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Draft text on a simplified insolvency regime

Note by the Secretariat

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I. Introduction

1. The background to the project of the Working Group on insolvency of micro and small enterprises (MSEs) may be found in the provisional agenda of the fifty-eighth session of the Working Group (A/CN.9/WG.V/WP.171). This note was prepared pursuant to the request of the Working Group at its fifty-seventh session (Vienna (online), 7-10 December 2020) to the secretariat to prepare a revised text on a simplified insolvency regime for consideration by the Working Group at its fifty-eighth session (A/CN.9/1046, para. 12).
2. The note consists of two parts. Chapter II contains draft recommendations that were considered by the Working Group at its fifty-seventh session. Chapter III, which is included in an addendum to this note (A/CN.9/WG.V/WP.172/Add.1), contains draft recommendations that the Working Group did not have time to consider at that session. Both sets of the draft recommendations are accompanied by the relevant draft commentary.
3. The footnotes in bold throughout the text reflect conclusions reached by the Working Group at its fifty-seventh session, points raised during the May and September 2020 informal consultations that have not yet been considered by the Working Group and points raised by the secretariat with respect to some provisions of the text. Other footnotes (i.e., not in bold) are inserted to stay in the final text unless the Working Group considers otherwise.
4. Without prejudice to the structure of the final text, the draft commentary is placed in this note after the draft recommendations for ease of reference by the Working Group since it considers draft recommendations first, before the draft commentary. The draft recommendations and the draft commentary were renumbered (in draft recommendations, the number placed second, in square brackets, indicate the corresponding number of the draft recommendation in document A/CN.9/WG.V/WP.170/Rev.1 considered by the Working Group at its fifty-seventh session. Where the draft recommendation is new, it is identified as such).

II. Draft recommendations on a simplified insolvency regime considered by the Working Group at its fifty-seventh session with accompanying commentary, including draft glossary

A. Draft recommendations

5. The Working Group may wish to consider the following draft recommendations:

A. Key objectives of a simplified insolvency regime
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| <ol style="list-style-type: none"> 1. States should provide for a simplified insolvency regime and for that purpose consider the following key objectives: <ol style="list-style-type: none"> (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-sized 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; |
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(d) Ensuring protection of persons affected by simplified insolvency proceedings[, including creditors, employees and other stakeholders]¹ (henceforth referred to as “parties in interest”²) throughout simplified insolvency proceedings;

(e) [Providing for effective measures to facilitate creditor participation and address creditor disengagement in simplified insolvency proceedings] [Providing effective measures to facilitate participation by creditors and other parties in interest in simplified insolvency proceedings, and to address creditor disengagement]³;

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

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

(g bis) Where reorganization is feasible, preserving employment and investment].⁴

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 MSEs

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 recommendation 8 of the Guide.*)⁵

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

¹ The words in square brackets were added further to the proposal at the fifty-seventh session of the Working Group, which the Working Group agreed to consider at its next session (A/CN.9/1046, paras. 128 and 131).

² Defined in (dd) of the glossary in the introduction to the UNCITRAL Legislative Guide on Insolvency Law (the “Guide”) as “any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority 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.”

³ The proposal was made at the fifty-seventh session of the Working Group to replace the original text in the first set of square brackets by the text in the second set of square brackets. The Working Group agreed to consider that proposal at its next session (A/CN.9/1046, paras. 128 and 131).

⁴ The proposal was made at the fifty-seventh session of the Working Group to add the text in square brackets. The Working Group agreed to consider that proposal at its next session (A/CN.9/1046, paras. 128 and 131).

⁵ Cross-references to recommendations of the Guide that address the same or similar issue are provided in this draft for ease of reference. The Working Group may wish to consider whether they should be removed from the final text and replaced by a table of concordance that would explain correlation of the recommendations in a UNCITRAL MSE insolvency text with recommendations in the Guide. Such table of concordance may be annexed to the text.

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 [5 bis]. 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 applicable law].⁶

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

7 [new]. 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.⁷

Possible functions of an independent professional

8 [5 ter]. 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,

⁶ The proposal was made at the fifty-seventh session of the Working Group to add the provision in square brackets. The Working Group agreed to consider that proposal at its next session (A/CN.9/1046, paras. 128 and 131).

⁷ This provision was added further to the agreement reached by the Working Group at its fifty-seventh session (see A/CN.9/1046, paras. 13 and 29).

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 [6]. 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 [7]. 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 recommendation 26 of the Guide.*)

D. Main features of a simplified insolvency regime

Default procedures and treatment

11 [8]. 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 [9]. 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 [10]. Consistent with the objective of establishing a cost-effective simplified insolvency regime,⁸ 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 [11]. 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 [11 ter]. The insolvency law providing for a simplified insolvency regime should specify the rights and obligations of the debtor-in-possession, in particular as regards

⁸ This opening phrase was added further to the agreement reached by the Working Group at its fifty-seventh session (see A/CN.9/1046, paras. 31 and 33).

the use and disposal of assets,⁹ post-commencement finance¹⁰ and treatment of contracts,¹¹ and allow the competent authority to specify them on a case-by-case basis.

Limited or total displacement of the debtor-in-possession

16 [11]. 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.*)

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

17 [11 bis]. 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 [12]. 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 [13]. 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]¹²:

- (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

⁹ 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.

¹⁰ Idem, but with reference to recommendations 63–68 of the Guide.

¹¹ Idem, but with reference to recommendations 69–86 and 100–107 of the Guide.

¹² The words in square brackets were added further to a proposal at the fifty-seventh session of the Working Group. The Working Group agreed to consider that proposal at its next session (A/CN.9/1046, paras. 128 and 131).

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 [14]. 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],¹³ 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.*)

F. Eligibility, application and commencement

Eligibility

21 [15]. 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.

Commencement criteria and procedures

22 [16]. 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

¹³ No discussion took place in the Working Group at its fifty-seventh session as regards the text in square brackets. The Working Group may wish to consider whether the text should be retained.

(c) Establish safeguards to protect both [debtors and creditors] [debtors, creditors and other parties in interest, including employees],¹⁴ from [improper use] [abuse]¹⁵ of the application procedure.

Commencement on debtor application

Application

23 [17]. 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 18 of the Guide.)

Information to be included in the application

24 [18]. 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

25 [19]. 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

26 [20]. 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 application¹⁶

Possible grounds for denial of application

¹⁴ The proposal was made at the fifty-seventh session of the Working Group to replace the original text in the first set of square brackets by the text in the second set of square brackets. The Working Group agreed to consider that proposal at its next session (A/CN.9/1046, paras. 128 and 131).

¹⁵ *Idem*.

¹⁶ Revisions were made to the provisions on denial of application as agreed by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 45). The resulting provisions were split into several recommendations for ease of reading.

27 [21]. 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

28 [new]. 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.).¹⁷

Possible consequences of denial of application

29 [new]. 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.¹⁸

Possible imposition of costs and sanctions against the applicant

30 [new]. 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 submitting an application.¹⁹ (See recommendation 20 of the Guide.)

Notice of commencement of proceedings

31 [21 bis]. 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 creditors²⁰ 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

32 [21 ter]. The insolvency law providing for a simplified insolvency regime should specify that the notice of commencement of a simplified insolvency proceeding is to include:

¹⁷ Added to make the text consistent with the Guide and the draft recommendation below on prompt notice of the dismissal of the proceeding.

¹⁸ Added further to the deliberations in the Working Group at its fifty-seventh session (A/CN.9/1046, para. 45).

¹⁹ Added to make the text consistent with the Guide and the draft recommendation below on possible consequences of dismissal of the proceeding.

²⁰ At its fifty-seventh session, the Working Group agreed to delete reference to “other known parties in interest” in this subparagraph and deferred the consideration of the reference to employees in this provision to a later stage (A/CN.9/1046, para. 52). The Working Group may wish to consider whether reference to employees should be added in this subparagraph, taking into account that the subparagraph envisages as the default the individual notification of the commencement of the simplified insolvency proceeding and that a new section J. Employees addresses a similar matter.

(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 [49] below); and

(e) Time period for expressing objection to the commencement of a simplified insolvency proceeding (see recommendation [33] below).

(See recommendation 25 of the Guide.)

Creditor objection to the commencement of a simplified insolvency proceeding

33 [22]. 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 [31-32] above).

[No effect of the commenced proceeding on unnotified creditors]

34 [23]. The insolvency law providing for a simplified insolvency regime [should] [could] specify that claims of creditors not notified of the commencement of the simplified insolvency proceeding and having not joined the proceeding are unaffected by the simplified insolvency proceeding and excluded from any discharge that may result from that proceeding.]²¹

Dismissal of a simplified insolvency proceeding after its commencement²²

Possible grounds for dismissal of the proceeding

35 [24]. 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

36 [24]. 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

37 [new]. 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

²¹ In the light of divergent views, the Working Group was unable to reach agreement on the draft recommendation at its fifty-seventh session. Interested delegations were encouraged to consult with a view to reaching a compromise (see A/CN.9/1046, paras. 53-59).

²² The provisions on dismissal of the proceeding were split into several recommendations for ease of reading.

insolvency law for the commencement of that other type of insolvency proceeding are met.²³

Possible imposition of costs and sanctions against the applicant

38 [24]. 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 notifications²⁴

Procedures for giving notices

39 [25]. 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

40 [26]. The insolvency law providing for a simplified insolvency regime should require that the debtor and any known creditor²⁵ 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

41 [27]. 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

42 [29]. 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 avoidance²⁶ or other actions; (See recommendation 35 of the Guide.)

²³ Added further to the Working Group's deliberations at its fifty-seventh session (A/CN.9/1046, para. 60).

²⁴ The Working Group may wish to consider whether this section should be located elsewhere (e.g., immediately before or after section E. Participants).

²⁵ At its fifty-seventh session, the Working Group agreed to delete reference to "and any other known party in interest" in this subparagraph to ensure consistency with amendments agreed to be made in draft recommendation 31 (b) (A/CN.9/1046, para. 62). See in that context an issue raised in footnote 20 as regards a possible addition of a reference to employees in provisions on individual notifications. If such reference is added in draft recommendation 31 (b), a consequential change may need to be made in this provision.

²⁶ "Avoidance provisions" are defined in (c) of the glossary in the introduction to the Guide as "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".

(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.*)

Date from which the insolvency estate is to be constituted

43 [30]. 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

44 [31]. The insolvency law providing for a simplified insolvency regime should ensure that avoidance mechanisms available under the insolvency law 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 proceedings²⁷

Scope and duration of the stay

45 [32]. 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.*)

Rights not affected by the stay

46 [33]. 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

47 [34]. 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.*)

²⁷ Defined in (rr) of the glossary in the introduction to the Guide as “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”.

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

48 [35]. 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. (*See recommendations 110 (b)(v) and 170 of the Guide.*) 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 [52] below).

Submission of claims by creditors

49 [36]. 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.²⁸ 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 [31 and 32] above) or in a separate notice;

(b) Reasonable time should be given to creditors to submit their claims expeditiously;²⁹

(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

50 [37]. 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 persons³⁰ 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.

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

²⁸ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 71).

²⁹ *Idem.*

³⁰ Defined in (jj) of the glossary in the introduction to the Guide as "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."

51 [37]. 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, 179, 181 and 184 of the Guide.*)

Treatment of disputed claims

52 [38]. 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.³¹ (*See recommendation 180 of the Guide.*)

Effects of admission

53 [39]. 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.*)³²

J. Employees³³

54 [new]. The insolvency law providing for a simplified insolvency regime should require the competent authority to ensure that all requirements of applicable law relating to the protection of employees' rights and interests in insolvency are complied with in simplified insolvency proceedings. Those requirements may in particular include 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.

K. Features of simplified liquidation proceedings

Decision on a procedure to be used

55 [40]. 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

³¹ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, paras. 74-75).

³² The Working Group may wish to consider whether this section should be expanded by a draft recommendation on notification of the final list of all admitted claims to all known parties in interest or it would be sufficient to address that point only in the commentary. See the relevant commentary below.

³³ This new section was added further to a proposal at the fifty-seventh session of the Working Group (A/CN.9/1046, paras. 128 and 131). The Working Group may wish to consider the new location for this section (e.g., in section E. Participants, or closer thereto) in the light of its close connection to draft recommendation 19 and possibly also to other draft recommendations above (e.g., section G. Notices and notifications and draft recommendation 31 on the notice of commencement).

preparation, notification and approval of the liquidation schedule (see recommendations [56-63] 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 [64-66] below).³⁴

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

Preparation of the liquidation schedule

Option 1

56 [41]. The insolvency law providing for a simplified insolvency regime should require the competent authority or an independent professional as applicable to prepare the liquidation schedule.

Option 2

56 [41]. 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.³⁵

Time period for preparing a liquidation schedule

57 [42]. 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

58 [43]. 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;³⁶
- (b) Specify the means of realization of the assets (public auction or private sale or other means);
- (c) List amounts and priorities of the admitted claims; and
- (d) Indicate the timing and method of distribution of proceeds from the realization of the assets.³⁷

Notification of the liquidation schedule to all known parties in interest

59 [44]. The insolvency law providing for a simplified insolvency regime should require the competent authority to give notice of the liquidation schedule to all known

³⁴ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 80).

³⁵ The Working Group deferred the consideration of these options to its fifty-eighth session (A/CN.9/1046, para. 84).

³⁶ The Working Group may wish to consider whether this provision should be expanded with references to other steps in liquidation, e.g., distribution of proceeds referred to in subparagraph (d) in this draft recommendation.

³⁷ Subparagraph (e) referring to a debt repayment plan was deleted further to the agreement reached at the fifty-seventh session of the Working Group (A/CN.9/1046, para. 90).

parties in interest, specifying a short period for expressing any objection to the liquidation schedule.³⁸

Prior review of the liquidation schedule by the competent authority

60 [44]. 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.³⁹

Approval of the liquidation schedule

61 [45]. 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.⁴⁰

Treatment of objections

62 [46]. 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

63 [47]. The insolvency law providing for a simplified insolvency regime should require distributions to be made promptly and in accordance with the insolvency law.⁴¹ (See recommendation 193 of the Guide.)

Procedure not involving the sale and disposal of assets and distribution of proceeds⁴²

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

64 [48]. 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

65 [49]. 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.⁴³

³⁸ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 91). The old draft recommendation 44 was split into two for ease of reading.

³⁹ *Idem*.

⁴⁰ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 94).

⁴¹ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 95).

⁴² The heading and provisions in this section were revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 97). The heading was further revised by the Secretariat to ensure consistency with the heading for the first procedure in this section.

⁴³ The competent authority would be expected to take a decision on discharge not later than at the

Treatment of objections

66 [50]. 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.^{44, 45}

L. Features of simplified reorganization proceedings**Preparation of a reorganization plan**

67 [51/zz]. 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 [or another person, but subject to verification of the assets, liabilities and plan required by the debtor]. Any undisclosed or concealed assets remain part of the insolvency estate, regardless of whether the reorganization plan has been confirmed or a simplified reorganization proceeding has been converted to a liquidation proceeding.⁴⁶

Time period for the proposal of a reorganization plan⁴⁷

68 [52]. 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

69 [52]. 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

time of the closure of the proceeding even if discharge itself may take effect later, e.g., after expiration of the monitoring period or implementation of a debt repayment plan. See section M of this [text] for related recommendations on discharge.

⁴⁴ Idem.

⁴⁵ The footnotes to draft recommendations 65 and 66 were added further to agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 97).

⁴⁶ This provision was originally proposed as draft recommendation zz. For consideration of that draft recommendation at the fifty-seventh session of the Working Group, see A/CN.9/1046, paras. 99-105. It was agreed at that session that the part proposed to be deleted in that provision should stay in square brackets for consideration by the Working Group at its next session. If the Working Group agrees to keep that part, the words “plan required by the debtor” would need to be clarified since their meaning is not clear. The Working Group may also wish to consider whether the last sentence in this provision should be retained or relocated elsewhere (e.g., to section H that contains provisions on the constitution, protection and preservation of the insolvency estate) as it may be applicable not only in the reorganization context. (For the draft recommendations originally proposed as draft recommendations xx and yy, see draft recommendation 83 at the end of this section).

⁴⁷ Provisions that were contained in the old draft recommendation 52 on the time period for the proposal of a reorganization plan were split in this draft into draft recommendations 68-70 for ease of reading. Draft recommendation 70 was revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 106).

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

70 [52]. 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

71 [53]. 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

72 [54]. The insolvency law providing for a simplified insolvency regime should specify the minimum contents of a plan, including:

- (a) The terms and conditions of the plan;
- (b) 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); and
- (c) Proposed ways of implementing the plan.

(See recommendation 144 of the Guide.)

Notification of the reorganization plan to all known parties in interest

Option 1

73 [55]. The insolvency law providing for a simplified insolvency regime should require the competent authority [or an independent professional as applicable]⁴⁸ to notify the plan to all known parties in interest to enable them to object or express opposition to the proposed plan and explain the consequences of any abstention.

Option 2

73 [55]. 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] [amendment]⁴⁹ 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 specify a [short] [sufficient] time period for expressing any objection or opposition to the plan and explain the consequences of any abstention.⁵⁰

Effect of the plan on unnotified creditors

74 [56]. 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

⁴⁸ The Working Group may wish to consider whether reference to an independent professional should be retained in this provision in the light of the draft recommendations in section G that require the competent authority to give notices and notifications. The same issue arises in option 2 although there that concern might be addressed by the commentary clarifying that the second part of that provision should be read with reference to the competent authority in the light of provisions in section G.

⁴⁹ The Working Group may wish to consider replacing the term “modification” with the term “amendment” and make a consequential change in draft recommendation 79 as proposed below.

⁵⁰ For consideration of this provision at the fifty-seventh of the Working Group, see A/CN.9/1046, paras. 108-112.

bound by the terms of the plan unless that creditor has been given the opportunity to express opposition on the approval of the plan.⁵¹ (*See recommendation 146 of the Guide.*)

Approval of the reorganization plan by creditors

Undisputed reorganization plan

75 [57]. The insolvency law providing for a simplified insolvency regime should specify that the plan is [deemed to be] approved by creditors if the competent authority receives no objection and no sufficient opposition to the proposed plan within the established time period.

Disputed plan

76 [58]. The insolvency law providing for a simplified insolvency regime should:

(a) Allow the [modification] [amendment]⁵² of the plan to address objection or sufficient opposition to the plan;

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

(c) Require the competent authority to transmit any [modified] [amended] plan to all known parties in interest indicating a short time period for expressing any objection or opposition to the [modified] [amended] 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] [amendment] of the original plan to address objection or sufficient opposition is not possible or (ii) if objection or sufficient opposition to the [modified] [amended] plan is communicated to the competent authority within the established time period (*See recommendation 158 (b) of the Guide.*); and

(e) Specify that the [modified] [amended] plan is approved by creditors if the competent authority receives no objection and no sufficient opposition to the [modified] [amended] plan within the established time period.⁵³

Confirmation of the plan by the competent authority

77 [59]. 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.*)⁵⁴

⁵¹ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 116).

⁵² The Working Group may wish to consider replacing the term “modification” with the term “amendment” also in this draft recommendation and make a consequential change in draft recommendation 79 as proposed below.

⁵³ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 121).

⁵⁴ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, para. 124).

Challenges to the confirmed plan

78 [60]. 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

79 [61]. 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, [approval and confirmation]⁵⁵ 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 consequences of failure to secure approval of proposed amendments. *(See recommendations 155 and 156 of the Guide.)*

Duration of the simplified reorganization proceedings

80 [62]. The insolvency law providing for a simplified insolvency regime should specify that a simplified reorganization proceeding remains open until its closure by the competent authority after confirmation of the implementation of the plan.

Supervision of the implementation of the plan

81 [63]. 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.⁵⁶

Consequences of the failure to implement the plan⁵⁷

82 [64]. 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:

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

⁵⁵ The Working Group may wish to explicitly refer in this provision to the time period between “approval and confirmation” consistent with recommendation 155 of the Guide and replace references to “modifications” with references to “amendments” in draft recommendations 73 and 76.

⁵⁶ Revised further to the agreement reached by the Working Group at its fifty-seventh session (A/CN.9/1046, paras. 125-126).

⁵⁷ The Working Group may wish to consider whether this draft recommendation should be amended to provide for a possibility of amending the plan, as envisaged in draft recommendation 79 above and recommendation 155 of the Guide. See the relevant commentary.

(b) Close the simplified reorganization proceeding and parties in interest may exercise their rights at law. (*See recommendations 158 (e) and 159 of the Guide.*)

Conversion of a simplified reorganization to a liquidation⁵⁸

83 [xx and yy]. 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 initiative 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:

(a) 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 [68 and 69] above);⁵⁹ and

Option 1

(b) The competent authority may [request] [require] the independent professional to opine on such conversion [and/or the independent professional shall have [the right to be heard] [the obligation to opine] on any such conversion].⁶⁰

Option 2

(b) The competent authority should request the independent professional, if one has been appointed, to make a recommendation as to whether the case should be converted or not and to set forth the basis for the recommendation.⁶¹

Option 3

(b) Where an independent professional has been appointed, the insolvency law providing for a simplified insolvency regime [should] [may] require the competent authority to seek that independent professional's opinion on conversion of a simplified reorganization proceeding to a liquidation and [should] specify the rights and obligations of an independent professional in that context.⁶²

B. Draft commentary

6. The Working Group may wish to consider the following draft commentary to the draft recommendations above (the parts of the draft commentary appearing in square brackets are linked to the outstanding issues in the draft recommendations):

“I. Introduction

A. Purpose of this [text]

1. Micro, small and medium-sized enterprises (MSMEs) constitute the majority of businesses in economies around the world. Those in the micro and small-sized 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. MSEs tend to be relatively undiversified

⁵⁸ Further to the Working Group's request (A/CN.9/1046, para. 105), the Secretariat provisionally put this draft recommendation (originally proposed as xx and yy) at the end of this section. It notes the close link of this draft recommendation with the provisions on conversion in section P (see chapter III.B in A/CN.9/WG.V/WP.172/Add.1).

⁵⁹ The Working Group deferred the consideration of this provision to its fifty-eighth session (A/CN.9/1046, para. 105).

⁶⁰ *Idem.*

⁶¹ *Idem.*

⁶² Proposed by the Secretariat.

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 [text] was prepared to assist policymakers with those efforts. [*The Working Group may wish to consider how the text should be referred to. In considering this issue, the Working Group may wish to take into account that the text is expected to contribute to the UNCITRAL texts addressing the entire life cycle of MSMEs. In the light of a broader scope of the work by UNCITRAL Working Group I (MSMEs), the title of the text may need to convey, for avoidance of doubt, that its scope encompasses only MSEs.*]⁶³ 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. [This [text] also touches upon some MSE insolvency prevention measures, acknowledging however that they would usually fall outside the insolvency law.] [*The Working Group may wish to consider whether the text should contain recommendations and commentary on insolvency prevention measures taking into account the expected work of Working Group I on legal measures to facilitate access by MSMEs to credit.*]⁶⁴

B. Interaction of this [text] 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

⁶³ The following title was proposed during informal consultations: “Legislative Guidance on Insolvency Law for Micro and Small Enterprises”. During the September 2020 informal consultations, it was suggested to emphasize in the title that the text addresses a simplified insolvency regime.

⁶⁴ In its communication to the Secretariat dated 3 July 2020, Côte d’Ivoire expressed its support for including provisions on insolvency prevention measures. During the May 2020 informal consultations, support was expressed for retaining, with amendments, draft recommendations that address those measures. Different views were expressed as regards the need to retain a draft recommendation on pre-commencement business rescue finance (draft recommendation 107 in this draft). (See those draft recommendations and annotations thereto in an addendum to this note (A/CN.9/WG.V/WP.172/Add.1).)

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. This [text] 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 this [text] to specific recommendations in the Guide which are of particular relevance to, or are supplemented by, this [text]. Where this [text] diverges from the recommendations in the Guide, this is expressly made clear in the commentary.]⁶⁵

C. Issues taken into account in preparing this [text]

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 commercial 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 that 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 request 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 the 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

⁶⁵ The inclusion of these two paragraphs in the text was supported during the May 2020 informal consultations. If the Working Group considers that a table of concordance between the recommendations in this [text] and recommendations of the Guide should be annexed to this [text] (see footnote 5 above), this section of the commentary could cross-refer to such table.

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, those 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 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, whereas in many MSE insolvency cases an MSE will be unable and the creditors will be unwilling to finance the MSE insolvency proceedings, including services of an insolvency representative, and there will be very few creditors, no or very few assets for realization and no or very few proceeds for distribution to creditors. In some jurisdictions, MSEs unable to finance insolvency proceedings may be ineligible to apply for insolvency 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 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 insolvency. In addition, they may address only business debts of legal entities whereas MSE insolvencies often necessitate to address 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 latter 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 this [text] to treating MSEs in financial distress

14. This [text] 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 MSE's lack of resources and sophistication in financial, business and insolvency matters and creditor disengagement. This [text] 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. The latter 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, this [text] leaves it to domestic policymakers to identify persons in their jurisdictions that may benefit from access to a simplified insolvency regime envisaged in this [text]. 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. This [text] 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 this [text] 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. This [text] 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, this [text] recognizes that expedited and simplified procedures should not jeopardize rights and legitimate interest 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. Banking and 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 facing 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 and conciliation 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 this [text]. They as well as other terms used in this [text] should be read in conjunction with the terms and explanations used in the Guide:

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

(b) “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(s) 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;

(c) “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 program 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;⁶⁶

(d) “MSEs”: micro and small-sized enterprises in any legal form, including individual entrepreneurs and unincorporated or incorporated, limited or unlimited liability entities, qualified as micro and small-sized enterprises under their domestic law;⁶⁷

(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/limited liability]⁶⁸ 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);

(ii) [“Unlimited liability MSEs”: micro and small-sized 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);

(iii) “Limited liability MSEs”: micro and small-sized enterprises with or without separate legal personality and with limited liability of their founders, owners or members;]⁶⁹

(e) “MSE debtor”: an MSE with respect to which simplified insolvency proceedings have been commenced or initiated. The term “debtor” used in this [text] intends to convey the same meaning unless the specific context suggests otherwise;

(f) “Simplified insolvency proceedings”: include both simplified reorganization and simplified liquidation proceedings.

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 [draft recommendation 1]

⁶⁶ Added pursuant to the Working Group’s request at its fifty-seventh session (A/CN.9/1046, para. 80).

⁶⁷ 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 [simplified corporate structure for MSMEs]. [*The final title of the cross-referred text is to be inserted in due course*].

⁶⁸ At its fifty-seventh session, the Working Group deferred the consideration of references to limited and unlimited MSEs to a later stage (A/CN.9/1046, para. 15).

⁶⁹ Idem.

27. Recommendations 1 to 7 of the Guide list the key objectives 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. This [text] 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]. 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 individual entrepreneurs 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 that such disengagement may cause for a smooth 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"). [Employees are specifically mentioned because they can be affected by insolvency proceedings beyond their role as creditors and because they enjoy additional protections under domestic laws.]⁷⁰

30. Putting in place 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 their inappropriate imposition may however discourage honest and cooperative MSE debtors from applying for simplified insolvency proceedings and may discourage creditors and other parties in interest from participating in simplified insolvency proceedings. In deterring abuses and inappropriate 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 [draft recommendations 2-4]

1. Application to all MSEs [draft recommendation 2]

⁷⁰ For outstanding issues in draft recommendation 1, see footnotes 1, 3 and 4 above.

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 (d) and footnote 67] above), this [text] was drafted primarily for persons that share the characteristics described in paragraphs [7–11] above, i.e., micro and small-sized enterprises, which larger enterprises, including medium-sized ones, would not possess. A simplified insolvency regime should focus on early resolution of financial difficulties of those persons, 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. This [text] 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 [draft recommendation 3]

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 the 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 procedures with different access conditions and procedural steps applicable to various debts involved in MSE insolvency may not be an optimal solution. This [text] 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 [draft recommendation 4]

34. This [text] 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, this [text] 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. This [text] suggests several safeguards against that risk, in particular that the procedure most appropriate to resolution of the MSE debtor’s financial difficulty is applied by the competent authority. That safeguard is found in recommendation [26 (c)] recognizing that it would be especially relevant where commencement of a simplified insolvency proceeding is initiated by a creditor. In addition, recommendations [27 and 35] 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 to a simplified reorganization (see section [P] 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 (g bis)])]. 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 [R] of this [text]].

C. Institutional framework [see draft recommendations 5-10]

1. The competent authority entrusted with functions related to a simplified insolvency regime [see draft recommendations 5 and 6]

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 this [text], the term “competent authority” was preferred to the term “court” used in the Guide and defined in its glossary,⁷¹ 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.

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

⁷¹ See (i) “‘Court’: a judicial or other authority competent to control or supervise insolvency proceedings.”

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, this [text] 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 this [text] 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; (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 applicable law] (see recommendation [6]). Some of the listed functions could be delegated by the competent authority to an independent professional to save costs or to benefit from expertise and for other reasons (see paras. [46-50] 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).

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 text (see, for example, recommendation [50] 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 [52] on 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. Services of an independent professional [draft recommendations 5, 7 and 8]

46. This [text] 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). This [text] 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 this [text], that term was preferred to the term “insolvency representative” used in the Guide and defined in its glossary,⁷² 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.

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 decision 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 paras. [71-74] 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

⁷² See (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.”

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.

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 and no criminal record or record of financial wrongdoing, 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 an 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. The 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 [R] of this [text].]

3. Review and appeal of decisions taken by the competent authority and an independent professional [draft recommendation 5 (c)]

(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)] recommends 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 in this context broadly 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 will 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 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 [77], 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 are specifically agreed to receive lesser treatment); and (c) the plan does not contain provisions contrary to law. The latter 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, this [text] recommends that challenges to the confirmed reorganization plan should be allowed only on the basis of fraud (see recommendation [78]). 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. Under recommendation [60], 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 and 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 also be made subject to review 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, this [text] recommends that a simplified insolvency regime should build in measures to avoid protracted reviews of the competent authority's decisions (see paragraphs [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 this [text] (see para. 25 (b) 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 authority by other relevant State authorities under other law.

4. Support with the use of a simplified insolvency regime [draft recommendation 9]

68. In addition to services of an independent professional addressed in paragraphs [46-50] above, this [text] 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 [draft recommendation 10]

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. This [text] 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, this [text] 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 [draft recommendation 11]

75. To avoid delays and at the same time to ensure transparency and predictability, this [text] 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. The competent authority may modify the proceedings by introducing, for example, a mandatory mediation stage or displacing the debtor-in-possession with an independent professional. To allow any party in interest to object to default procedures or treatment or request an alternative procedure or treatment in a timely fashion, this [text] 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.

2. Short time periods [draft recommendation 12]

76. Consistent with the objective of establishing an expeditious simplified insolvency regime, this [text] 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, like pandemic). The

law may allow only a certain maximum number of permissible extensions (e.g., once or twice). This [text] envisages certain consequences, including conversion of one type of proceeding to another type, where the established deadlines cannot be complied with.

3. **Reduced formalities [draft recommendation 13]**

77. 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, this [text] 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 [see draft recommendations 14, 15 and 16]**

Debtor-in-possession as the default approach [draft recommendation 14]

78. This [text] 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. 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.

79. 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.

Rights and obligations of the debtor-in-possession [draft recommendation 15]

80. The common rights and obligations of the debtor are addressed in recommendations [19 and 20] (see paras. [92-97] 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. This [text] 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 this text. In the debtor-in-possession approach, references to the insolvency representative in those provisions should be read as references to the debtor-in-possession.

81. The debtor-in-possession may be assisted by the competent authority or an independent professional in day-to-day operation of 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.)). 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.

82. 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.

Limited or total displacement of the debtor-in-possession [draft recommendation 16]

83. 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 poor management that caused its financial distress. 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. This [text] 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 [draft recommendation 17]

84. 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, this [text] 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 [48]).

6. Deemed approval [draft recommendation 18]

85. Despite the envisaged active role of the competent authority in administration of simplified insolvency proceedings, this [text] 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.

86. 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. This [text] 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.

87. 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 [73]); 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.

88. 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]).

89. 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, 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 communication (issues with retrieval of information properly dispatched because of security measures (firewalls, etc.)).

90. 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.

91. The term “objection” is used in this [text] to refer to rejection of the proposed course of action on any legal ground (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 this [text] to refer to rejection of any aspects of the proposed course of action for extra-legal 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. 274-279 below.)

E. Participants

1. Rights and obligations of parties in interest [see draft recommendation 19]

92. For certainty and the protection of different parties in interest involved in simplified insolvency proceedings, this [text] recommends specifying the rights and obligations of the MSE debtor, creditors and other parties in interest[, including employees], 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, this [text], building on recommendation 109 of the Guide, recognizes that individual entrepreneurs will be entitled to retain certain property 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).

93. 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] of this text. It is supplemented by recommendation [102] that lists some key insolvency prevention obligations of persons exercising control over management and oversight of the MSE operations, 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. *[This section may need to be expanded by references to rights and obligations of other parties in interest, in particular employees, depending on the Working Group’s views on the relevant provisions.]*

2. Obligations of the debtor [draft recommendation 20]

94. This [text] provides that, on the commencement of a proceeding and throughout the proceeding, to ensure that simplified insolvency proceedings can be conducted effectively and efficiently, 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.

95. This [text] 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.

96. In the debtor-in-possession approach, which is envisaged as the default in this [text] 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.

97. 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.

F. Eligibility, application and commencement

1. Eligibility [draft recommendation 21]

98. 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, this [text] 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.

99. This [text] 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. This [text] 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, where the number of creditors is more than 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 [draft recommendation 22]

100. Making simplified insolvency proceedings available and easily accessible to MSEs is listed in recommendation [1] of this [text] as one of the key objectives of a simplified insolvency regime. The commencement criteria and procedures play an important role in achieving that objective. This [text] 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.

101. This [text] recognizes that ease of access needs to be balanced against proper and adequate safeguards to prevent improper use 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. A simplified reorganization proceeding may be commenced by the debtor in order to delay unavoidable liquidation.

102. At the same time, this [text] considers that those concerns are better addressed by discouraging improper use, rather than by devising complex commencement criteria and procedures. Measures discouraging such improper use by either a creditor or the debtor are found throughout this [text], 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. An important measure consists of the power of the competent authority to decide on application of a stay. 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.

103. This [text] 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 acknowledgment 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. 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. 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 [draft recommendations 23–25]

No requirement to prove insolvency [draft recommendation 23]

104. 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 16 of the Guide).

105. 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.

106. This [text] recommends not requiring a MSE debtor to prove insolvency. It recommends allowing a MSE to apply for simplified insolvency proceedings at an “early stage of financial distress” (see recommendation [23]). It is left to States to define an “early stage of financial distress”. 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 already 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.

107. 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. This [text] 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 recommendation [86])).

108. This [text] 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 [33]). 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 [27]. Where the application functions to automatically commence proceedings, the competent authority will have 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 [35 and 38]. 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).

Information to be included in the application [draft recommendation 24]

109. 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, this [text] recommends that the disclosure obligation upon application should be kept to an essential minimum. Recognizing that under this [text] 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.

110. 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.

111. 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.

112. 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.

Effective date of commencement [draft recommendation 25]

113. This [text] 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.

4. Commencement on creditor application [draft recommendation 26]

114. As provided for in recommendation [21] of this [text], 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. This [text] 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.

115. 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.

116. 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.

117. 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 this [text] 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).

118. 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, e.g., 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 para. [105] above).

119. In that context, States may refer to recommendation 17 of the Guide, 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 17 is accompanied by a footnote reading: "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."

120. 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 [draft recommendations 27-30]

121. This [text] 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 this [text]. In accordance with recommendation [21], the law providing for a simplified insolvency regime should also specify the persons eligible to apply for commencement of simplified insolvency proceedings.

122. 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).

123. 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 [Q] and its accompanying commentary.)

124. 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 [28]). 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 [draft recommendation 31]

125. Giving notice of the commencement of insolvency proceedings is central to several key objectives of an insolvency regime. It ensures the transparency of the proceedings 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, this [text] recommends that the insolvency law providing for a simplified insolvency regime should require that the competent authority should give the notice of the commencement of the simplified insolvency proceedings.

126. Two forms of notice are envisaged: a general notice (subparagraph (a) of the recommendation); and individual notices to the debtor and all known creditors (subparagraph (b)).⁷³

127. The aim of the general notice is to ensure that the information is likely to come to the attention of all parties in interest. "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 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.

128. This [text] 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 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.

129. However, the public notice will not always be appropriate. For example, concerns over stigmatization because of insolvency and possible negative

⁷³ On the outstanding issue related to the notification of employees, see footnote 20 above.

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 by circulation of the notice of commencement of proceeding by electronic means to all known parties in interest or by granting them a restricted access to a secure web page of the proceeding.

130. In addition to that general notice, this [text] 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 the commencement of the proceeding and because they may need to receive an individualized content.

131. All creditors will have an interest in being individually notified of the commencement in order to be able to participate and protect their interests in insolvency proceedings. Certain creditors (such as suppliers) also need to be notified so as to make an informed decision concerning continuing provision of goods and services to the MSE debtor to avoid the accumulation of further debt. In addition, they may have grounds to object to the commencement of the proceeding or a particular type thereof or to the commencement of any insolvency proceeding with respect to the debtor. These considerations equally apply where the proceeding commences upon application of the debtor or where it commences upon application of creditor(s) since in the latter case, creditors other than those applying for commencement of proceedings will have a direct interest in being individually notified of the commencement of the proceeding.

132. This [text] 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. 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 incompleteness or inaccuracies 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.

133. 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 [114-120] above, where the proceeding commences upon creditor's application, the debtor is expected under this [text] to be individually notified of the application (see recommendation [26 (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 26 (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.

134. While recommending the individual notification of the commencement of the simplified insolvency proceeding to the debtor and all known creditors, this [text] 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 email. The notice may be delivered to immediate family members or a general notice given under subparagraph (a) of the recommendation (either public or more restricted general) may be considered sufficient.

135. Where electronic means of notification is 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 addressees to retrieve communication at an electronic address designated by the addressee (e.g., security measures such as filters or firewalls that might prevent them to retrieve electronic communications from unknown originators), they will be presumed in receipt of communication at the time when an electronic communication reaches their electronic address; this presumption may be rebutted by evidence showing that the addressee had in fact no means of retrieving the communication.

136. The competent authority may be considered fulfilling its notification obligations from the time of “dispatch” of notices, understood as the time when communication leaves its sphere of control. In paper-based communication, this will be the time when it 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.⁷⁴

7. Content of the notice of commencement of a simplified insolvency proceeding [draft recommendation 32]

137. This [text] recommends that the insolvency law providing for a simplified insolvency regime should require the notice of the commencement of insolvency proceedings 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.

138. 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 (total or limited; see recommendation [16]). As noted in the context of recommendation [31], the

⁷⁴ 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.

debtor may be expected to receive additional information concerning the assessment of its insolvency if the proceeding is commenced without its agreement.

139. 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 [text] envisages the right of both to seek review of competent authority's decisions. In addition, a possibility of creditors raising objection to the commencement of the proceeding is specifically envisaged in recommendation [33]. 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]).

140. 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.

8. Creditor objection to the commencement of a simplified insolvency proceeding [draft recommendation 33]

141. Recommendation [25] recommends that simplified insolvency proceedings are commenced automatically or promptly upon application of the debtor by a decision of the competent authority. The expeditious commencement will exclude a possibility for creditors to learn about the debtor's application and raise objection to the commencement before the commencement.

142. Creditors may object to the commencement of a simplified insolvency proceeding, for example, on the ground that the application constituted an improper use by the debtor of the simplified insolvency regime because it is in a good standing (i.e., not insolvent and not at an early stage of financial distress) and simply wishes to avoid its debt repayment obligations by taking advantage of a stay and other benefits of insolvency proceedings. 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 to the commencement of a particular type of simplified insolvency proceeding, e.g., a simplified reorganization proceeding as opposed to a simplified liquidation proceeding.

143. This [text] 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 [32]). In line with recommendation [12], this time period should be short.

144. Different options will be available to the competent authority depending on the ground 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. 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.

[No commentary on draft recommendation 34 has been included pending the Working Group's view on whether that recommendation should stay in the text and if so, its content (A/CN.9/1046, paras. 53-59).]

9. Dismissal of a simplified insolvency proceeding after its commencement [draft recommendations 35 - 38]

145. Recommendation [35] 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, that is, that there was improper use of a simplified insolvency regime, either by the debtor or creditor(s), or the applicant was ineligible (see recommendation [21] on Eligibility).

146. Under recommendation [36], 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 [45]). 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.

147. As in the case with the denial of application, recommendation [37] recommends that the insolvency law providing for a simplified insolvency regime should set out possible consequences of the dismissal of proceedings. Recommendation [38] further recommends that the competent authority should have the power to impose costs or sanctions, where there is evidence of improper use of the simplified insolvency proceedings by either the debtor or creditor(s). 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 [draft recommendation 39]

148. This [text] 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.

149. Consistent with the objective of establishing a cost-effective simplified insolvency regime, this [text] 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 [draft recommendation 40]

150. This [text] recommends that, as a default rule, the debtor and any known creditor should be individually notified about matters that require their attention. Those matters include: (a) as far as the debtor is concerned, the notices of creditor application (see recommendation [26 (a)]) and of commencement of a simplified insolvency proceeding (see recommendation [31 (b)]); and (b) as far as creditors are concerned, the notices of commencement of a simplified insolvency proceeding (see recommendation [31 (b)]), of adverse actions as regards their claims (see recommendation [51]), of a liquidation schedule (see recommendation [59]) and of a reorganization plan (see recommendation [74]). In those cases, individual notification of the person(s) concerned will be the default.

151. The competent authority may however 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 email address or the debtor no longer lives at its habitual residence and its whereabouts are unknown, giving public notice may be considered appropriate. Instead of sending a separate individual email to each known creditor with the attached reorganization plan for approval, the plan may be made available on the web portal of the relevant insolvency proceeding with the link thereto automatically generated to creditors participating in the proceeding.

152. 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 this text. 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 [draft recommendation 41]

153. This [text] 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.

154. 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 them, including through the use of relevant public registries, local publications and electronic means.

155. 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 video conference 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 [draft recommendations 42 and 43]

156. This [text] recommends specifying in the law that the insolvency estate is to be constituted from the effective date of commencement of the proceeding. It also recommends specifying the manner of constituting the insolvency estate. Different approaches may be taken. 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.

157. 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.

2. Avoidance in simplified insolvency proceedings [draft recommendation 44]

158. 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, 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, this [text] 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.

159. The competent authority should have the principal responsibility to commence avoidance proceedings in a simplified insolvency regime. This approach would be justified in particular in simplified reorganization proceedings where it would be paradoxical to expect the debtor-in-possession who concluded a voidable transaction to handle avoidance.

160. 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 timeframe 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).

161. The refusal to commence avoidance proceedings in the simplified insolvency proceeding or by converting the simplified insolvency proceeding to a standard business insolvency proceeding, as any other decisions of the competent authority, may be challenged by creditors in the relevant review body (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.

162. 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.

163. Mechanisms for covering costs of administering simplified insolvency proceedings discussed in the context of draft 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, e.g., 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 and/or tax deduction).

164. 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.

165. 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 paras. [373-379]) 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 [23]) may raise additional issues as regards determination of avoidable transactions, in particular a suspect period.

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

3. Stay of proceedings [draft recommendations 45 and 46]

167. Like the Guide (see recommendation 46), this [text] 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 will 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 will allow arranging a sale that will 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 will allow all parties concerned to carefully assess chances of business survival and ways of successful reorganization of viable business.

168. To achieve those objectives and to promote transparency and predictability, this [text] 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.

169. Recommendations [45 and 46] 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.

170. 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, this [text] 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. The 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. This [text] 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.

171. 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. This [text] 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), this [text] 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.

172. 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.

173. The competent authority will have 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 (see paras. [192 and 204-205] below)).

174. 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, e.g., 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

175. This [text], 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 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 simplified insolvency proceeding, in order to prevent dissipation of 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.

176. 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.

177. Other provisions of insolvency law may be also relevant for the protection of the insolvency estate before commencement, such as reclamation of assets.

I. Treatment of creditor claims [draft recommendations 47–53]

1. Claims affected by simplified insolvency proceedings [draft recommendation 47]

178. This [text] 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.

179. 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).

180. 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 omission of the debtor.

181. This [text] 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. 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 [see draft recommendation 48]

182. 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. This [text] recommends two methods of admission of claims: one, addressed in recommendation [48], does not involve submission of claims by creditors; and the other, addressed in recommendation [49], involves such submission.

183. As noted in the context of the commencement of simplified insolvency proceedings by the debtor in paragraph [110] above, 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 this [text] 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.

184. 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.

185. 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 being able to obtain accurate and relevant information from the debtor.

186. Ensuring the accuracy of the list of creditor claims, indicating clearly amounts and the 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, this [text] 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.

187. 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., email). 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.

188. 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. 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. 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 step may slow down the proceedings considerably.

3. Submission of claims by creditors [draft recommendation 49]

189. This [text] 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.

190. 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 will 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.

191. 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.

192. 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 (see paras. [204-205] below), and clear rules are required to reduce possible uncertainties.

193. 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 an insolvency law include clear rules on the treatment of secured creditors for the purposes of submission of claims.

194. The request to submit claims will be contained either in the notice of commencement of the proceeding (see recommendation [32]) 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.

195. 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 e-mail 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. Where necessary, the competent authority may request information or documentation to prove any claim additional to that contained in the form.

196. This [text] does not recommend that the insolvency law should fix a particular timeframe 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 time difference, a different workdays and days-off schedule, etc.).

197. For those reasons, this [text] 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.

198. 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.

199. The consequences of failure to submit 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 has that result.

4. Admission or denial of claims [draft recommendation 50]

200. 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).

201. A category of creditors that may require special consideration is those persons related to the debtor, whether in a familial or business capacity. This [text] recommends that the competent authority should be able to subject claims by related persons to special scrutiny and treatment as may be permitted by the insolvency law. Special scrutiny and treatment of the claims of these persons is often justified because they are more likely than other creditors to have been favoured and to have had early knowledge of the financial difficulties of the debtor.

202. The mere fact of a special relationship with the debtor, however, may not be sufficient in all cases to justify special treatment of a creditor's claim. In some cases, these 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.

203. For a secured creditor's claim, this [text] 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.

204. 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.

205. 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.

206. 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.

207. 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 time stamps, electronic means of identification and authentication, online meetings and online cross-check with public registries' records.

208. 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.

209. 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 [48]), 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 [49]), 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 the cost-efficient manner.

5. Prompt notice of denial of claims or subjecting them to a special scrutiny or treatment [draft recommendation 51]

210. This [text] 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 (see paragraph [209] above). It is included in this text 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.

211. This [text] 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, would facilitate review of the contested decision by a review body.

212. 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 treatment or scrutiny, 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 [draft recommendation 52]

213. The right of any party in interest to dispute any claim is reflected in recommendation [52] of this [text] that recommends that the insolvency law providing for a simplified insolvency regime should allow 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 such provision.

214. 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. This

[text] recommends including such information in the liquidation schedule (see recommendation [58]) that is required to be notified to all known parties in interest (see recommendation [59]).

215. Most insolvency laws provide for disputes over claims to be resolved by the judicial body to ensure finality of the decision. In addition, claims that may be submitted in the proceedings may be already the subject of a dispute outside of the simplified insolvency proceedings. Depending on the application of the stay and its scope, the resolution of those disputes outside the simplified insolvency proceeding may or may not be stayed. This [text] 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.

216. This [text] suggests that disputed claims could be treated differently. For example, a disputed claim may be admitted provisionally (see paragraphs [205-206] above for 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.

217. A mechanism for 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 [draft recommendation 53]

218. Admission of a creditor's claim will establish the rights of that creditor to participate in the proceeding. The admitted creditors are in particular expected to be notified of all matters affecting their rights and interests, to be heard and to be counted for determining whether the creditor approval on matters requiring such approval was obtained. Upon admission, the amount and priority of the admitted claim will be fixed and that fixed amount and priority must be taken into account in distribution of proceeds from realization of the insolvency estate assets.

J. Employees [draft recommendation 54]

219. This [text] includes employees in the circle of parties in interest (see recommendation [1 (d)]) to reflect the fact that employees can be affected by insolvency beyond their role as creditors (which is captured by the recommendations dealing with creditors' rights and position) and that they might be subject of additional protection under domestic law. The appropriate level of protection of employees is for States to determine. Simplified insolvency proceedings recommended in this [text] do not intend to remove or diminish such protection or advise States against putting it in place. To the extent that MSEs eligible to apply for simplified insolvency proceedings will have employees, the obligations under domestic law concerning employees would remain applicable in the simplified insolvency context.

220. Recommendation [54] recommends that the law providing for a simplified insolvency regime should require the competent authority to ensure that legal

requirements relating to the protection of employee's rights and interests in insolvency are complied with in simplified insolvency proceedings. Since those requirements may be found not only in the insolvency law, the recommendation contains a broader reference to applicable law.

221. 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 when applicable, to be consulted, to provide an opinion or to agree on the type of the proceeding to be commenced (e.g., a reorganization as opposed to a liquidation) and measures leading to changes in the work arrangements and contractual relations with employees.

222. Recommendation [54] singles out notification and information requirements in the light of the importance of fulfilling those requirements for exercising other 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. Other recommendations in this [text] address other aspects of employees' protection. *[This section may need to be expanded by cross-references to other recommendations in this text where the Working Group may consider adding specific references to employees, e.g., draft recommendations 6 (i), 19, 22 (c) and 31. For example, it may state that, under recommendation [19], employees, like all other parties in interest, will have the rights to be heard, to request review on any issue in the proceeding affecting their rights, obligations or interests, to participate in simplified insolvency proceedings and to obtain information relating to the proceeding from the competent authority.]*

K. Features of simplified liquidation proceedings [see draft recommendations 55–66]

1. Decision on a procedure to be used [draft recommendation 55]

223. 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. The owner(s) 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 for unsatisfied claims.

224. Where there are assets in the insolvency estate, this [text] 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 encumbered asset, the amount owed by the debtor to the secured creditor and the commercial reasonableness of the intended method of the realization of the asset. Where no distribution to creditors is possible due to the lack of (sufficient) assets in the insolvency estate, this [text] 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 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.

225. 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 [56-63] of this [text]. It is where there are no assets to sell and no proceeds to distribute to creditors, recommendations [64-66] will apply.

2. Procedure involving the sale and disposal of assets and distribution of proceeds [see draft recommendations 56-63]

Preparation of the liquidation schedule [draft recommendation 56]

226. Although preparation of the liquidation schedule may not be known in some jurisdictions, this [text] recommends introducing such 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 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 [58], the liquidation schedule may become a helpful reference document where a simplified liquidation proceeding is converted to a simplified reorganization proceeding.

227. 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. In those cases, this [text] recommends that the competent authority itself will prepare the liquidation schedule. In other cases, this [text] recognizes that it might be more efficient to entrust liquidation and preparation of the liquidation schedule to an independent professional [or a creditor]. 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 advice of an independent professional where necessary, the competent authority should be allowed to determine the method(s) for realization of assets it deems most appropriate. This may in particular be required for urgent sales (perishable assets, etc.).

228. The involvement of the debtor in liquidation and preparation of the liquidation schedule is not completely excluded in this text. Recommendation [17] envisages such possibility. [*This may need to be expanded by reference to recommendation 56 if option 2 for that recommendation is selected*]. The extent of such involvement may be limited and will be determined by the competent authority on a case-by-case basis. As noted in paragraph 84 above, 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 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.

Time period for preparing a liquidation schedule [draft recommendation 57]

229. This [text] 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 this [text] 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). 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 review of decisions by the competent authority. In addition, to ensure transparency, accountability, predictability and certainty, this [text] recommends that all known parties in interest should also be notified of the deadline.

230. 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 for 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 paragraph [227] above).

Minimum contents of the liquidation schedule [draft recommendation 58]

231. Recommendation [58] 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 the procedure. At the same time, the liquidation schedule should be 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 should thus include the party responsible for the realization of the insolvency estate,⁷⁵ the means to be used (public or private auction or other means), amounts and priorities of 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 complying with the minimum content requirements where such document is prepared. Making them binding may however remove flexibility – one of the objectives of a simplified insolvency regime – and should be avoided.

Notification of the liquidation schedule to all known parties in interest [draft recommendation 59]

232. This [text] 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

⁷⁵ See a suggestion raised with respect to that phrase in the draft recommendation (footnote 36 above).

only by those parties of interest, or by transmitting it by email or by other means to those parties in interest. General notice and notification requirements would apply (see recommendations and accompanying commentary in section [G] of this [text]). 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, this [text] 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.

Prior review of the liquidation schedule by the competent authority [draft recommendation 60]

233. This [text] provides for an additional safeguard in situations where the liquidation schedule is prepared by a person other than the competent authority (see recommendation [56]). 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.

234. As noted above, making available checklist, templates or standard forms for liquidation schedules, including online, may considerably simplify the task of preparing a complete, accurate and law-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.

Approval of the liquidation schedule [draft recommendation 61]

235. This [text] does not recommend that the liquidation schedule should be approved by creditors. While giving creditors the opportunity to object, this [text] recommends that it should be left to the competent authority to approve or reject the liquidation schedule. In the absence of any objection within a time period specified in the notification of the liquidations schedule, this [text] 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.

Treatment of objections [draft recommendation 62]

236. This [text] 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 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. Second, it 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.

237. The third option may be a conversion 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.

Prompt distribution of proceeds in accordance with the insolvency law [draft recommendation 63]

238. This [text] does not recommend establishing any special rules for distribution of proceeds and priority in simplified insolvency proceedings. They will take place and be determined in accordance with the generally applicable insolvency law. Recommendations 185–193 and the accompanying commentary in the Guide that address priorities and the distribution of proceeds will thus be applicable in a simplified insolvency regime.

239. 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 secured 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 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.

240. The liquidation schedule will set out the amounts and priorities of claims and the timing and method of distribution as recommended in recommendation [58], which would help any disputes regarding those matters be resolved early in the process. Section [I] of this [text] on treatment of creditor claims, in particular provisions on disputed claims, will also be relevant in this context.

241. This [text] emphasizes the need to distribute proceeds promptly.

3. Simplified liquidation proceedings where there are no assets to realize and no proceeds to distribute [see draft recommendations 64–66]

General

242. This [text] envisages that the competent authority may decide to proceed with the closure of the simplified liquidation proceeding after its commencement 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 organising them. 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.

243. 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.

244. 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.

Notice of a decision to proceed with the closure of the proceeding [draft recommendation 64]

245. This [text] 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. Such notice has to be given promptly in the light of an 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.

246. 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, this [text] recommends allowing only a short time period for expressing objections, consistent with recommendation [12] and an 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.

Decision to close the proceeding in the absence of objection [draft recommendation 65]

247. Where no objection is raised, this [text] 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 [M]).

Treatment of objections [draft recommendations 66]

248. When an objection to the decision to proceed with the closure of the proceedings is raised, this [text] 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 earlier decision, the competent authority is provided with several 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 [44])).

249. Generally, the debtor should cease to be eligible for the procedure envisaged in recommendations [64-66] 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 should proceed with the procedure for realization of assets and distribution of proceeds described in recommendations [56-63] or convert a simplified liquidation proceeding to a standard business insolvency proceeding. In other cases, the competent authority should proceed with the closure of the proceeding after taking a decision on discharge (see paragraph [247] above) and notifying its final decision to the objecting creditor.

250. 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 to below the required threshold before application for an insolvency proceeding or to strategically time the filing of the application to allow them to escape from debt obligations while benefiting later from post-discharge income.

251. 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. Sanctions, including criminal ones, may be imposed in certain cases of abuse of this procedure.

L. Features of simplified reorganization proceedings [draft recommendations 67-83]

1. General

252. 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.

253. 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 its accompanying commentary below.)

2. Preparation of a reorganization plan [draft recommendation 67]

254. Consistent with the debtor-in-possession approach recommended in this text as the default for simplified reorganization proceedings (see recommendation [14]), this [text] recommends 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. Provided that the plan contains sufficient information to enable assessment of its viability, submission of a disclosure statement as envisaged in recommendations 141–143 of the Guide should not be required.

255. Where it is clear that the MSE debtor will not be able to propose a plan, this [text] recommends that the competent authority should be allowed to entrust the preparation of a plan to an independent professional [or another person]. *[This section will need to be expanded depending on the final text of draft recommendation 67.]* In addition, assistance of an independent professional may be required in negotiating the plan with creditors and ensuring that the plan complies with applicable law requirements, including as regards treatment of employees.

3. Proposal of the reorganization plan [draft recommendations 68-70]

256. 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 of the competent authority or an independent professional with the preparation and negotiation of the plan with creditors.

257. This [text] 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, this [text] 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.

258. Recognizing that circumstances may arise that would justify extension of the original deadline, this [text] 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.

259. 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 [text] 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.

260. At the same time, this [text] 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 this [text] 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 recommendation [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 [draft recommendation 71]

261. This [text] 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 another person entrusted by the competent authority under recommendation [67]. The law providing for such an option would need to specify the conditions and the time period for presenting the alternative plan.

262. The alternative plan may be submitted simultaneously with the original plan if, for example, some creditors that participated in 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, i.e., 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 [68] envisages the possibility of extension up to the maximum period established by law for the proposal of a reorganization plan.

263. 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 [70], an insolvent debtor will be deemed to enter the liquidation proceeding and for the solvent debtor the reorganization proceeding will terminate.

264. Although this competitive approach 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 [draft recommendation 72]

265. This [text] draws on recommendation 144 of the Guide that sets out the minimum requirements for the content of the plan but significantly simplifies them since not all of them would always be applicable in a simplified insolvency regime. This [text] recommends that the plan should at a minimum set out terms and conditions of business reorganization, ways of implementing the plan 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. The reorganization plan may modify priorities and the subordination 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.

6. Notification of the reorganization plan to all known parties in interest [draft recommendation 73]⁷⁶

266. [This [text] recommends that, upon receipt of the plan and before communicating the plan to all known parties in interest, the competent authority should be expected to ascertain that the plan complies with the procedural requirements as provided in the law. Any such non-compliance should be rectified by the party responsible for preparing the plan. The competent authority itself may rectify them by amending the plan, if it feels comfortable doing so. In such case, it would be expected to give a prompt notice of the amendments to the party that prepared the plan.]

267. The latter option may necessitate putting in place efficient mechanisms for resolving possible disagreements between the competent authority and the party that prepared the plan about the amendments introduced by the competent authority to the originally proposed plan. Narrowing the scope of possible amendments by the competent authority to the plan (e.g., limiting them to those that are dictated by procedural requirements of law rather than linked to business, financial and other substantive aspects of the plan) may mitigate risks of disputes. An option to seek review of the competent authority's decision under draft recommendation 5 (c) would still exist.]

268. This [text] (recommendations [18 and 40]) recommends that the debtor and any known creditor should be individually notified by the competent

⁷⁶ This section will need to be revised further to the Working Group's view on whether option 1 or 2 should stay in the text and its wording.

authority of all matters that require their approval. A reorganization plan is such a matter. As discussed in the context of provisions on notification, cost-efficient means, such as electronic means, could be used for individual notification, including a possibility of making a reorganization plan available on the web page of the proceeding with a notice of the plan generated automatically by the system to all known parties in interest.

269. The notice should specify the deadline by which any objection or opposition to the plan should be expressed. It should also explain consequences of abstention, in particular that abstention would be counted as approval of the plan.

7. Effect of the plan on unnotified creditors [draft recommendation 74]

270. 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 [74], which is supplemented by recommendation [34]⁷⁷.

271. A number of recommendations in this [text] ensure that all known creditors of the debtor are given the opportunity to express their views on a reorganization plan. Creditors are expected first to be properly notified of the commencement of the simplified insolvency proceeding 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 [31, 32, 48 and 49]). All admitted creditors are expected subsequently to be individually notified by the competent authority of all matters on which their approval is required (see recommendations [18] on deemed approval, [40] on individual notifications, [73] on notification of the reorganization plan, [76 (c)] on notification of a modified plan and [79 (c)] on notification of an amended plan). This [text] recommends that a [short] [sufficient] time is given to creditors to raise their objections or express their opposition (see recommendations [18 and 73]) and that the competent authority should be required to duly consider any objection or opposition received (see recommendation [76]). Where creditors are unsatisfied with the competent authority's decisions, including with the confirmation of the reorganization plan, they can seek review of those decisions in a relevant review body (see recommendations [5 (c) and 78]).

272. 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 objection or opposition, as envisaged in recommendation [9]. As noted in the context of that recommendation, such templates or forms should not be made mandatory so as to avoid procedural rigidity.

273. At the same time, this [text] 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, this [text] recommends counting abstaining or non-participating creditors as creditors that

⁷⁷ The link between these two related provisions is to be further explained in the commentary if the Working Group agrees to retain draft recommendation 34 and depending on its content. See footnote 21 above.

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 [73]. This system 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 plan by creditors [draft recommendations 75 and 76]

General

274. 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, this [text] recommends reducing formalities for all procedural steps involved in simplified insolvency proceedings (see recommendation [13]). This will include steps involved in the approval of the reorganization plan.

275. This [text] 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, disclosure statement hearings, creditor meetings or a formal vote. The latter is replaced by a mechanism of deemed approval explained in the context of recommendation [18] above, 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).

276. Although this mechanism may be unknown to insolvency law in some jurisdictions and is not envisaged in the Guide, this [text] 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, the factors that are absent in MSE insolvency.

277. 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 capital structure of MSEs, too complex requisite majority thresholds may need to be adjusted for a simplified insolvency regime.

278. 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 effectively and timely use such opportunity. They are discussed in more detail in paragraphs [271-272] above.

279. Bearing in mind the broad impetus of providing a simplified and efficient process, while at the same time ensuring protection of all parties in interest, this

[text] thus seeks to achieve the right balance between these competing goals through: (a) deemed approval, which aimed to address the issue of creditor disengagement; and (b) individual notification and other safeguards for creditors. Where concerns exist that the mechanism of deemed approval may produce negative impact on protection of creditor's rights or on the availability of credit for MSEs or it may require a stronger institutional capacity than that required for holding a formal vote, States may retain voting in all MSE insolvency cases or may require voting in some specified cases and preserving it as an option in other cases. In such case, they should consider allowing counting absent votes or abstentions as positive votes in a simplified insolvency regime.

Undisputed reorganization plan [draft recommendation 75]

280. 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 a sufficient ground alone to stop the process so that allegations could be investigated and if they are substantiated, grounds for objection would need to be removed. Sanctions and costs could be imposed for objections raised in bad faith.

281. The nature of opposition is different: it does not concern matters of law 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, a 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.

Disputed plan [draft recommendation 76]

282. In case of any objection or opposition to the proposed plan, this [text] recommends allowing a modification of the plan.⁷⁸ It does not specify which party will be responsible for introducing modifications. It would depend on the nature of 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.

283. In case of opposition, the competent authority would need to 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. This [text] recommends

⁷⁸ See footnotes 49, 52 and 55 suggesting that the term "amendment" may be used in place of "modification", with a consequential change in draft recommendation 79. Such change would affect the commentary to the relevant recommendations of this text.

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 case of an insolvent debtor (or termination of the proceeding in 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 are deemed to accept the compromise reached in the modified plan.

284. Sanctions and costs should be imposed on creditors for bad faith behaviour (e.g., for raising opposition where the adoption of a restructuring plan in fact does not unfairly affect their rights and interests) in the light of serious consequences envisaged in this [text] for the debtor and its business if the plan cannot be approved by the established deadline. 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 [draft recommendation 77]

285. In standard business insolvency proceedings, the competent authority is usually not expected to evaluate 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. The plan approved by creditors will take effect automatically and be binding on any dissenting party in interest unless it is successfully challenged in a review body.

286. 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 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, this [text] 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 impossible to implement the plan from a practical, rather than an economic, point of view.

287. Recommendation 152 of the Guide sets out conditions for 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 confirmation of the plan by the competent authority. The competent authority may decide to engage the services of an independent professional for determination of the outcome of an alternative liquidation scenario where necessary.

10. Challenges to the confirmed plan [draft recommendation 78]

288. This [text] 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.

289. 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.

290. Because of an alleged fraud and public interest concerns, this [text] 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)].

291. 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, this [text] 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 for just and equitable grounds such as fraud. The alternative option, often envisaged in cases of the 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 [see draft recommendation 79]⁷⁹

292. This [text] addresses two time points at which amendment of the reorganization plan may be sought: before its approval and confirmation; and during its implementation. This [text] recommends allowing any party in interest to propose amendments to the original plan at any time before its approval by creditors and confirmation by the competent authority. Mechanisms for modifying the plan at that stage and consequences of the failure to secure approval or confirmation of modifications are addressed in recommendation [76]. To avoid delays, short time limits should generally be imposed for proposing and accepting any modifications at that stage.

293. In addition, this [text] recommends that the law should provide for the possibility of amending the plan after its approval by creditors and confirmation by the competent authority. To ensure predictability and 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 in 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

⁷⁹ See footnote 55 above for issues raised in connection with that recommendation, which may affect the commentary.

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.

294. 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. It will thus resemble the approval and confirmation of the original or modified plan and 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.

295. 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, e.g., 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.

296. Some plans could be self-modifying, e.g., 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. Duration of the simplified reorganization proceedings [draft recommendation 80]

297. In general, insolvency laws adopt different approaches to closing reorganization proceedings. They may be closed when the reorganization plan is confirmed. In such case, rights and obligations included in the plan will be enforced under non-insolvency law. Another approach is to close proceedings 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. This [text] follows the latter approach recommending that a simplified reorganization proceeding remains open until its closure by the competent authority after confirmation of the implementation of the plan. This approach was favoured because this [text] envisages important functions for the competent authority until the end of the implementation of the reorganization plan.

298. The first function is supervision of the implementation of the plan, which can be done by the competent authority directly or through an appointed independent professional (see recommendation [81]). To allow them to fulfil that function until the end, the proceeding must remain open. The second function is confirmation of the implementation of the plan as a precondition for the closure of the simplified reorganization proceeding. The competent authority is expected to fulfil that function irrespective of whether the competent authority itself or any other person supervised the implementation of the plan.

299. There will be other grounds to close a simplified reorganization proceeding. They are addressed in other provisions of this [text] (e.g., failure to propose or approve the plan by the established deadline may lead to the

closure of a simplified reorganisation proceeding for a solvent debtor and its conversion to a liquidation for an insolvent debtor).

13. Supervision of the implementation of the plan [draft recommendation 81]

300. This [text] envisages a possibility for the competent authority or an independent professional to supervise the implementation of the plan recognizing that supervision of the plan by the competent authority or an independent professional in all cases may be unnecessary and costly. In some cases, the debtor may be effectively supervised by persons other than the competent authority or an independent professional (e.g., by creditors) while yet in other cases 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, all these approaches are intended to be captured by the provision.

14. Consequences of the failure to implement the plan [draft recommendation 82]

301. There could be substantial breach by the debtor of the terms of the plan or implementation of the plan may break down for other reason, including inability of the debtor to perform the plan (because of health reasons or extraordinary circumstances). This text envisages several options for the competent authority to consider in those cases. Depending on the stage reached in 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. 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.

302. Where the plan cannot be implemented by the debtor for justified reasons, the law may allow the debtor or an independent professional supervising the implementation of the plan to petition the competent authority to amend the plan. Although such possibility is not explicitly envisaged in recommendation [82], amendment of the reorganization plan during its implementation is envisaged in recommendation [79]. When such option is pursued, a balance should be achieved between different factors, including the time required to approve an amended plan, achieving the best outcome of all parties in interest concerned and the need for expeditious conduct of the proceedings.⁸⁰

303. Another option for an insolvent debtor is conversion of a failed simplified reorganization proceeding to a simplified liquidation proceeding or a different type of insolvency proceeding, which will be one of the grounds for conversion envisaged in recommendation [97]. For a solvent debtor, the competent authority would not be able to effectuate such conversion; it 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. Such 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.

⁸⁰ See footnote 57 above for issues raised in connection with that draft recommendation.

304. In case of a breach by the debtor of specific terms of the plan, the competent authority may decide that either the whole plan will be terminated or the plan will only be terminated in respect of the specific obligation breached. In the event of partial termination, the creditor whose obligation is breached will not be bound by the plan and may have its claim restored to the full amount if it agreed to receive a lesser amount under the plan unless such option is not permitted under the law and the creditor will be bound by the amount of the claim included in the plan.

305. The issue of failure of implementation may also be addressed in the reorganization plan, which may specify the rights of creditors in that event.

15. Conversion of a simplified reorganization to a liquidation [draft recommendation 83]⁸¹

306. 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 or approve a reorganization plan; failure to approve proposed amendments that are required for implementation of the plan; a successful challenge to a confirmed plan; a material or substantial breach by the debtor of its obligations under the plan; or failure of implementation of the plan for some other reason. Those reasons for conversion are addressed in recommendations [70, 76 (d), 78 (d), 79 (c) and 82].

307. The law may also envisage automatic 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).

308. In addition, this [text] 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 day-to-day management of business to terminate administration of the reorganization proceedings as soon as it is evident that reorganization will not be possible, in order to preserve value for creditors. Sanctions and costs may be imposed for violating that obligation.

309. 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.

[This section will need to be expanded by explanation of the expected involvement of an independent professional in the decision on conversion, reflecting the Working Group's view on the content of the respective provisions in draft recommendation 83.]

⁸¹ This section may need to be revised and relocated depending on the Working Group's view on the content and location of draft recommendation 83.

310. 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. Accordingly, consideration may need to be given to the procedural requirements for commencement and conduct of converted proceedings. (See recommendation [98] and paragraphs [346-348]).

311. 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 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; and the treatment of creditor claims that have been compromised in the reorganization. Payments made in the course of the reorganization may need to be protected from the operation of avoidance provisions. Claims that have been compromised in the reorganization may be reinstated to full value in any subsequent liquidation or may be enforceable only as compromised. (See further recommendations [99 and 100] and paragraphs [349 – 352] in section [P] below.)
