taken in the context of simplified insolvency proceedings generally or in the context of a specific simplified insolvency proceeding, in accordance with one of the objectives of a simplified insolvency regime (See recommendation 1 *(g)*). Some laws may however require issuing a public notice of closure of insolvency proceedings in all cases as a measure to prevent abuses by the debtor that may, for example, continue claiming benefits of a stay and other protective measures triggered by the insolvency proceeding.

N. Treatment of personal guarantees; procedural consolidation or coordination

1. General

358. The need for procedural consolidation or coordination of linked proceedings in a simplified insolvency regime may arise because of the cross-over of business and personal insolvency, the overlap of business and household assets and intertwined debts of related persons, in particular because they provided personal guarantees for business needs of the MSE debtor. Since more than one State body may be involved in handling linked proceedings, achieving procedural consolidation or coordination of those proceedings would not only be procedurally convenient and cost-efficient but would also facilitate sharing of information to obtain a more comprehensive evaluation of the situation of the various parties involved and finding the best solution for all concerned.

359. States may already adequately provide for the possibility of coordinating or consolidating linked proceedings, considering joint applications and using other means to accord proper treatment to closely linked interests of different persons. The MSE Insolvency Guide nevertheless recommends introducing specific requirements and procedures to that effect for a simplified insolvency regime. It also recommends addressing in a simplified insolvency regime the treatment of personal guarantees provided for business needs of the MSE debtor by individual entrepreneurs, owners of limited liability MSEs or their family members. Special treatment of such guarantors may be necessary in order to alleviate disproportionate hardship and it may be achieved through procedural consolidation or coordination of linked proceedings or other means.

2. Treatment of personal guarantees

Recommendation 93: Treatment of personal guarantees

93. A simplified insolvency regime should address, including through procedural consolidation or coordination of linked proceedings, the treatment of personal guarantees provided for business needs of the MSE debtor by individual entrepreneurs, owners of limited liability MSEs or their family members.

360. Lenders to MSEs often require guarantees to secure business loans. Such guarantees are commonly provided by individual entrepreneurs, owners of limited liability MSEs or their family members. Personal guarantors will face payment claims where the guaranteed obligation cannot be performed by the debtor, which is usually before or after the opening of an insolvency proceeding. Allowing unrestricted enforcement of guarantees could lead to destitution for the entire family of an individual entrepreneur or owners of limited liability MSEs. For these reasons, the MSE Insolvency Guide recommends addressing in a simplified insolvency regime personal guarantees provided for business needs of the MSE debtor by individual entrepreneurs, owners of limited liability MSEs or their family members.

361. Generally, the insolvency proceedings and discharge have no alleviating effect on the liability of the guarantor. The purpose of requiring a personal guarantee is to protect against the principal debtor's insolvency by ensuring that the creditor will be paid. Adjusting the guarantor's liability in the insolvency proceeding would reduce the protection for the creditor concerned. This could, in the long run, restrict access to credit, including for MSEs many of which may not be able to obtain financing in other ways.

362. Nevertheless, where invoking a personal guarantee would likely result in, in addition to the business insolvency, the personal insolvency of individual entrepreneurs, owners of limited liability MSEs or their family members, consideration should be given to providing a procedure to address the position of the MSE debtor and its guarantors together. The MSE Insolvency Guide suggests that this may be achieved through procedural consolidation or coordination of linked proceedings, in this case insolvency proceedings against the MSE debtor and insolvency or enforcement proceedings against its guarantors.

363. For example, the creditors may initiate an insolvency proceeding against the guarantor if their enforcement attempts against the guarantor failed, or the guarantor itself may apply for a simplified insolvency proceeding at an early stage of financial distress under recommendation 24, where it is eligible. At the time of

application, the applicant may trigger the procedural consolidation and coordination of the linked insolvency proceedings as envisaged in recommendations 94–96. Where no insolvency proceeding but debt enforcement proceeding has been commenced against a personal guarantor of the MSE debtor, recommendation 93 suggests providing in the law for a possibility of linking also those different types of the commenced proceedings (the insolvency proceeding against the MSE debtor on the one hand and the personal guarantee enforcement proceeding against the guarantor on the other hand).

364. Where no proceeding against the guarantor has commenced, the law may allow the guarantor to bring potential claims of creditors for consideration in the insolvency proceeding commenced against the MSE debtor so that those claims could be accorded appropriate treatment with the purpose of preventing potential insolvency of the guarantor. For example, the law may permit imposing a stay on the enforcement against personal guarantors of the MSE debtor for a limited duration on a case-by-case basis. When approving or confirming a reorganization plan, the competent authority may accord special treatment to a guarantor's claim against the MSE debtor vis-à-vis other claims in the plan. The insolvency law may permit MSE debtors' guarantors to petition for a reduction or discharge of their obligations under the guarantee if those obligations are disproportionate to the guarantor's revenue. It may also permit the guarantor to pay in instalments for an extended period. The competent authority or another relevant State body may be allowed to exercise discretion in favour of the guarantor's discharge or the reduction of the obligation to the part of the debt not covered by the MSE debtor's debt repayment obligations.

365. These measures may facilitate the successful reorganization of the MSE debtor and alleviate disproportionate hardship on the guarantor. Special measures of protection may be envisaged in law other than insolvency law for especially vulnerable guarantors, for example those who are found to have provided guarantees under duress or those who are dependent on or have strong emotional ties with the debtor. Special treatment has been accorded to such guarantors, for example, when the guarantee was found unreasonable or because, at the time of signing the contract, the financiers did not explain the consequences of giving a personal guarantee or agreeing on certain clauses (e.g. "all money" clauses). Some jurisdictions may impose restrictions on the kinds of guarantee a spouse, child or other dependent person may give.

3. Procedural consolidation or coordination of linked business, consumer and personal insolvency proceedings

Recommendation 94: *Orders of procedural consolidation and coordination*

94. The insolvency law may require procedural consolidation or coordination of linked business, consumer and personal insolvency proceedings in order to address comprehensively intertwined business, consumer and personal debts of individual entrepreneurs, owners of limited liability MSEs and their family members. The law may specify that, in such cases, the competent authority or another competent State body, as the case may be, may order procedural consolidation or coordination of linked proceedings on its own motion or upon request of any party in interest, which may be made at the time of application for commencement of insolvency proceedings or at any subsequent time.

Recommendation 95: *Modification or termination of an order for procedural consolidation or coordination*

95. The insolvency law should specify that an order for procedural consolidation or coordination may be modified or terminated, provided that any actions or decisions already taken pursuant to the order are not affected by the modification or termination. Where more than one State body is involved in ordering procedural consolidation or coordination, those State bodies may take appropriate steps to coordinate modification or termination of procedural consolidation or coordination.

Recommendation 96: *Notice of procedural consolidation and coordination*

96. The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural consolidation or coordination and modification or termination of procedural consolidation or coordination, including the scope and extent of the order, the parties to whom notice should be given, the party responsible for giving notice and the content of the notice.

366. The MSE Insolvency Guide suggests that the law may require procedural consolidation or coordination of linked business, consumer and personal insolvency proceedings in order to address comprehensively intertwined business, consumer and personal debts of individual entrepreneurs, owners of limited liability MSEs and their family members. The order of procedural consolidation or coordination may be issued at the outset of simplified insolvency proceedings or later.

Such order may originate not only from the competent authority but from another State body involved in consideration of a related case. Procedural consolidation or coordination may be initiated on the motion of the competent authority or that other State body or upon request of the debtor or another party in interest.

367. The scope of an order for procedural consolidation or coordination would generally be determined by the competent authority or other relevant State body in each case. The conduct and administration of any related proceedings could be consolidated (procedural consolidation) or could run in parallel with measures put in place to ensure close coordination between or among them (procedural coordination). Although administered in a coordinated manner, the assets and liabilities of each person involved in the procedural consolidation or coordination would remain separate and distinct. Accordingly, the effect of procedural consolidation or coordination would be limited to administrative aspects of the proceedings (e.g. coordinating deadlines) and would not involve substantive consolidation discussed in part three of the Guide. While the need for substantive consolidation of assets of various persons involved in MSE insolvency cannot be excluded altogether, the complexities arising from the substantive consolidation will most likely necessitate commencement of a standard business insolvency proceeding in those cases.

368. The MSE Insolvency Guide also recommends envisaging in the law a possibility of modification or termination of an order for procedural consolidation or coordination. Actions and decisions already taken in the proceedings should be preserved in case of modification or termination of the original order, and coordination of steps of the involved States bodies should be ensured. For transparency, certainty and predictability and protection of interests of all parties involved, the MSE Insolvency Guide recommends that giving notice of all matters related to procedural consolidation and coordination should be required, and the insolvency law should specify the scope and extent of the orders for procedural consolidation or coordination, the parties to whom notice should be given and the content of such notice. Since more than one State body may be involved, the law should also clearly identify the State body responsible for giving such notices.

O. Conversion

1. Conditions for conversion

Recommendation 97: Conditions for conversion

97. The insolvency law should provide for conversion between different types of proceedings in appropriate circumstances and subject to applicable eligibility and other requirements.

369. The MSE Insolvency Guide recommends that a possibility of conversion between different types of insolvency proceeding, whether simplified or standard, should be envisaged in a simplified insolvency regime. Conversion of one type of proceeding to another would be possible only if eligibility and other requirements applicable to that other proceeding are met. The MSE Insolvency Guide also recommends that conversion should take place only in appropriate circumstances. A single complication, complexity or difficulty that may arise in a simplified insolvency proceeding should not trigger an immediate conversion to a standard business insolvency proceeding. All efforts should be made to preserve effectiveness of a simplified insolvency regime in resolution of financial difficulties of eligible debtors.

370. Reasons for conversion of one type of a simplified insolvency proceeding to the other and of simplified insolvency proceedings to standard business insolvency proceedings have been addressed in preceding sections of the MSE Insolvency Guide. In summary, the MSE Insolvency Guide explicitly envisages, or does not exclude the possibility of: *(a)* conversion of a simplified reorganization proceeding to a simplified liquidation proceeding; *(b)* conversion of a simplified liquidation proceeding to a simplified reorganization proceeding; *(c)* conversion of a simplified insolvency proceeding to a standard business insolvency proceeding; and *(d)* conversion of one type of a simplified liquidation proceeding to the other (i.e. one involving a sale and disposal of the assets and distribution of proceeds to the other not involving such steps and vice versa). The need for conversion in those cases will be assessed by the competent authority.

371. The MSE Insolvency Guide envisages conversion of simplified reorganization to simplified liquidation where: *(a)* a reorganization plan is not presented for approval by creditors within the established deadline (See recommendation 71); *(b)* the original or modified plan failed to obtain required approval by creditors (See recommendation 77 *(d)*); *(c)* a challenge of the confirmed reorganization plan is successful (See recommendation 79 *(d)*); *(d)* there is a substantial breach by the debtor of the terms of the plan or inability to implement the plan (See

recommendation 82); or *(e)* it was established that the debtor is insolvent and there is no prospect for viable reorganization (See recommendation 83). Although not explicitly addressed in the text, such conversion may take place also if the competent authority is unable to confirm the plan approved by creditors for reasons specified in recommendation 78 or where the amended plan did not receive the required approval of creditors (See recommendation 80 *(c)*).

372. A conversion of a simplified liquidation proceeding to a simplified reorganization proceeding (for example, where business rescue finance became available to the MSE debtor after the commencement of the simplified liquidation proceeding) is not explicitly envisaged in the MSE Insolvency Guide because such conversion would be rare. The law providing for a simplified insolvency regime may need to establish a time point in the simplified liquidation process after which conversion to a simplified reorganization proceeding would not be possible and should also address whether, and if so, how the effects of the simplified liquidation proceeding would be preserved in a simplified reorganization proceeding.

373. Conversion of a simplified insolvency proceeding to a standard business insolvency proceeding may be justified by the complexity of the case. For example, the MSE Insolvency Guide envisages such conversion in case of the need to commence avoidance proceedings (See recommendation 46) or following verification of reasons for the objection to the closure of the proceeding as provided in recommendation 67. Conversion of a simplified liquidation proceeding to a different type of insolvency proceeding is envisaged also under recommendation 63 where an objection is raised to a liquidation schedule. A simplified reorganization proceeding may be converted to a different type of insolvency proceeding under recommendation 79 *(d)* if the confirmed reorganization plan is successfully challenged, or under recommendation 82 where there is a substantial breach by the debtor of the terms of the reorganization plan or inability to implement the plan. The phrase "a different type of insolvency proceeding" found in those recommendations should be interpreted depending on the context as encompassing not only another type of a simplified insolvency proceeding envisaged in the MSE Insolvency Guide but also a standard business insolvency proceeding (liquidation or reorganization).

374. Although outside the scope of the MSE Insolvency Guide, the conversion of a standard business insolvency proceeding to a simplified insolvency proceeding may also need to be envisaged in an insolvency law. The need for such conversion might arise for example after commencement of a standard business insolvency proceeding and confirmation by a competent State body that the debtor is eligible for a simplified insolvency proceeding and that an effective oversight of the debtor's liquidation or reorganization can better be ensured by the competent authority in a simplified insolvency proceeding (e.g. because of creditors' disengagement).

375. Conversion of proceedings should be differentiated from modifications within the same proceeding, such as displacement of the debtor-in-possession in simplified reorganization proceedings or introduction of a mediation stage to resolve disputes among creditors or between the debtor and its creditor(s). The insolvency law should allow the competent authority to introduce modifications on its own motion or upon request of any party in interest where the circumstances of the case so justify.

2. Procedures for conversion

Recommendation 98: Procedures for conversion

98. The insolvency law should address procedures for conversion, including notification to all known parties in interest about the conversion, and mechanisms for addressing objections to that course of action.

376. How conversion can be triggered is the question for the domestic insolvency law to address. It may be automatic once certain conditions are fulfilled, with the law allowing a dissenting party to challenge such an automatic conversion, or conversion may require application to a relevant State body by an interested party. Such body could also be given the power to convert on its own motion where certain conditions are met. Entries may be required to be made in relation to the debtor in relevant State records. For those reasons, the MSE Insolvency Guide defers these issues to the domestic law suggesting that the insolvency law should address procedures for conversion, including notification to all known parties in interest about conversion and mechanisms for addressing objections to that course of action.

377. Automatic conversion would help to avoid the delay and expense of a separate application by the party interested in conversion. It may not however always be desirable. For example, in some cases, even where the failure to implement the reorganization plan is attributable to a breach of obligation or the lack of a debtor's cooperation, creditors may prefer reorganization to liquidation to extract more value from the business. Instead of conversion to liquidation, they may opt for replacement of the debtor-in-possession with an independent professional. It may also be preferable to leave creditors to pursue their rights at law, without necessarily liquidating the debtor, in particular where the debtor commenced a reorganization proceeding to address financial difficulties at an early stage of financial distress. Serving an advance notice of intended conversion to all known parties in interest to allow them to object to that course of action may therefore be considered an essential safeguard.

378. A related question is whether a conversion is treated as a continuation of the originally filed proceeding or the formal closure of the originally filed proceeding and the commencement of a new proceeding. Approaches may vary depending on jurisdictions and the MSE Insolvency Guide defers that issue to the domestic law as well.

3. Effects of conversion

Recommendation 99: Effect of conversion on post-commencement finance

99. The insolvency law should specify that where a simplified reorganization proceeding is converted to a liquidation proceeding, any priority accorded to post-commencement finance in the simplified reorganization proceeding should continue to be recognized in the liquidation proceeding. (*See recommendation 68 of the Guide.*)

Recommendation 100: Other effects of conversion

100. The insolvency law should address other effects of conversion, including on deadlines for actions, the stay of proceedings and other steps taken in the proceeding being converted. (*See recommendation 140 of the Guide.*)

379. Regardless of the approach taken to conversion and its procedures (see the commentary to recommendation 98), implications of conversion on all steps in the proceedings should be carefully considered. Recommendations 99 and 100 single out from those steps post-commencement finance, deadlines for actions and the stay of proceedings in the light of their particular importance on the debtor and other parties in interest.

380. The MSE Insolvency Guide recommends that priority accorded to post-commencement finance in the simplified reorganization proceeding should be recognized in a subsequent liquidation proceeding. This measure is recommended in order to encourage the provision of such finance to financially distressed debtors undergoing reorganization.

381. As regards deadlines, adjustments may need to be made to the standard time periods that run from the effective date of commencement of an insolvency proceeding since some time may elapse between the commencement of the originally filed proceeding and its conversion. For example, where a simplified liquidation proceeding is converted to a reorganization proceeding, the insolvency law should address the impact of conversion on time periods for proposing a reorganization plan.

382. Clarity about the continued application of the stay and its scope in case of conversion would be essential for all parties in interest. In particular, the duration and the scope of the stay in simplified reorganization proceedings may be longer and broader than in simplified liquidation proceedings, in particular as far as encumbered assets are concerned that may be vital for successful reorganization of the debtor's business.

383. The insolvency law should address other implications of conversion, including: *(a)* the effect of the conversion on the exercise of avoidance powers in respect of payments made in the course of the reorganization proceedings; *(b)* the effect of the conversion on the timing of the suspect period; *(c)* the treatment of creditor claims that have been adjusted in the reorganization, that is, whether in any subsequent liquidation they are to be reinstated to the original value or enforced with the adjusted value as reflected in the approved and confirmed reorganization plan; and *(d)* any additional costs arising from conversion (e.g. the party requesting conversion may be required to provide security to cover additional costs). As noted in the commentary to recommendation 97, the insolvency law should also address whether and, if so, how the effects of the simplified liquidation proceeding would be preserved in a simplified reorganization proceeding.

P. Appropriate safeguards and sanctions

Recommendation 101: Appropriate safeguards and sanctions

101. The insolvency law providing for a simplified insolvency regime should build in appropriate safeguards to prevent abuses and improper use of a simplified insolvency regime and permit the imposition of sanctions for abuse or improper use of the simplified insolvency regime, for failure to comply with the obligations under the insolvency law and for non-compliance with other provisions of the insolvency law. (*See recommendations 20, 28 and 114 of the Guide.*)

384. Implementing an effective sanctions regime to prevent abuse or improper use of the simplified insolvency regime and to impose appropriate penalties for misconduct is listed among the key objectives of a simplified insolvency regime (See recommendation 1). Inclusion of that objective in the context of the simplified insolvency regime was considered justified because of the main features of a simplified insolvency regime: *(a)* simple, flexible, low-cost, expeditious and easily accessible and available procedures; *(b)* debtor-in-possession as the default

approach in simplified reorganization proceedings; and *(c)* the likely creditor disengagement and, as a consequence, the lack of creditors' effective control over the insolvency estate and the MSE debtor's actions during simplified insolvency proceedings (those features are discussed in more detail in the Introduction and section D of this commentary). In the light of those features, an effective system of sanctions has been considered necessary as a deterrent of possible abuses and improper use of a simplified insolvency regime and an essential means of achieving other objectives of a simplified insolvency regime such as ensuring protection of all parties in interest throughout simplified insolvency proceedings.

385. At the same time, in designing the sanctions regime, the underlying purpose of a simplified insolvency regime and the characteristics of its intended main users – MSEs – should not be overlooked. Sanctions should not be imposed with the aim to punish an MSE for any inappropriate or negligent step that it might take, perhaps due to its low sophistication in business, financial and insolvency matters. Such approach would run counter the goals of promoting entrepreneurship and sound risk-taking by honest and cooperative MSEs and would discourage MSEs to resolve their financial difficulties as early as possible by using a simplified insolvency regime.

386. For those reasons, the MSE Insolvency Guide focuses on building in appropriate support measures and safeguards that should aim at preventing mistakes, abuses and improper uses of a simplified insolvency regime from occurring. They in particular include provision of timely and affordable assistance and supervision to the MSE debtor with respect to the fulfilment of its obligations under the insolvency law before and throughout the simplified insolvency proceedings. They are supplemented by requirements for notices and notifications (See recommendations 18, 32 and 33 and section G) and the rights of any party in interest to raise objections, to be heard and request review (See recommendation 19). In addition, a range of options is made available to the competent authority and parties in interest for deployment when justified, in particular displacement of the debtor-in-possession in simplified reorganization proceedings where necessary (See recommendation 16) and conversion of proceedings (see section O above).

387. In addition to a general reference to an effective sanctions regime among the key objectives of a simplified insolvency regime, explicit references to sanctions are found in recommendations 31 and 39 that deal with denial of application for commencement of a simplified insolvency proceeding and a dismissal of the proceedings. In those cases, imposition of sanctions is listed as a possible consequence of denial or dismissal. The words "where appropriate" found in those provisions suggest that imposition of sanctions would not always be an appropriate measure. In the absence of wrongful intent, the competent authority may deny the application or dismiss the proceedings already commenced or commence a different type of insolvency proceedings than the one requested by the debtor or creditor(s) in

their application for commencement of insolvency proceedings, without imposing any sanctions or costs.

388. An explicit reference to sanctions and costs only in those two recommendations should not mean that in other cases the need for imposition of sanctions or costs would not arise in a simplified insolvency regime. The MSE Insolvency Guide highlights throughout the text other instances where imposition of sanctions or costs either on the debtor or creditors or other parties in interest may be appropriate in order to deter or punish abuses or improper uses of a simplified insolvency regime.

389. The MSE Insolvency Guide leaves it to the domestic law to specify when the competent authority would be required and where it will be allowed to impose sanctions and, if so, which one(s). Consideration should also be given to the parties to whom the sanctions should apply in the case of a legal person, for example, any person who generally might be described as being in control of that legal person, including directors and managers (see in that respect recommendations 20 and 102).

390. Sanctions may include denial of discharge, longer periods for obtaining a full discharge, other conditions attached to discharge, revocation of discharge granted and disqualification from taking up or pursuing a specific business activity or practising a particular profession. Sanctions under insolvency law may be accompanied by sanctions under other law, such as criminal law for more serious misconduct such as fraudulent, dishonest or bad faith behaviour.

391. To be effective, sanctions should be appropriate and proportionate. It would be unreasonable to impose the same sanctions for fraudulent, dishonest and bad faith behaviour as for less serious non-compliance with the insolvency law especially not involving wrongful intent. To be effective, sanctions should also be enforceable and imposed and enforced in a timely manner.

Q. Pre-commencement aspects

1. Obligations of persons exercising control over MSEs in the period approaching insolvency

Recommendation 102: Obligations of persons exercising control over MSEs in the period approaching insolvency

102. The law relating to insolvency should specify that, at the point in time when the persons exercising control over the business knew or should have known that

insolvency was imminent or unavoidable, they should have due regard for the interests of creditors and other stakeholders and take reasonable steps at an early stage of financial distress to avoid insolvency and, where it is unavoidable, to minimize the extent of insolvency. Reasonable steps might include:

(a) Evaluating the current financial situation of the business;

(b) Seeking professional advice where appropriate;

(c) Not committing the business to the types of transaction that might be subject to avoidance unless there is an appropriate business justification;

(d) Protecting the assets so as to maximize value and avoid loss of key assets;

(e) Ensuring that management practices take into account the interests of creditors and other stakeholders;

(f) Considering holding informal debt restructuring negotiations with creditors; and

(g) Applying for commencement of insolvency proceedings if it is required or appropriate to do so.

(*See recommendations 255, 256 and 257 of the Guide.*)

392. Due to their low sophistication in business, financial and insolvency matters and the lack of resources to have recourse to regular professional advice on those matters, MSEs may be unaware of their obligations during the time of financial difficulties, in particular that they are expected to exercise special care with respect to business, business assets, business transactions, creditors and employees and take actions to avoid insolvency or to minimize its extent. At the time of financial distress, MSEs may be inclined to collaborate with related persons or powerful creditors (e.g. by repaying the debt to only one bank or transferring business assets to related persons at an undervalue to secure additional loans) or to obtain goods or services on credit without any prospect of payment. As a consequence, they may face civil and criminal liability, including a longer period for discharge of their debts.

393. Recommendation 102 was included to make obligations of persons exercising control over MSEs in the period approaching insolvency more explicit. It draws on recommendations 255 and 256 of the Guide, adjusting obligations listed in recommendation 256 of the Guide to the specific context of MSEs. Ideally, the insolvency law providing for a simplified insolvency regime itself should list such obligations, for ease of reference and better clarity. The MSE Insolvency Guide, like the Guide, recognizes however that such obligations might be found in laws other than the insolvency law (such as the law on corporations or any laws and regulations specific to MSEs). For that reason, recommendation 102 refers to the

law relating to insolvency as the source of such obligations, rather than the insolvency law providing for a simplified insolvency regime.

394. The general obligation of persons exercising control over MSEs in the period approaching insolvency is found in the chapeau provision of recommendation 102, which states that such persons should have due regard to the interests of creditors and other stakeholders and to take reasonable steps at an early stage of financial distress to avoid insolvency and, where it is unavoidable, to minimize the extent of insolvency. The recommendation illustrates steps that might be considered reasonable for the purpose of fulfilling that general obligation. Some steps listed in recommendation 102, such as evaluating the current financial situation of the business (subparagraph *(a)*) or seeking professional advice (subparagraph *(b)*), would be expected to be taken by persons exercising control over MSEs continuously throughout the operation of an MSE regardless of whether MSE is in financial difficulty or not. Reference to professional advice may include pro bono, debt counselling services, mediation or other professional advice and services that may be made available specifically to MSEs by public or private entities in a given State. Some other steps listed in the recommendation may be more relevant at an early stage of financial distress or in the period approaching insolvency (e.g. holding informal debt restructuring negotiations).

395. In particular, under recommendation 24 of the MSE Insolvency Guide, applying for commencement of a simplified insolvency proceeding would be an option for MSEs at an early stage of financial distress. This is because recommendation 24 allows eligible debtors to apply for commencement of a simplified insolvency proceeding at an early stage of financial distress without the need to prove insolvency. The use of that option may allow the debtor to restructure debt in a timely manner and avoid insolvency. However, when insolvency of an MSE is actual, imminent or unavoidable, persons exercising control over the MSE would be under an obligation to commence an insolvency proceeding at the risk of facing civil and criminal liability under applicable domestic insolvency law for not doing so on time.

396. Recommendation 102 sets out the standard of behaviour with the consequence that, if such standard is not adhered to, personal liability may be imposed on persons exercising factual control over MSEs. The behaviour of such persons will be judged against knowledge, skills and experience actually possessed by such persons, or reasonably be expected of such persons. The obligations discussed above would attach to any person who exercised factual control over MSE at the time the business was facing actual or imminent insolvency, and may include persons who subsequently resigned but should exclude persons appointed after the commencement of the simplified insolvency proceeding.

397. Different persons may exercise factual control over MSEs. In the case of individual entrepreneurs, this will be an individual entrepreneur herself or himself; in the case of entities, such persons may include the owners, actual or formally appointed managers or directors[7] and individuals and entities acting as de facto[8] or "shadow" directors,[9] as well as persons to whom the powers or duties of a manager or director may have been delegated by the managers or directors.

398. Persons exercising factual control over the MSE business may also include special advisers and in some circumstances, banks and other creditors, when they are advising an MSE on how to address its financial difficulties. In some cases, that "advice" may amount to determining the exact course of action to be taken by the MSE and making the adoption of a particular course of action a condition of extending credit. Nevertheless, provided that the MSEs retains discretion to refuse the course of action dictated by outside advisers and the outside advisers are acting at arm's length, in good faith and in a commercially appropriate manner, it is desirable that such advisers not be considered as falling within the class of persons subject to any obligations listed in recommendation 102. If self-serving behaviour of such advisers prejudiced the position of other creditors, they may however face liability under insolvency law.

[7] There is no universally accepted definition of what constitutes a "director". A person might be regarded as a director when charged with making or do in fact make or ought to make key decisions with respect to the management of a company. They may be independent outsiders or officers or managers of a company serving as executive directors, referred to as "inside directors".

[8] A de facto director is generally considered to be a person who acts as a director but is not formally appointed as such or there is a technical defect in their appointment. A person may be found to be a de facto director irrespective of the formal title assigned to them if they perform the relevant functions. It may include anyone who at some stage takes part in the formation, promotion or management of the company. In MSEs, that will most likely include family members. Typically, more than simply involvement in the management of the company would be required. A de factor director status may be determined by a combination of acts, such as the signing of invoices or payment orders; signing of business correspondence as "director"; allowing customers, creditors, suppliers and employees to perceive a person as a director or "decision maker"; and making financial decisions about the future of business with banks, creditors and accountants.

[9] A "shadow" director may be a person not formally appointed as a director but in accordance with whose instructions the MSE is accustomed to act. Generally, shadow directors would not include professional advisers. To be considered a shadow director, the person should have the capacity to influence business decision making and to make financial and commercial decisions which bind the business. In some cases, the management may cede some or all of its management authority to the shadow director. In considering the conduct that might qualify a person to be a shadow director, it may be necessary to take into account the frequency of the conduct and whether or not the influence was actually exercised.

2. Early rescue mechanisms

Recommendation 103: Early rescue mechanisms

103. As a means of encouraging the early rescue of MSEs, a State should consider establishing mechanisms for providing early signals of financial distress to MSEs, increasing financial and business management literacy among MSE managers and owners and promoting their access to professional advice. These mechanisms should be available and easily accessible to MSEs.

399. The MSE Insolvency Guide recommends putting in place early rescue mechanisms with the aim to prevent MSE insolvencies. Those mechanisms may be different. The MSE Insolvency Guide highlights three: *(a)* providing MSE with early warning signals about their financial difficulties; *(b)* increasing financial and business management literacy among MSEs; and *(c)* promoting MSE access to professional advice.

400. Early warning tools may be put in place by States or by private entities to detect circumstances that could give rise to the likelihood of insolvency and can signal to an MSE the need to act without delay. Information technology solutions may in particular be helpful in automatically generating alert mechanisms, for example, when an MSE has not made certain types of payment (e.g. taxes or social security contributions). Non-payment of those contributions may, however, be the consequence of already serious financial problems. Certain professionals, such as tax advisers and accountants, may be in a position to identify signals of financial distress considerably earlier. The domestic law may build incentives for those professionals to flag signals of financial distress to MSEs once they are identified.

401. Insufficient knowledge of business management and financial transactions is cited as a common cause of business failure among MSEs, especially first-time starters. For this reason, the MSE Insolvency Guide recommends making available to MSEs educational tools to increase their financial and business management literacy and skills. Training on the usual factors that lead or contribute to financial distress, such as the loss of a key customer, supplier or contract, departure of a key employee or adverse changes in rental, supply or loan terms, may be supplemented by training on examination of the viability of the business and changes that may be required in expenditure, business and management practices.

402. MSEs may also benefit from professional advice on their financial situation, debt restructuring options and preparation of an application to commence insolvency proceedings or response to an application for commencement of an insolvency proceeding launched by a creditor. Mediation services may also be helpful for resolution

of disputes between MSE debtors and creditors and among creditors. For this reason, the MSE Insolvency Guide recommends promoting and facilitating the access of MSEs to professional advice. Such advice may be provided by public or private organizations, such as tax authorities, banks, chambers of commerce, professional associations as well as law and accounting firms in their pro bono programmes.

403. The MSE Insolvency Guide recommends making these mechanisms available and easily accessible by MSEs. Otherwise, they will not achieve the desired objective. Information about them may be made available, for example, on a dedicated website or web page of relevant State authorities in charge of MSE issues.

3. Informal debt restructuring negotiations

General

404. Unlike formal insolvency proceedings that involve all creditors, informal debt restructuring negotiations usually involve a limited number of creditors. This feature of informal debt restructuring negotiations may accommodate the need for a prompt resolution that is not always possible in formal proceedings. Informal debt restructuring negotiations also allow parties to preserve confidentiality, which helps to avoid the stigma attached to insolvency. In addition, they may provide debtors with the benefit of resolving their financial difficulties without affecting their personal credit scores, which is important for obtaining new finance and a fresh start. As an alternative to the need to file for formal insolvency proceedings every time MSEs want to restructure all or some of their debts at an early stage of financial distress, informal debt restructuring negotiations can effectively supplement a simplified insolvency regime and prevent it from being overwhelmed and not being able to fulfil its objectives.

405. For these reasons and also in the light of the expected advantages of informal debt restructuring negotiations in preventing the build-up of non-performing loans and over-indebtedness of MSEs, the MSE Insolvency Guide invites States to consider creating an enabling environment for holding informal debt restructuring negotiations. It recommends certain measures that would be conducive to creating such an environment.

Recommendation 104: *Removing disincentives for the use of informal debt restructuring negotiations*

104. For the purpose of avoiding MSE insolvency, the State may consider identifying and removing disincentives for the use of informal debt restructuring negotiations.

406. The MSE Insolvency Guide recommends that States may consider removing any explicit or implicit prohibitions or disincentives for engaging in informal debt restructuring negotiations. While in some jurisdictions informal debt restructuring negotiations are permitted or required to be exhausted by a debtor and its creditors before they can initiate formal insolvency proceedings, in other jurisdictions debt restructuring agreements or arrangements between a debtor in financial distress and some or all of its creditors cannot occur outside formal insolvency proceedings. In particular, an obligation found in the insolvency legislation of many countries to file for formal insolvency within a certain period after the occurrence of certain events creates obstacles to holding informal debt restructuring negotiations. Another common disincentive to holding them is insolvency law provisions on avoidance of transactions concluded during a certain period before filing for insolvency (a suspect period).

407. Disincentives for using informal debt restructuring negotiations may also be found in other laws. For example, tax regulations may allow writing off only those debts that were discharged in formal insolvency proceedings. They may permit only creditors to claim losses and tax deductions from debt write-offs but impose income tax on debtors whose debts are written off.

Recommendation 105: *Providing incentives for participation in informal debt restructuring negotiations*

105. The State may consider providing appropriate incentives for the participation of creditors, including public bodies, and other relevant stakeholders, in particular employees, in informal debt restructuring negotiations.

408. The MSE Insolvency Guide recommends that incentives may be built into the law for participation in informal debt restructuring negotiations. For example, monthly targets may be imposed on banks to successfully restructure debts of MSEs. Tax incentives may apply for writing off bad or renegotiated debts. Sanctions may be imposed on parties acting in bad faith during those negotiations and the law may stipulate that creditors will be bound by a reached settlement if they disregard attempts to hold negotiations.

409. In addition, informal debt restructuring negotiations have proved to be efficient when they rely on some features of formal insolvency processes, such as the statutory stay on enforcement and other proceedings against a debtor and its assets. Such statutory stay would allow the negotiations to progress without the threat that a single creditor may disrupt the entire process by filing for insolvency proceedings, commencing enforcement actions or suspending, terminating or modifying existing contracts with a debtor. A contract-based stay may be less effective

since creditors usually preserve the right to terminate it at any time at their discretion, bringing uncertainty and unpredictability to parties involved in informal debt restructuring negotiations. In addition, a contract-based stay on the payment of debts may trigger formal insolvency in some jurisdictions.

410. The insolvency law may also build in incentives for holding and participation in informal debt restructuring negotiations. In particular, it may exempt transactions arising from such negotiations from avoidance. It may also provide for an expedited mechanism for the approval of a debt restructuring plan resulting from informal debt restructuring negotiations if such approval is required by law or desired by negotiating parties. Usual safeguards would apply to ascertain that creditors that were not involved in negotiations are not affected by the plan and that adversely affected creditors are properly protected. Recommendations 160–168 of the Guide are relevant in that context.

Recommendation 106: *Institutional support with the use of informal debt restructuring negotiations*

106. The State may consider providing for:

(a) Involvement of a competent public or private body, where necessary, to facilitate informal debt restructuring negotiations between creditors and debtors and between creditors;

(b) A neutral forum to facilitate negotiation and resolution of debtor-creditor and inter-creditor issues; and

(c) Mechanisms for covering or reducing the costs of the services mentioned in subparagraphs *(a)* and *(b)* above.

411. The MSE Insolvency Guide recommends that the involvement of a competent public or private body as a facilitator of informal debt restructuring negotiations may be necessary in the MSE context. Such body should have sufficient authority and power to persuade key institutional creditors, such as tax authorities and banks, to participate in informal debt restructuring negotiations with MSEs. It should also have capacity to ensure oversight to prevent abuses (e.g. creditors may use their bargaining power to refuse to agree to any modifications of their claims or pressure debtors into accepting onerous plans that are not viable and would not be acceptable in formal proceedings). Such body should also be expected to ensure that non-viable businesses with no prospect of survival enter liquidation as quickly as possible to avoid the acceleration and accumulation of losses to the detriment of creditors, employees and other stakeholders, as well as the economy as a whole.

412. Such body could be a State authority in charge of administering negotiations between a debtor and its creditors (e.g. a central bank, a central debt-counselling agency, a commission for over-indebtedness or the debt enforcement authority). In other systems, debtors may rely on counselling and negotiation support from semi-private or private sector actors.

413. There may also be a need for a neutral forum to facilitate negotiation and resolution of debtor-creditor and inter-creditor issues. It could be an existing arbitration or mediation facility or small claim tribunals. Alternatively, a State authority in charge of administering negotiations between a debtor and its creditors may be authorized to appoint an ad hoc arbitrator or mediator for the process.

414. The MSE Insolvency Guide recommends putting in place mechanisms for covering or reducing the costs of services of a competent public or private body that may need to be involved in facilitating informal debt restructuring negotiations between creditors and debtors and among creditors. Mechanisms should also exist for covering or reducing the costs of services of a neutral forum that may be involved in facilitating negotiation and resolution of debtor-creditor and inter-creditor issues. Some mechanisms discussed in the commentary to recommendation 10 may be relevant in this context (e.g. creating incentives for pro bono services to MSEs).

4. Pre-commencement business rescue finance

Recommendation 107: Pre-commencement business rescue finance

107. The law should:

(a) Facilitate and provide incentives for finance to be obtained by MSEs in financial distress before commencement of insolvency proceedings for the purpose of rescuing business and avoiding insolvency;

(b) Subject to proper verification of appropriateness of that finance and protection of parties whose rights may be affected by the provision of such finance, provide appropriate protection for the providers of such finance, including the payment of such finance provider at least ahead of ordinary unsecured creditors;

(c) Provide appropriate protection for those parties whose rights may be affected by the provision of such finance.

415. The success of attempts to rescue business and avoid insolvency very often depends on whether there are financial resources in place to support the operation

of the business. Financial resources for MSEs are likely to come from existing lenders, clients or suppliers who are interested in an ongoing relationship with the MSE. Those parties may be interested in advancing new funds or providing trade credit in order to enhance the likelihood of recovering their existing claims. The MSE Insolvency Guide recommends that the law should create inducements and incentives for such creditors to make pre-commencement business rescue finance available to MSEs. Without them, the access of an MSE to fresh credit is substantially hindered.

416. Creditors usually agree to provide new funding on the condition that priority status will be accorded to the new funding or additional security over the assets of the MSE will be given. Those creditors who participate in informal debt restructuring negotiations may agree among themselves that, if one or more of them extends further credit, the others will subordinate their claims to enable the new credit to be repaid ahead of their own claims. In those cases, as among those creditors, there will be a contractual agreement for the repayment of new money where the informal debt restructuring negotiations are successful and the business is rescued.

417. If a business rescue fails despite that additional funding and, as a consequence, insolvency proceedings must be commenced, creditors would want to find in the law some protection for their pre-commencement business rescue finance, in particular that the provision of such finance would be protected from avoidance. They would also want to avoid facing civil, administrative or criminal liability for providing such finance, such liability being often imposed on lenders for extending new finance to businesses in financial distress. In addition, they would want to be ranked ahead of unsecured creditors.

418. To encourage creditors to provide pre-commencement business rescue finance, the MSE Insolvency Guide recommends that the law should ensure appropriate protection for the providers of such finance. In particular, giving to providers of pre-commencement business rescue finance priority in payment at least over unsecured claims in any subsequent insolvency proceedings could create a strong incentive to existing creditors to provide fresh finance to MSEs since they could otherwise be subordinated to new lenders providing such finance.

419. At the same time, the MSE Insolvency Guide recognizes that measures to encourage the provision of pre-commencement business rescue finance should be balanced against other considerations, such as the 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 pre-existing security rights and priorities. It is also important to consider the impact of pre-commencement business rescue finance on unsecured creditors who may see the remaining unencumbered assets disappear

to secure new lending. The MSE Insolvency Guide therefore recommends that the law should provide for appropriate protection for those parties whose rights may be affected by the provision of pre-commencement business rescue finance.

420. Safeguards may take different forms, including ex ante or ex post controls over such finance by public and private institutions, such as regulatory bodies overseeing the banking and credit sector or those that are tasked with assisting MSEs in raising finance. Such controls should give confidence and comfort to affected parties that protection for the providers of pre-commencement business rescue finance, including from avoidance and personal liability, is extended only for new funding provided in good faith and immediately necessary for the rescue of the business and its continued operation or the preservation or enhancement of the value of that business. There should also be assurances that the prospect of the continued operation of the business will benefit the affected parties.

Annex to the commentary to the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises

Table 1. Table of concordance between the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises and recommendations in the UNCITRAL Legislative Guide on Insolvency Law

UNCITRAL Legislative Recommendations on Insolvency of Micro— and Small Enterprises	Recommendation(s) of the UNCITRAL Legislative Guide on Insolvency Law used as the starting point
Key objectives of a simplified insolvency regime (recommendation 1): in addition to listing key objectives of a simplified insolvency regime, recommendation 1 cross-refers to the objectives of an effective insolvency law	Recommendations 1 to 5
Application to all MSEs (recommendation 2)	Recommendations 8 and 9
Comprehensive treatment of all debts of individual entrepreneurs (recommendation 3)	—
Types of simplified insolvency proceedings (recommendation 4)	Recommendation 2
Competent authority (recommendations 5–7)	Recommendation 13
Independent professional (recommendations 5 and 7–9)	No equivalent but recommendations 115–125 of the Guide are relevant where an independent professional performs functions of the insolvency representative
Support with the use of a simplified insolvency regime (recommendation 9)	—
Mechanisms for covering costs of administering simplified insolvency proceedings (recommendation 10)	Recommendations 26 and 125
Default procedures and treatment (recommendation 11)	—
Short time periods (recommendation 12)	No equivalent but see a footnote to recommendation 43
Reduced formalities (recommendation 13)	—
Debtor-in-possession in simplified reorganization proceedings (recommendations 14–16)	Recommendations 112 and 113
Possible involvement of the debtor in the liquidation of the insolvency estate (recommendation 17)	Id.
Deemed approval (recommendation 18)	No equivalent but recommendation 127 is relevant

UNCITRAL Legislative Recommendations on Insolvency of Micro— and Small Enterprises	**Recommendation(s) of the UNCITRAL Legislative Guide on Insolvency Law used as the starting point**
Rights and obligations of parties in interest: • Recommendation 19 (a) • Recommendation 19 *(b)* • Recommendation 19 *(c)*	 Recommendations 137 and 138 Recommendations 108, 111 and 126 Recommendation 109
Obligations of the debtor (recommendation 20)	Recommendations 110 and 111
Protection of employees' rights and interests in simplified insolvency proceedings (recommendation 21)	—
Eligibility (recommendation 22)	Recommendations 8, 9 and 14–16
Commencement criteria and procedures (recommendation 23)	The text preceding recommendation 14 describing purpose of legislative provisions
Application by the debtor (recommendation 24)	Recommendation 15
Information to be included in the application (recommendation 25)	—
Effective date of commencement (recommendation 26)	Recommendation 18
Commencement on creditor application (recommendation 27)	Recommendation 19
Denial of application (recommendations 28–31)	Recommendations 20 and 21
Notice of commencement of proceedings (recommendation 32)	Recommendations 23 and 24
Content of the notice of commencement of a simplified insolvency proceeding (recommendation 33)	Recommendation 25
Creditor objection to the commencement of a simplified insolvency proceeding (recommendation 34)	—
Possible consequences on claims of creditors not notified of the commencement of the simplified insolvency proceeding (recommendation 35)	—
Dismissal of the proceeding (recommendations 36–39)	Recommendations 27–29
Procedures for giving notices (recommendation 40)	Recommendations 22 and 23
Individual notification (recommendation 41)	Recommendation 24
Appropriate means of giving notice (recommendation 42)	Recommendation 23

UNCITRAL Legislative Recommendations on Insolvency of Micro— and Small Enterprises *(continued)*	**Recommendation(s) of the UNCITRAL Legislative Guide on Insolvency Law used as the starting point *(continued)***
Constitution of the insolvency estate: • Recommendation 43 (a) • Recommendation 43 *(b)*	 • Recommendation 35 • Recommendations 38 and 109
Undisclosed or concealed assets (recommendation 44)	—
Date from which the insolvency estate is to be constituted (recommendation 45)	Recommendation 37
Avoidance in simplified insolvency proceedings (recommendation 46)	No equivalent but recommendations 87–99 of the Guide are relevant
Scope and duration of the stay (recommendation 47)	Recommendations 46, 47, 49 and 51
Rights not affected by the stay (recommendation 48)	Recommendations 47, 50, 51 and 54
Claims affected by simplified insolvency proceedings (recommendation 49)	Recommendations 171 and 172
Admission of claims on the basis of the list of creditors and claims prepared by the debtor (recommendation 50)	Recommendations 110 *(b)* (v) and 170
Submissions of claims by creditors (recommendation 51)	Recommendations 169, 170, 174 and 175
Admission or denial of claims (recommendation 52)	Recommendations 177, 179 and 184
Prompt notice of denial of claims or subjecting them to a special scrutiny or treatment (recommendation 53)	Recommendations 177 and 181
Treatment of disputed claims (recommendation 54)	Recommendation 180
Effects of admission (recommendation 55)	Recommendation 183
Decision on a procedure to be used (recommendation 56)	—
Preparation of the liquidation schedule (recommendation 57)	—
Time period for preparing a liquidation schedule (recommendation 58)	—
Minimum contents of the liquidation schedule (recommendation 59)	—
Notification of the liquidation schedule to all known parties in interest (recommendation 60)	—
Prior review of the liquidation schedule by the competent authority (recommendation 61)	—

UNCITRAL Legislative Recommendations on Insolvency of Micro— and Small Enterprises	**Recommendation(s) of the UNCITRAL Legislative Guide on Insolvency Law used as the starting point**
Approval of the liquidation schedule (recommendation 62)	—
Treatment of objections (recommendation 63)	—
Prompt distribution of proceeds in accordance with the insolvency law (recommendation 64)	Recommendations 193
Notice of a decision to proceed with the closure of the proceeding (recommendation 65)	—
Decision to close the proceeding in the absence of objection (recommendation 66)	—
Treatment of objections (recommendation 67)	—
Preparation of a reorganization plan (recommendation 68)	—
Time period for the proposal of a reorganization plan (recommendation 69)	Recommendation 139
Notice of the time period established for the proposal of a reorganization plan (recommendation 70)	—
Consequences of not submitting the reorganization plan within the established time period (recommendation 71)	Recommendation 158 (a)
Alternative plan (recommendation 72)	—
Content of the reorganization plan (recommendation 73)	Recommendations 143 (d) and 144
Notification of the reorganization plan to all known parties in interest (recommendation 74)	—
Effect of the plan on unnotified creditors (recommendation 75)	Recommendation 146
Undisputed reorganization plan (recommendation 76)	—
Disputed plan (recommendation 77)	Recommendations 155, 156 and 158
Confirmation of the plan by the competent authority (recommendation 78)	Recommendation 152
Challenges to the confirmed plan (recommendation 79)	Recommendations 154 and 158 (d)
Amendment of a plan (recommendation 80)	Recommendations 155 and 156
Supervision of the implementation of the plan (recommendation 81)	Recommendation 157

UNCITRAL Legislative Recommendations on Insolvency of Micro— and Small Enterprises *(continued)*	**Recommendation(s) of the UNCITRAL Legislative Guide on Insolvency Law used as the starting point *(continued)***
Consequences of the failure to implement the plan (recommendation 82)	Recommendations 158 (e) and 159
Conversion of a simplified reorganization to a liquidation (recommendation 83)	—
Decision on discharge in simplified liquidation proceedings (recommendation 84)	—
Discharge conditional upon expiration of a monitoring period (recommendation 85)	Recommendation 194
Discharge conditional upon the implementation of a debt repayment plan (recommendation 86)	—
Discharge in simplified reorganization proceedings (recommendation 87)	—
Conditions for discharge (recommendation 88)	Recommendation 196
Exclusions from discharge (recommendation 89)	Recommendation 195
Criteria for denying discharge (recommendation 90)	—
Criteria for revoking a discharge granted (recommendation 91)	Recommendation 194
Closure of proceedings (recommendation 92)	Recommendations 197 and 198
Treatment of personal guarantees (recommendation 93)	—
Orders of procedural consolidation and coordination (recommendation 94)	—
Modification or termination of an order for procedural consolidation or coordination (recommendation 95)	—
Notice of procedural consolidation and coordination (recommendation 96)	—
Conditions for conversion (recommendation 97)	—
Procedures for conversion (recommendation 98)	—
Effect of conversion on post-commencement finance (recommendation 99)	Recommendation 68
Other effects of conversion (recommendation 100)	Recommendation 140
Appropriate safeguards and sanctions (recommendation 101)	Recommendations 20, 28 and 114
Obligations of persons exercising control over MSEs in the period approaching insolvency (recommendation 102)	Recommendations 255, 256 and 257

UNCITRAL Legislative Recommendations on Insolvency of Micro— and Small Enterprises	**Recommendation(s) of the UNCITRAL Legislative Guide on Insolvency Law used as the starting point**
Early rescue mechanisms (recommendation 103)	—
Removing disincentives for the use of informal debt restructuring negotiations (recommendation 104)	—
Providing incentives for participation in informal debt restructuring negotiations (recommendation 105)	—
Institutional support with the use of informal debt restructuring negotiations (recommendation 106)	—
Pre-commencement business rescue finance (recommendation107)	—

Table 2. Table of concordance between recommendations of the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises

Recommendations of the UNCITRAL Legislative Guide on Insolvency Law	**UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises where the same or similar subject is addressed, if at all**
Key objectives of an effective and efficient insolvency law: • Recommendations 1–5 • Recommendations 6 and 7	Key objectives of a simplified insolvency regime: • Recommendation 1 • No equivalent but the gist of recommendations 6 and 7 is reflected throughout the text
Eligibility (recommendations 8–9)	No equivalent but the gist of recommendations 8–9 is reflected in recommendation 2 (application to all MSEs). See also recommendation 22 on eligibility
Jurisdiction (recommendations 10–12)	No equivalent but recommendations 10–12 of the Guide are applicable mutatis mutandis in a simplified insolvency context
Competent courts (recommendation 13)	Recommendation 5
Persons permitted to apply (recommendation 14)	Recommendation 22
Debtor application (recommendation 15)	Recommendation 24

Recommendations of the UNCITRAL Legislative Guide on Insolvency Law ***(continued)***	**UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises where the same or similar subject is addressed, if at all** ***(continued)***
Creditor application (recommendation 16)	Recommendation 27
Presumption that the debtor is unable to pay (recommendation 17)	Commentary to recommendation 27 refers to recommendation 17 of the Guide and a footnote thereto
Commencement on debtor application (recommendation 18)	Recommendation 26
Commencement on creditor application (recommendation 19)	Recommendation 27
Denial of an application to commence proceedings (recommendations 20–21)	Recommendations 28–31
Notices of commencement of proceedings (recommendations 22–24)	Recommendations 32 and 40
Content of the notice (recommendation 25)	Recommendation 33
Debtors with insufficient assets (recommendation 26)	Recommendation 10
Dismissal of insolvency proceedings after commencement (recommendations 27–29)	Recommendations 36–39
Applicable law in insolvency proceedings (recommendations 30–34)	No equivalent but recommendations 30–34 of the Guide are applicable mutatis mutandis in a simplified insolvency context
Assets constituting the insolvency estate (recommendations 35–38)	Recommendations 43–45
Protection and preservation of the insolvency estate (recommendations 39–51)	Recommendations 47–48
Use and disposal of assets (recommendations 52–62)	No equivalent but recommendations 52–62 of the Guide are applicable mutatis mutandis in a simplified insolvency context. See the relevant footnote to recommendation 15
Post-commencement finance (recommendations 63–68)	No equivalent but recommendations 63–68 of the Guide are applicable mutatis mutandis in a simplified insolvency context. See the relevant footnote to recommendation 15
Treatment of contracts (recommendations 69–86)	No equivalent but recommendations 69–86 of the Guide are applicable mutatis mutandis in a simplified insolvency context. See the relevant footnote to recommendation 15
Avoidance proceedings (recommendations 87–99)	Recommendation 46

Recommendations of the UNCITRAL Legislative Guide on Insolvency Law	**UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises where the same or similar subject is addressed, if at all**
Rights of set-off (recommendation 100)	No equivalent but recommendation 100 of the Guide is applicable mutatis mutandis in a simplified insolvency context. See the relevant footnote to recommendation 15
Financial contracts and netting (recommendations 101–107)	No equivalent but recommendations 101–107 of the Guide are applicable mutatis mutandis in a simplified insolvency context. See the relevant footnote to recommendation 15
Participants:	
• The debtor (recommendations 108–114)	Recommendations 14–17, 19–20 and 101
• The insolvency representative (recommendations 115–124)	No equivalent but recommendations 115–124 of the Guide are applicable mutatis mutandis in a simplified insolvency context where an independent professional performs functions of the insolvency representative in simplified insolvency proceedings
• Estates with insufficient assets to meet the costs of administration (recommendation 125)	Recommendation 10
• Participation by creditors (recommendation 126)	Recommendations 18, 19 and 53
• Voting by creditors (recommendation 127)	No equivalent but the gist of recommendation 127 of the Guide is reflected in recommendation 18 of the text
• Convening meetings of creditors (recommendation 128)	—
• Creditor committee-related provisions (recommendations 129–136)	—
• Party in interest's right to be heard and to appeal (recommendations 137 and 138)	Recommendation 19
The reorganization plan (recommendations 139–159)	Recommendations 68–83
Expedited reorganization proceedings (recommendations 160–168)	—
Treatment of creditor claims (recommendations 169–184)	Recommendations 49–55
Priorities and distribution of proceeds (recommendations 185–193)	No equivalent but recommendations 185–193 of the Guide are applicable mutatis mutandis in a simplified insolvency context. See recommendation 64

Recommendations of the UNCITRAL Legislative Guide on Insolvency Law ***(continued)***	**UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises where the same or similar subject is addressed, if at all** ***(continued)***
Discharge (recommendations 194–196)	Recommendations 84–91
Closure of proceedings (recommendations 197–198)	Recommendation 92
Treatment of enterprise groups (recommendations 199–254)	—
Directors' obligations in the period approaching insolvency:	
• Recommendations 255–258	• Recommendation 102
• Recommendations 259–266	• No equivalent but recommendations 259–266 of the Guide are applicable mutatis mutandis in a simplified insolvency context
• Recommendations 267–270	• —

Annex.
Decision of the United Nations Commission on International Trade Law[1]

In accordance with the procedure for taking decisions of UNCITRAL during the COVID-19 pandemic, the Commission adopted the following decision on 12 July 2021:

"*The United Nations Commission on International Trade Law,*

"*Recognizing* the importance of effective, efficient and predictable insolvency regimes for investment, entrepreneurial activity, employment, economic recovery and sustainable development,

"*Recalling* that the UNCITRAL Legislative Guide on Insolvency Law provides for key elements of an effective, efficient and predictable insolvency regime,

"*Acknowledging* the important role of micro- and small businesses in economies around the globe,

"*Convinced* that it is in the interest of all States to resolve financial difficulties of micro- and small businesses effectively and efficiently at an early stage of financial distress,

"*Concerned* that standard business insolvency processes designed for large and medium-sized enterprises may not be suitable for micro- and small businesses, or their cost may be prohibitive for micro- and small businesses in financial distress,

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 77.

"*Recognizing* that expeditious, simple, flexible and low-cost proceedings should be made available and easily accessible to micro- and small businesses at an early stage of their financial distress in order to enable their fresh start,

"*Taking note of* special socioeconomic policy considerations involved in the design of simplified insolvency proceedings for micro- and small businesses in the light of characteristics of such enterprises, in particular the prevalence of comingled personal and business assets and debts, and the need to address specificities of their insolvencies, such as creditor disengagement and concerns over stigmatization because of insolvency,

"*Recalling* in that context the mandate given to Working Group V (Insolvency Law),[2]

"*Expressing its appreciation* to the Working Group for preparing a draft UNCITRAL legislative guide on insolvency law for micro- and small enterprises that offers solutions to enable expeditious liquidation of non-viable MSEs and reorganization of viable micro- and small businesses at an early stage of their financial distress,

"*Appreciating* the participation in, and support for, that work of relevant international intergovernmental and non-governmental organizations,

"*Noting with approval* the collaboration between the Working Group and the World Bank Group towards facilitating the development of a unified international standard in the area of insolvency law, encompassing provisions on MSE insolvency,

"1. *Adopts* the Legislative Recommendations on Insolvency of Micro- and Small Enterprises, annexed to the report of the United Nations Commission on International Trade Law on the work of its fifty-fourth session;[3]

"2. *Approves in principle* the draft commentary to the Legislative Recommendations contained in the working papers of Working Group V[4] and in a note by the Secretariat,[5] with amendments adopted by the Commission at its fifty-fourth session;[6]

[2] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.
[3] Ibid., *Seventy-sixth Session, Supplement No. 17* (A/76/17), annex II.
[4] A/CN.9/WG.V/WP.172 and A/CN.9/WG.V/WP.172/Add.1.
[5] A/CN.9/1077.
[6] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 64–75.

"3. *Requests* the secretariat to revise the draft commentary in the light of those amendments and other relevant deliberations of the Commission and transmit the revised text for review and approval by the Working Group at its fifty-ninth session in December 2021;

"4. *Requests* the Working Group to decide at its fifty-ninth session, in December 2021, whether the approved text should be considered final or should be transmitted for finalization and adoption by the Commission at its fifty-fifth session, in 2022."[7]

[7] For the action by the Working Group, at its fifty-ninth session, on the text, see A/CN.9/1088, paras. 17 and 18. For the action by the General Assembly on the *Legislative Recommendations on Insolvency of Micro- and Small Enterprises*, see General Assembly resolution 76/229 of 24 December 2021, para. 2.

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