

Background Note and Overview of Topic

This background note is prepared for attendees of the second session of the UNCITRAL-World Bank Group Judicial Capacity-Building Initiative on International Best Practices in Insolvency Law (the Initiative).¹ A key objective of the Initiative is to allow an exchange of views and experiences between judges from different jurisdictions, in order to promote a more effective handling of domestic insolvency cases and learning about recommended international best practices in the area of insolvency law. Each session focuses on a different topic. The chosen topic for the second session of the Initiative is the commencement standards in insolvency law.

The purpose of this background note is to outline the scope of the topic and articulate the key international best practice guidance relevant to the topic. The guidance is contained in the Financial Stability Board-designated international standards on insolvency law, the World Bank's *Principles for Effective Insolvency and Creditor/Debtor Regimes* (the "Principles") and UNCITRAL's *Legislative Guide on Insolvency Law* (the "Legislative Guide"), together referred to as the International Insolvency Standard. Annexed to this background note is an extract of the relevant provisions.

Commencement criteria are of critical importance to the overall functioning of the insolvency framework. They determine when an insolvency proceeding may be commenced, parties permitted to request commencement and whether commencement procedures should change depending on whether it is the debtor or a creditor requesting commencement. They are used by the judiciary and other competent authorities in charge of insolvency proceedings (collectively referred to as the "courts") to fulfil their role of the guardian of the insolvency law and the gatekeeper to insolvency proceedings.

Under the International Insolvency Standard, the courts, when applying and interpreting the commencement standards, would be expected to balance two competing considerations: (a) ease of access to insolvency proceedings; and (b) prevention of improper use of insolvency proceedings. Examples of improper use may include:

- (a) application for commencement of insolvency proceedings by a debtor that is not in financial difficulty in order to take improper advantage of the protections provided by the insolvency law, such as the automatic stay, or to avoid or delay payment to creditors; and
- (b) application for commencement of insolvency proceedings by creditors who are competitors of the debtor, where the purpose of the application is to take advantage of insolvency proceedings to disrupt the debtor's business and thus gain a competitive edge.

Accordingly, the themes that will be considered in the session as relevant to judges when they apply and interpret the commencement standards applicable in their jurisdictions are as follows: (a) the application of tests for the commencement of insolvency proceedings (balance sheet vs. cash-flow tests); (b) accompanying safeguards against abuses and improper use of insolvency proceedings; and (c) how the application of those safeguards are balanced against the requirements of time- and cost-efficiency and ease of access in insolvency law. The following sections provide an overview of the guidance relevant to these themes.

The session will not cover: (a) eligibility requirements (i.e. persons permitted to apply, including the treatment of debtors with insufficient assets as well as entities, such as state-owned enterprises (SOEs), consumers, financial institutions and insurance agencies that may be subject to special insolvency regimes, and whether it is only the debtor or also creditors that may apply for the commencement of insolvency proceedings); (b) provisional measures and measures upon commencement of insolvency proceedings (e.g. notices and notifications, a stay of proceedings, appointment of an insolvency representative); and (c) the composition and scope of the insolvency

¹ The first iteration of the initiative took place in 2021. More detail can be found here: <https://uncitral.un.org/en/content/uncitral-world-bank-group-judicial-capacity-building-initiative-international-best-practices>.

estate. The discussion of abuse / improper use will focus only on the risk of abuse at the stage of commencement, not throughout the insolvency process.

A – Commencement tests

A1 - Outline of International Insolvency Standard Guidance

The International Insolvency Standard acknowledges the existence of various tests for the commencement of insolvency proceedings. It prefers the “cash flow” test (also known as the “liquidity” or “cessation of payments” test). This test can be defined as the inability of the debtor to pay its debts as they fall due. There is also the “balance sheet test”. This test can be defined as the value of the debtor’s liabilities exceeding its assets. The International Insolvency Standard also opines that the two tests can be used in combination with good effect, but that if only one test is to be used, it should not be the balance sheet test.

In the Principles, commencement criteria are addressed at C4, particularly C4.2.² That Principle states:

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.

This is followed by a footnote which states, “A single or dual approach may be adopted, although where only a single test is adopted, it should be based on the liquidity approach for determining insolvency – that is, the debtor’s inability to pay due debts.”³

The Legislative Guide goes into greater detail on the alternative approaches to commencement criteria. With respect to the cash flow test, which it is observed is “used extensively”,⁴ the Legislative Guide notes that, by focusing attention on the failure to repay creditors, that test “puts the defining factors within the reach of creditors”, and in so doing, by design, serves to “activate insolvency proceedings sufficiently early in the period of the debtor’s financial distress to minimize dissipation of assets and avoid a race by creditors to grab assets that would cause dismemberment of the debtor to the collective disadvantage of all creditors.”⁵

However, the Legislative Guide also acknowledges that an issue associated with the cash flow test, particularly relevant in the context of the COVID-19 recovery, is that the debtor’s inability to repay debts may be caused by temporary cash flow or liquidity problems, in a business “that is otherwise viable.”⁶ For example, competition may compel market participants to accept ever-lower profits or even losses on a temporary basis in order to become competitive and maintain or gain market share.

In comparison, the balance sheet test makes it impractical for other parties (in particular, creditors) to ascertain the true state of the debtor’s financial situation until after its difficulties have become a settled and often irreversible fact. It also risks delays due to the need for expert analysis of the books and financial data of the

² The Principles, page 22.

³ Ibid., page 35.

⁴ The Legislative Guide, page 45, paragraph 23.

⁵ Ibid., page 46, paragraph 23.

⁶ Ibid., page 46, paragraph 24.

company, which may be absent or not properly maintained (e.g. part five of the Legislative Guide notes this as a recurrent issue in MSE businesses), to ascertain its fair market value. The Legislative Guide therefore notes that the balance sheet test may not easily form the basis for a creditor application and often “leads to proceedings being commenced after the possibilities of reorganization have disappeared”.⁷ In addition, it notes that the balance sheet test may give a misleading indication of the debtor’s financial situation because it focuses upon what is essentially an accounting question of how assets should be valued (e.g. a liquidation value as opposed to a going concern value). It also raises questions of whether a debtor’s balance sheet is reliable and gives a true indication of the debtor’s ability to pay, in particular where accounting standards and valuation techniques give rise to results that do not reflect the fair market value of a debtor’s assets or where markets are not sufficiently developed or stable to enable that value to be established. This is particularly true in the case of service businesses that under this test may technically be insolvent because of a lack of assets, even when the business is essentially viable. Alternatively, a business may have a positive balance sheet without the cash flow necessary to sustain its operations. The Legislative Guide thus describes the balance sheet as not “sufficiently reliable” to be a sole commencement criterion but observes that it can assist in conjunction with the cash flow test.⁸

The relevant recommendations of the Legislative Guide are 15, 16, 294, 297 and 373, and their accompanying commentary. These recommendations are extracted in an annex to this paper.

A2 - Issues for Consideration by Participants

Participants may consider discussing the following 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. How courts establish the debtor’s imminent insolvency or early stage of financial distress envisaged in the commencement standard for application by the debtor, linking those aspects to the issues of the type of proceeding to be commenced - liquidation or reorganization - and the ultimate goal pursued in a particular case – preserving the business as a going concern or piecemeal sale of the insolvency estate assets.

B – Safeguards against abuse or improper use of insolvency proceedings

B1 - Outline of International Insolvency Standard Guidance

The second element for discussion is the risk of parties commencing insolvency proceedings in a manner that is abusive or improper. By abusive or improper, it is meant the use of the insolvency process by creditors or debtors for reasons other than the intended use of the insolvency process. The reality of the risk of abuse by the commencement of insolvency proceedings raises several issues, including the role of the court in safeguarding against abuse.

The key part of the Principles related to this topic is Principle D6.3, Integrity of participants. This Principle reads as follows:

⁷ Ibid., page 46, paragraph 25; page 47, paragraph 26.

⁸ Ibid., page 47, paragraph 26.

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.

Similarly, the Legislative Guide emphasizes the role of the courts in preventing abuse, for example, by a debtor that is not in financial difficulty entering proceedings and using them 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. Recognizing the ease with which MSEs can enter simplified insolvency proceedings under part five, the Legislative Guide explicitly allows creditors to object to the commencement of simplified insolvency proceedings (rec. 304). It would be for the court to assess grounds for the creditors' objection and whether those grounds justify dismissal of the proceeding (recs. 27 and 306). In the case of the dismissal, it would also be for the court to determine consequences of the dismissal (recs. 28, 308-309 and 371).

In the case of a creditor application, abuses might include those cases where a creditor uses insolvency as an inappropriate substitute for debt enforcement procedures (which may not be well developed); to attempt to force a viable business out of the marketplace; or to attempt 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).

Improper use or abuses can be addressed by providing that the court has the power to deny the application or dismiss the already commenced proceedings.⁹ In addition, the court may impose sanctions on the party improperly using the proceedings, including by objecting to the commencement of the proceedings without a justified ground, or require that party to pay costs and possibly damages to the other party for any harm caused. Remedies may also be available under non-insolvency law. Conversion between liquidation and reorganization may be another remedy.

In case of creditors' application, a court is required to consider whether the commencement criteria have been met before deciding to commence the proceedings, i.e. the insolvency of the debtor must be established (see below for a discussion of other safeguards in such cases). A primary reason is to avoid abuse by creditors or other parties in interest.

In addition, the debtor has a fundamental right to be heard. In case of creditors' application, the debtor would have various courses of action open to it, including consenting to the application, disputing the applicant's claim as to its financial position and requesting the commencement of different proceedings (e.g. where the application is for liquidation, requesting commencement of reorganization). The debtor may also have jurisdictional or procedural defences to a creditor application.

Irrespective of whether the application is made by a debtor or creditors, the court may be required to determine not only whether the entry conditions have been met, but also whether the type of proceeding applied for is appropriate to the particular circumstances of the debtor.

More generally, the Legislative Guide observes that the insolvency system will only be effective if the courts and officials responsible for its implementation have the necessary capacity to provide the most efficient, timely and fair outcome to those for whose benefit an insolvency regime exists.¹⁰

The relevant recommendations of the Legislative Guide are 20, 27, 28, 298, 300, 301, 304, 306, 308, 309 and 371, and their accompanying commentary. These are extracted in an annex to this paper.

⁹ Ibid., page 54, para. 47.

¹⁰ Ibid., page 33, para. 1.

B2 - Issues for Consideration by Participants

Participants may consider discussing the following issues:

1. Possible ways in which the insolvency process can be abused, both by the debtor and the creditors. As an example, this might include creditors seeking to impose illegitimate pressure to pay a disputed debt, or to influence the operations or management of the company;
2. Possible safeguards against abuse in the hands of the judiciary, including sanctions and consequences of abuse;
3. How to strike the right balance in preventing abuse while ensuring timely, efficient and cost-effective processing of applications for commencement.

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

C1- Outline of International Insolvency Standard Guidance

The International Insolvency Standard provides some guidance on measures that can help ensure timely, efficient and cost-effective processing of applications for commencement of insolvency proceedings. Principle C4.1 indicates generally that access to the insolvency system should be “efficient and cost-effective”. One way to achieve this, as listed in Principle C4.2, is for commencement criteria and insolvency presumptions to be “clearly defined in the law”. Furthermore, the Principles provide more guidance as to how Simplified Insolvency Proceedings designed to cater for MSEs can achieve even greater speed, efficiency and cost-effectiveness. This includes reduced procedural formalities (C19.4), easy access to proceedings at an early stage of financial difficulty with a rebuttable presumption of insolvency or financial difficulty being created by a debtor’s filing showing proof of basic criteria (C19.2), and broad and clear eligibility criteria (C19.1).

The Legislative Guide goes into more detail on specific procedural considerations that can improve speed, efficiency and cost-effectiveness, both in general and in the specific context of MSE frameworks.¹¹ If the requirements for the assessment of whether commencement standards are satisfied are complex, there is a potential not only for delay between application and commencement, but also for further debts to be incurred in that period, as the debtor continues to trade and allows trade debts to increase in order to preserve cash flow, and for assets to be dissipated by the actions of creditors. Where the court is required to assess various issues before proceedings can be commenced, one means of reducing the potential complexity of the assessment is to provide for the assessment to be made after commencement when the court can be assisted by the insolvency representative and other experts. In addition, a presumption that the debtor is unable to pay in recommendation 17 of the Legislative Guide and a presumption of insolvency in the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), Article 31, may assist courts to process decisions related to the commencement of insolvency proceedings expeditiously. Furthermore, as noted in the commentary to recommendation 294 of the Legislative Guide, the results of the early rescue mechanisms and information about early signals of financial distress (see rec. 373 of the Legislative Guide) may inform the court about financial distress and the need to open insolvency proceedings.

C2 - Issues for Consideration by Participants

Participants may consider discussing the following issues:

¹¹ The latter are specifically considered in part five of the Legislative Guide, prepared in 2021, titled “UNCITRAL Legislative Guide on Insolvency Law. Part five: Insolvency law for micro- and small enterprises”.

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.

Annex to the Background Note - Extracts from the International Insolvency Standard Related to Commencement Standards

World Bank Principles Extracts on Commencement

C3 Eligibility

The insolvency proceeding should apply to all enterprises or corporate entities, including state-owned enterprises. Exceptions should be limited, clearly defined, and should be dealt with through a separate law or through special provisions in the insolvency law.

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.

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.

C5 Provisional Measures and Effects of Commencement

C5.1 When an application has been filed, but before the court has rendered a decision, provisional relief or measures should be granted when necessary to protect the debtor's assets and the interests of stakeholders, subject to affording appropriate notice to affected parties.

C5.2 The commencement of insolvency proceedings should prohibit the unauthorized disposition of the debtor's assets and suspend actions by creditors to enforce their rights or remedies against the debtor or the debtor's assets. The injunctive relief (stay) should be as wide and all-encompassing as possible, extending to an interest in assets used, occupied, or in the possession of the debtor.

C5.3 A stay of actions by secured creditors also should be imposed in liquidation proceedings to enable higher recovery of assets by sale of the entire business or its productive units, and in reorganization proceedings where the collateral is needed for the reorganization. The stay should be of limited, specified duration, strike a proper balance between creditor protection and insolvency proceeding objectives, and provide for relief from the stay by application to the court based on clearly established grounds when the insolvency proceeding objectives or the protection of the secured creditor's interests in its collateral are not achieved. Exceptions to the general rule on a stay of enforcement actions should be limited and clearly defined.

Insolvency of Micro and Small Enterprises (MSEs)

C18 Key Objectives and Policies

Though country approaches may vary, effective insolvency systems for MSEs should aim to:

- Lower the barriers to access, and encourage early utilization of out-of-court restructuring procedures, hybrid procedures and in-court simplified insolvency proceedings.
- Design and implement a streamlined regime that reduces the complexity and costs of ordinary insolvency proceedings, providing for expeditious and flexible mechanisms to rehabilitate and/or reorganize viable insolvent or financially distressed MSEs, and to effectively liquidate nonviable ones.
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- Maintain basic safeguards for protecting the rights of creditors, debtors and all parties involved in or affected by MSEs insolvency proceedings.
- Implement an effective regime to prevent and sanction fraud, improper use and abuse of MSEs insolvency proceedings.

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.¹²

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

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.¹³

C19.3 Conversion of Proceedings

The law should define specific circumstances which enable conversion of:

- i. Simplified insolvency proceedings to ordinary insolvency proceedings and vice versa; and,
- ii. Simplified reorganization proceeding to simplified liquidation and vice versa.

The law should address the implications of conversion of proceedings.

C19.4 Procedural Formalities and Deadlines

¹² The most common quantifiable criteria are thresholds such as the amount of total debt or liabilities, maximum number of employees, assets and income below certain level, annual turnover, and / or number of unsecured creditors. Some well-defined qualitative eligibility criteria may be added.

¹³ Otherwise, Principles C4.1, C4.2 and C4.4 fully apply to commencement on creditor application.

The law should specify information and minimal procedures by which simplified insolvency proceedings should be commenced and closed, keeping them straightforward, speedy and cost-effective.

Simplified insolvency proceedings should require fewer and less complex procedural formalities and shorter deadlines than those required in ordinary insolvency proceedings. In particular, complex and costly rules on notice, publications, creditors' committees and assemblies, filing and resolution of claims, liquidation of assets of the debtor and distribution of proceeds to creditors should be disabled or streamlined.

The law should allow the use of electronic tools and data to simplify processes. If practicable, online filing and standardized forms should be established.

UNCITRAL Legislative Guide Extracts on Commencement

Parts One and Two (Legislative Guide on Insolvency Law)

Recommendation 15: Debtor application¹⁴

15. The insolvency law should specify that insolvency proceedings can be commenced on the application of a debtor if the debtor can show either that:

- (a) It is or will be generally unable to pay its debts as they mature; or
- (b) Its liabilities exceed the value of its assets.¹⁵

Recommendation 16: Creditor application¹⁶

16. The insolvency law should specify that insolvency proceedings can be commenced on the application of a creditor if it can be shown that either:

- (a) The debtor is generally unable to pay its debts as they mature; or
- (b) The debtor's liabilities exceed the value of its assets.

Recommendation 17: Presumption that the debtor is unable to pay¹⁷

17. 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.¹⁸

Recommendation 18: Commencement on debtor application¹⁹

18. The insolvency law should specify that where the application for commencement is made by the debtor:

- (a) The application for commencement will automatically commence the insolvency proceedings;
or

¹⁴ The accompanying commentary is at paragraphs 33-36 for liquidation and 45-47 for reorganization.

¹⁵ The intention of this recommendation and the recommendation on creditor applications is to allow legislators flexibility in developing commencement standards, based on a single or dual test approach. Where the insolvency law adopts a single test, it should be based on the debtor's inability to pay debts as they mature (cessation of payments test) and not on the balance sheet test. Where the insolvency law contains both tests (cessation of payments and balance sheet tests), proceedings can be commenced if one of the tests can be satisfied.

¹⁶ The accompanying commentary is at paragraphs 37-41 for liquidation and 48-53 for reorganization.

¹⁷ The accompanying commentary is at paragraph 37.

¹⁸ Where the debtor has not paid a mature debt and the creditor has obtained a judgement against the debtor in respect of that debt, there would be no need for a presumption to establish that the debtor was unable to pay its debts. 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.

¹⁹ The accompanying commentary is at paragraph 65.

- (b) The court will promptly determine its jurisdiction and whether the debtor is eligible and the commencement standard has been met and, if so, commence insolvency proceedings.

Recommendation 19: Commencement on creditor application²⁰

19. The law generally should specify that, where a creditor makes the application for commencement:
- (a) Notice of the application promptly is given to the debtor;²¹
 - (b) The debtor be given the opportunity to respond to the application, by contesting the application, consenting to the application or, where the application seeks liquidation, requesting the commencement of reorganization proceedings; and
 - (c) The court will promptly determine its jurisdiction and whether the debtor is eligible and the commencement standard has been met and, if so, commence insolvency proceedings.²²

Recommendation 20: Denial of an application to commence proceedings²³

20. The insolvency law should specify that, where the decision to commence proceedings is to be made by the court, the court may deny the application to commence and, where appropriate, impose costs or sanctions against the applicant, if it determines that:
- (a) It does not have jurisdiction, or the debtor is ineligible or does not meet the commencement standard; or
 - (b) The application is an improper use of the law.

Recommendations 27 and 28: Dismissal of insolvency proceedings after commencement²⁴

27. The insolvency law should permit the court to dismiss proceedings if, after commencement, the court determines, for example, that:

- (a) The proceedings constitute an improper use of the insolvency law; or
- (b) The debtor was ineligible or did not meet the commencement standard at the time of commencement.

28. The insolvency law should specify that, where proceedings are dismissed, the court may impose costs or sanctions, where appropriate, against the applicant for commencement of the proceedings.

²⁰ The accompanying commentary is at paragraphs 57 and 67.

²¹ Where the debtor's whereabouts is unknown and it cannot be contacted, the general law may provide relevant rules concerning the giving of notice in such circumstances.

²² A determination that the commencement standard has been met may involve consideration of whether the debt is subject to a legitimate dispute or offset in an amount equal to or greater than the amount of the debt. The existence of such a set-off may be a ground for dismissal of the application.

²³ The accompanying commentary is at paragraphs 61-63.

²⁴ The accompanying commentary is at paragraph 79.

Part Five: Insolvency Law for Micro- and Small Enterprises

Recommendation 293: Commencement criteria and procedures²⁵

293. 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.)

Recommendation 294: Application²⁶

294. 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.)

Recommendation 297: Commencement on creditor application²⁷

297. 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 con- testing 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.)

²⁵ The accompanying commentary is at paragraphs 113-116.

²⁶ The accompanying commentary is at paragraphs 117-122.

²⁷ The accompanying commentary is at paragraphs 128-134.

Recommendation 298: Possible grounds for denial of application²⁸

298. 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.)

Recommendation 300: Possible consequences of denial of application²⁹

300. 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 301: Possible imposition of costs and sanctions against the applicant³⁰

301. 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 298, to impose costs or sanctions, where appropriate, against the applicant for submitting the application.

(See recommendation 20.)

Recommendation 304: Creditor objection to the commencement of a simplified insolvency proceeding³¹

304. 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 302 and 303.)

Recommendation 306: Possible grounds for dismissal of the proceeding³²

306. 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

²⁸ The accompanying commentary is at paragraphs 135-138.

²⁹ The accompanying commentary is at paragraphs 135-138.

³⁰ The accompanying commentary is at paragraphs 135-138.

³¹ The accompanying commentary is at paragraphs 155-158.

³² The accompanying commentary is at paragraphs 161-164.

- (b) The applicant is ineligible.

(See recommendation 27.)

Recommendation 308: Possible consequences of dismissal of the proceeding³³

308. 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 309: Possible imposition of costs and sanctions against the applicant³⁴

309. 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.)

Recommendation 371: Appropriate safeguards and sanctions³⁵

371. 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.)

Recommendation 373: Early rescue mechanisms³⁶

373. 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.

³³ The accompanying commentary is at paragraphs 161-164.

³⁴ The accompanying commentary is at paragraphs 161-164.

³⁵ The accompanying commentary is at paragraphs 384-391.

³⁶ The accompanying commentary is at paragraphs 399-403.