UNCITRAL United Nations Commission on International Trade Law

Safeguards against Improper Commencement of Insolvency Proceedings under the UNCITRAL Legislative Guide on Insolvency Law

Samira Musayeva

Senior Legal Officer, UNCITRAL secretariat

Secretary, UNCITRAL Working Group V (Insolvency Law)

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Judicial Gatekeeping in Insolvency Proceedings

- Judges are guardians of the gateway.
- Commencement stage = most critical for system integrity.
- Legislative Guide empowers courts to assess, prevent abuse and protect fairness

- Link to the eligibility and commencement standards discussed at the second session
- Link to the types of proceedings and valuation
- Link to sophistication and good faith of an applicant
- Link to other areas of law, e.g. criminal law
- Link to oversight, including by all affected parties in interest

Judicial Power to Deny Improper Filings

Debtor misuse: delay, obstruction, unlawful “phenix” tactics

Creditor misuse: pressure, collection tactic or anti-competitive behaviour

Courts may deny commencement when:

- Requirements unmet;
- No insolvency purpose;
- Claim bona fide disputed.

E.g. recent case law on the use of insolvency to suspend or bypass adjudication

Action by the courts

- Screen for good faith
- Assess for solvency
- Protect from coercive filings
- Deny or dismiss when justified
- Award costs
- Impose other sanctions

Tools: notice and notification, the roles of other parties in interest

Why important?

- Fairness and accessibility
- Integrity at commencement = public confidence in the courts, insolvency law and insolvency proceedings
- Timely and appropriate intervention = prevention of unnecessary human, time and financial resources

Judicial response should match intent and effect:

- Bad faith → firm sanctions.
- Honest error → corrective approach

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