



Introduction to UNCITRAL commencement standards

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Commencement aspects generally

- Main text – the UNCITRAL Legislative Guide on Insolvency Law
- Some related provisions are in MLCBI – presumption of insolvency (article 31)
- Commencement is addressed in the contexts of:
 - Standard business insolvency proceedings (recs. 14-29)
 - Expedited reorganization proceedings (recs. 160-165)
 - Enterprise group insolvency (recs. 199-200)
 - Simplified insolvency proceedings for MSEs (recs. 292-309)

Not all aspects are covered in this session!

- Overall goals, inter alia:
 - Global rescue culture
 - Effective and efficient insolvency proceedings
 - Ease of access
 - Safeguards against abuses

Commencement standard

Eligible applicants:

- Debtors (cessation of payments (actual or imminent) (1) vs. balance sheet (2))
- In case of MSEs, at an early stage of financial distress without the need to prove insolvency
- Creditors of insolvent debtors, subject to certain safeguards for the debtor
- Special rules for commencement of expedited reorganization proceedings and in the context of enterprise group insolvency

Types of commencement

- Dual vs. unitary approaches
- Automatic vs. almost automatic vs. not automatic (assisted by presumptions)
- Link to denial/dismissal, conversion, sanctions and other safeguards

Why important?

- Many important consequences flow from the commencement of insolvency proceedings
- For all parties in interest (the debtor, creditors, employees, etc.)
- E.g.:

- Constitution of the insolvency estate
- Possible displacement of the debtor
- Stay of proceedings
- Rights, obligations, causes of action and possible liabilities arising by operation of insolvency law (e.g. avoidance and suspect period, actions against directors)
- Treatment of claims (pre- and post-commencement, set-off)
- Treatment of contracts, including ipso facto clauses



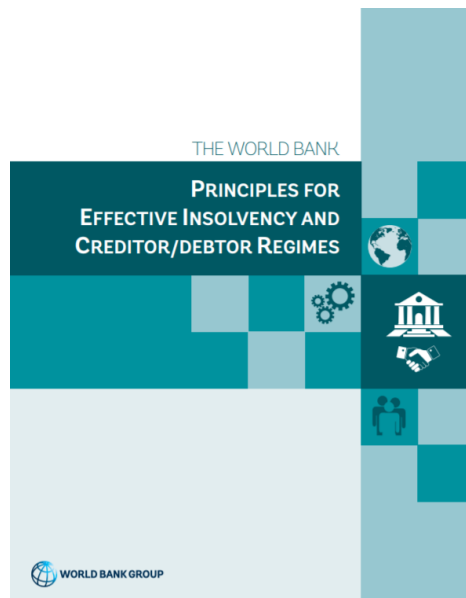
World Bank Group ICR Principles



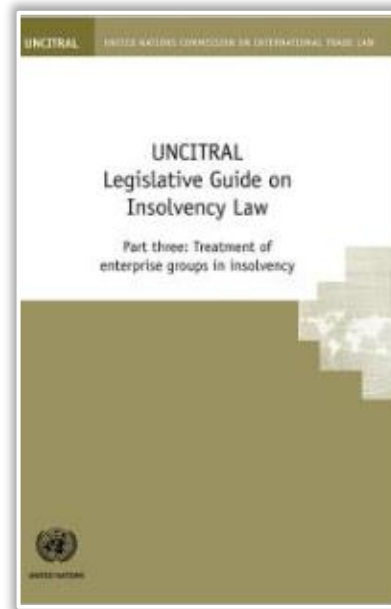
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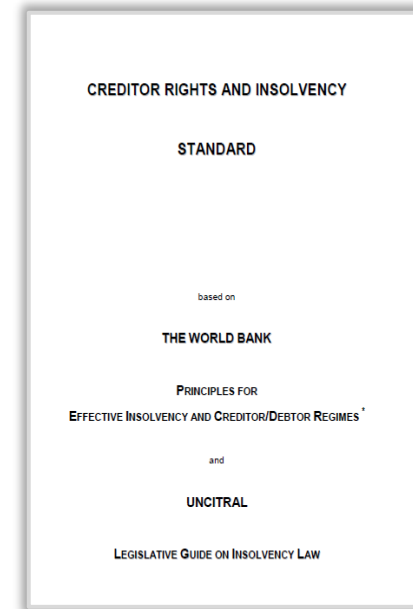
- ✓ Key International Instruments that Guide Effective Insolvency Regimes and Creditor/Debtor Regimes



WB ICR Principles



UNCITRAL Legislative Guide



Unified Standard for ICR

World Bank ICR Principles

- ✓ We assist governments in improving their credit environments through the development of more effective insolvency systems and creditor/debtor regimes.
- ✓ This is achieved through international standard-setting, detailed diagnostics, and technical assistance for implementation.
- ✓ Principles are a distillation of international best practice **and do not offer detailed prescriptions for national systems**

The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes



- 1. Commencement tests**
- 2. Safeguards against abuse or improper use of insolvency proceedings**
- 3. Measures to ensure timely, efficient and cost-effective processing of applications for commencement**

Commencement - Tests

C4 **Applicability and Accessibility**

- C4.1** Access to the system should be efficient and cost-effective. Both debtors and creditors should be entitled to apply for insolvency proceedings.
- C4.2** Commencement criteria and presumptions about insolvency should be clearly defined in the law. The preferred test to commence an insolvency proceeding should be the debtor's inability to pay debts as they mature, although insolvency may also exist where the debtor's liabilities exceed the value of its assets, provided that the values of assets and liabilities are measured on the basis of fair-market values.⁷
- C4.3** Debtors should have easy access to the insolvency system upon showing proof of basic criteria (insolvency or financial difficulty).
- C4.4** Where the application for commencement of a proceeding is made by a creditor, the debtor should be entitled to prompt notice of the application, an opportunity to defend against the application, and a prompt decision by the court on the commencement of the case or the dismissal of the creditor's application.

Commencement – Tests – Some Key Issues

1. Factors that guide the court to avoid a premature finding of insolvency and liquidating an applicant when applying the “cash flow” commencement standard;

2. Experiences in both common law and civil law jurisdictions with the use of the balance sheet test and/or the cash flow test;

3. Relationship between the commencement standard and the broader goals of insolvency.

Commencement - Safeguards against abuse or improper use of insolvency proceedings

D6 Integrity of the System

- D6.1 Integrity of the court.** The system should guarantee security of tenure and adequate remuneration of judges, personal security for judicial officers, and the security of court buildings. Court operations and decisions should be based on firm rules and regulations to avoid corruption and undue influence.
- D6.2 Conflict of interest and bias.** The court must be free of conflicts of interest, bias, and lapses in judicial ethics, objectivity, and impartiality.
- D6.3 Integrity of participants.** Persons involved in a proceeding must be subject to rules and court orders designed to prevent fraud, other illegal activity, and abuse of the insolvency and creditor rights system. In addition, the court must be vested with appropriate powers to enforce its orders and address matters of improper or illegal activity by parties or persons appearing before the court with respect to court proceedings.

Commencement – Safeguards – Some Key Issues

1. Possible ways in which the insolvency process can be abused, both by the debtor and the creditors.

2. Possible safeguards against abuse in the hands of the judiciary.

3. Striking the right balance in preventing abuse while ensuring timely, efficient and cost-effective processing of applications for commencement.

Commencement - Measures to ensure timely, efficient and cost-effective processing of applications for commencement

C19 Simplified Insolvency Proceedings

The law should establish simplified insolvency proceedings for reorganization and liquidation of MSEs, which should include the following key features:

C19.1 Eligibility

Simplified insolvency proceedings should apply to both juridical and natural persons classified as MSEs by each particular country, according to well defined and simple eligibility criteria specified by the law.²⁰

All personal and business debts of a natural person should be included in simplified insolvency proceedings.

Simplified insolvency proceedings may be made mandatory or optional for use by eligible debtors.

C19.2 Commencement Criteria

Debtors should have easy access to simplified reorganization proceedings in case of insolvency and also at an early stage of financial difficulty. The law should establish a debtor's filing showing proof of basic criteria as a rebuttable presumption of insolvency or financial difficulty.

MSEs liquidation proceedings may be commenced on the application of a creditor provided that it is established that the debtor is insolvent.²¹

Commencement – Efficiency – Some Key Issues

1. The role of the legislative framework in encouraging timely, efficient and cost-effective processing of applications for commencement;

2. Case management practices targeted at timely, efficient and cost-effective processing of applications for commencement;

3. Approaches taken to commencement of insolvency proceedings in MSE-specific legislative frameworks.

THANK YOU

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