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**Draft legislative guide on insolvency law**
**Note by the Secretariat**
**Contents**

*[The Introduction and Part One of the draft Guide appear in document A/CN.9/WG.V/WP.63; Part Two, Chapter I appears in documents A/CN.9/WG.V/WP.63/Add.1 and Add.2; Chapter II.A and B appear in documents A/CN.9/WG.V/WP.63/Add.3 and Add.4; Chapter III.A appears in document A/CN.9/WG.V/WP.63/Add.5; Chapter III.C-F and chapters IV-VII appear in subsequent addenda]*

	<i>Paragraphs</i>	<i>Page</i>
Part Two (continued)		
III. Treatment of assets on commencement of insolvency proceedings . . . . .		2
B. Protection and preservation of the insolvency estate . . . . .	71-104	2
1. Introduction . . . . .	71	2
2. Protection of the estate by application of a stay . . . . .	72-76	2
3. Scope of application of a stay . . . . .	77-83	3
4. Procedural issues . . . . .	84-95	5
5. Protection of secured creditors . . . . .	96-102	9
6. Limitations on disposal of assets by the debtor . . . . .	103-104	10
Recommendations . . . . .	(30)-(42)	10

*Paragraph numbers in [...] refer to relevant paragraph numbers in A/CN.9/WG.V/WP.58, the previous version of the text of the Guide.*

*Recommendation numbers in [...] refer to relevant recommendations in A/CN.9/WG.V/WP.61 and A/CN.9/WG.V/WP.61/Add.1, the previous version of the recommendations. Additions to the recommendations are indicated in this document by underlined text.*

## **Part Two (continued)**

### **III. Treatment of assets on commencement of insolvency proceedings**

#### **B. Protection and preservation of the insolvency estate**

##### **1. Introduction**

71. [53] An essential objective of an effective insolvency system is the establishment of a protective mechanism to ensure that the value of the insolvency estate's assets is not diminished by the actions of the various parties in interest and that the insolvency proceedings can be administered in a fair and orderly manner. The parties from whom the estate needs the greatest protection are the debtor and its creditors.

##### **2. Protection of the estate by application of a stay**

72. [54] With regard to creditors, one of the fundamental principles of insolvency law is that it is a collective proceeding, which requires that the interests of all creditors be protected against individual action by one of them. Many insolvency laws provide for the imposition of a mechanism that not only prevents creditors from enforcing their rights through legal remedies during some or all of the period of the liquidation or reorganization proceedings, but also suspends actions already underway and prevents the commencement of new actions. This mechanism is variously termed a moratorium, suspension or stay, depending on the scope of the mechanism. For the purposes of this Guide, the term "stay" is used in a broad sense to refer to both suspension of actions and a moratorium against the commencement of actions.

73. [55] As a general principle, the emphasis in liquidation is on selling the assets, in whole or in part, so that creditors can be repaid from the proceeds of sale as quickly as possible. Maximizing value is an overriding objective. The imposition of a stay in liquidation can ensure a fair and orderly administration of the proceedings, providing the insolvency representative with adequate time to avoid making a forced sale that fails to maximize the value of the assets being liquidated, and also an opportunity to see if the business can be sold as a going concern, where the collective value of assets may be greater than if the assets were to be sold piecemeal. The difficult balance is between the competing interests of secured creditors, who will often hold security in some of the most important assets of the business, and the interests of unsecured creditors.

74. [55] In reorganization proceedings, a stay of proceedings allows the debtor a breathing space to organize its affairs, time for preparation and approval of a

reorganization plan and for the other steps necessary to ensure successful implementation of the reorganization to be taken, including shedding unprofitable activities and onerous contracts. Given the goals of reorganization, the impact of the stay is greater and therefore more crucial than in liquidation and can provide an important incentive to encourage debtors to initiate reorganization proceedings. At the same time, the commencement of proceedings and the imposition of the stay give notice to all those who do business with the debtor that the future of the business is uncertain. This can cause a crisis of confidence and uncertainty as to how the insolvency will impact upon them as suppliers, customers and employees of the debtor's business.

75. [56] One of the key issues in the design of an effective insolvency law is how to balance these concerns - the immediate benefits that accrue to the debtor by having a broad stay quickly imposed to limit the actions of creditors and the longer-term benefits that are derived from limiting the degree to which the stay interferes with contractual relations between debtors and creditors, especially secured creditors.

76. [57] The scope of rights that are affected by the stay varies considerably among insolvency laws. There is little debate regarding the need for the suspension of actions by unsecured creditors against the debtor or its assets. The application of the stay to secured creditors, however, is potentially more difficult and requires a number of competing interests to be balanced. These include, for example, observing commercial bargains and contracts; respecting the pre-insolvency priorities of secured creditors as regards their rights over the security; protecting the value of secured interests; ensuring that creditors are paid out of the assets of the estate in proportion to their claim; maximizing asset values for all creditors; and, in cases of reorganization, ensuring the successful reorganization of a viable entity.

*[(b) Provisional measures moved to 4(b) Time of application of the stay]*

### **3. Scope of application of the stay**

#### **(a) Actions to which the stay will apply**

77. [60] Some countries adopt the approach that to ensure the effectiveness of the stay, it must be very wide, applying to all remedies and proceedings against the debtor and its assets, whether administrative, judicial or self-help and restraining both unsecured and secured creditors from exercising enforcement rights, as well as governments from exercising priority rights. Examples of the types of actions that may be stayed could include: the commencement or continuation of actions or proceedings against the debtor or in relation to its assets; the commencement or continuation of enforcement proceedings in relation to assets of the debtor, including the execution of a judgement and perfection or enforcement of a security interest; recovery by any owner or lessor of property that is used or occupied by, or is in the possession of, the debtor; payment or provision of security in respect of a debt incurred by the debtor prior to the commencement date; the right to transfer, encumber or otherwise dispose of any assets of the debtor (in reorganization, this might be limited to transfer, encumbrance or disposal outside the ordinary course of business); and termination, suspension or interruption of supplies of essential services (for example, water, gas, electricity and telephone) to the debtor. Article 20 of the UNCITRAL Model Law on Cross-Border Insolvency (see chapter VIII), for example, provides that commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities and execution against the debtor's assets are stayed.

78. [61] Some insolvency laws provide that, where legal proceedings against the debtor (including both continuation and commencement of those proceedings) are within the scope of the stay in liquidation, those proceedings can be continued at the discretion of the court if it is considered necessary to preserve a claim or establish the quantum of a claim. Article 20(3) of the UNCITRAL Model Law on Cross-Border Insolvency, for example, provides that the application of the stay to commencement or continuation of individual actions or proceedings against the debtor is not to affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor. Other insolvency laws allow the commencement or continuation of legal proceedings, but the application of the stay prevents enforcement of any resulting order. In some insolvency laws a distinction is made between regulatory and pecuniary actions; some laws allow claims of both a regulatory and pecuniary nature to be continued, others only regulatory claims. Other insolvency laws provide that specific actions, such as employee actions against the debtor, can be commenced or continued, but any enforcement action resulting from those proceedings will be stayed. Some insolvency laws also allow commencement or continuation of actions seeking to restrain the debtor from undertaking certain activities, such as those causing environmental damage. Where claims can be pursued against the debtor, the insolvency representative will need to be involved where the debtor is divested of control.

79. [62] To ensure transparency and predictability, it is highly desirable that an insolvency law clearly identify the actions that are to be included within and excluded from the scope of the stay, irrespective of who may commence those actions, whether unsecured creditors (including preferential creditors such as employees, legislative lienholders or governments), third parties (such as a lessor or owner of property in the possession or use of the debtor or occupied by the debtor), secured creditors or other parties. Exclusions might include: [63] set-off rights and netting of financial contracts (see Part two, chapter III.F), actions to protect public policy interests, such as to restrain environmental damage, or to prevent abuse, such as the use of insolvency proceedings as a shield for illegal activities.

**(b) Secured creditors**

80. [69] Creditors generally seek security for the purpose of protecting their interests in the event that the debtor fails to repay. If security is to achieve this objective, it can be argued that, upon commencement of insolvency proceedings, the secured creditor should not be delayed or prevented from immediately realising its security. The secured creditor has, after all, bargained for security in exchange for value that reflects the reliance on the security. For that reason, the introduction of any measure that will diminish certainty in the ability of the secured creditor to recover debt or erode the value of security interests, such as applying the stay to secured creditors, may need to be carefully considered. Such a measure may ultimately undermine not only the autonomy of the parties in their commercial dealings and the importance of observing commercial bargains, but also the availability of affordable credit; as the protection provided by security interests declines, the price of credit may need to increase to offset the greater risk. [72] Some of the insolvency laws that exclude secured creditors from the stay focus on encouraging pre-commencement negotiations between the debtor and creditors to achieve agreement on how to proceed. Where that process is effective, a stay may not need to apply to secured creditors. [70] A growing number of insolvency laws recognize, however, that in some cases permitting secured creditors to freely separate their security (in order to satisfy their claims) from the insolvency estate can frustrate the basic objectives of the insolvency

proceedings, particularly in reorganization, but also where the business can be sold as a going concern in liquidation.

81. [71] Where secured interests are included within the scope of the stay, an insolvency law can adopt measures that will ensure the secured rights are not diminished by the stay. These measures may relate to the duration of the stay, protection of the value of the security, payment of interest and provision of relief from the stay where the secured interests are not sufficiently protected or where the security is not necessary to the sale of the entire business or a productive part of it.

*(i) Reorganization*

82. [70] In reorganization proceedings, [74] where there is a genuine possibility of effecting a reorganization, it is desirable that the extent of the stay be very wide and all embracing. [70] Where assets essential to the operation of the debtor's business are encumbered by security interests, enforcement by secured creditors of their claims at the commencement of the proceedings may make it impossible for the debtor to keep the business operating while it formulates a reorganization plan and, where secured creditors are not bound by the plan, make it impossible to implement the plan (see Part two, chapter V.A).

*(ii) Liquidation*

83. [72] Insolvency laws take different approaches to the application of the stay to secured creditors in liquidation proceedings. As a general principle, where the insolvency representative's function is to collect and realize assets and distribute proceeds among creditors by way of dividend, the secured creditor may be permitted to freely realize its security to satisfy its claim despite the liquidation. Some insolvency laws thus exclude secured creditors from the scope of the stay on the basis that where the assets are to be liquidated the balance will weigh in favour of allowing secured creditors to enforce their rights. Where that approach is adopted, some flexibility may be needed, however, where the insolvency representative may be able to achieve a better result that maximizes the value of the assets for the collective benefit of all creditors if the stay is applied to restrict realization of the security. This may be particularly relevant where the business can be sold as a going concern in the context of the liquidation proceeding. It may also be true in some cases where even though assets are to be sold in a piecemeal manner, some time is needed to arrange a sale that will give the highest return for the benefit of all unsecured creditors.

#### **4. Procedural issues**

##### **(a) Discretionary or automatic application of the stay**

84. [64] A preliminary question on application of the stay is whether it should apply automatically (by operation of the insolvency law) or at the discretion of the court. Local policy concerns and factors such as the availability of reliable financial information and the ability of the debtor and creditors to have access to an independent judiciary with insolvency experience may affect the decision on this issue. Applying the stay on a discretionary basis may allow the stay to be tailored to the needs of the specific case (as regards the debtor, its assets and its creditors) and avoid both unnecessary applications of the stay and unnecessary interference with the rights of secured creditors. This approach, however, has the potential to cause delay while the court considers the relevant issues; does not create a predictable situation for those creditors and third parties to whom the stay

may apply; and may create a need for some mechanism, such a provisional measures, to address the period before the court decides on the application of the stay; as well as requirements for the provision of notice as to application of the stay. An alternative approach which minimizes delay, will assist the achievement of the maximization of the value of the assets and ensure that the insolvency process is fair and ordered as well as transparent and predictable, might be to provide for the stay to apply automatically to specified actions, with the possibility of extension of the stay to other actions at the discretion of the court. This approach is adopted in the UNCITRAL Model Law on Cross-Border Insolvency: article 20 specifies the types of actions that will be stayed automatically upon recognition of foreign main proceedings, while article 21 indicates examples of additional relief that may be provided upon recognition, at the discretion of the court. The automatic stay is a feature of many modern insolvency law regimes.

**(b) Time of application of the stay**

85. [65] A further concern related to application of the stay is the time at which it will apply in both liquidation and reorganization proceedings.

*(i) From commencement - the need for provisional measures*

86. [66] Different approaches may be taken to the time of application of the stay. The most common approach is for the stay to apply on commencement of the proceedings, when issues of eligibility, jurisdiction and satisfaction of the commencement criteria will have been resolved and it is clear that proceedings should be commenced rather than the application be denied. In some insolvency laws, the application of the stay on commencement is combined with provisional measures to address the period between application and commencement, [58] when there is the potential for the debtor's business situation to change and for dissipation of the debtor's assets - the debtor may be tempted to transfer assets out of the business, and creditors, on learning of the application, may take remedial action against the debtor to pre-empt the effect of any stay that may be imposed upon commencement of the proceedings. Where an insolvency law provides for the granting of provisional measures, it is important that it also address what happens to those measures on commencement of the insolvency proceedings.

87. [59] These provisional measures may be available on the application of the debtor, creditors or ordered by the court on its own motion and may include: appointing a preliminary insolvency representative; prohibiting the debtor from disposing of assets; taking control of some or all of the debtor's assets; suspending enforcement by creditors of security interests against the debtor; staying any action by creditors to separate a debtor's assets, such as by a secured creditor or holder of a retained title; or preventing the commencement of individual actions by creditors to enforce their claims. Since these measures are provisional in nature and are granted before the court's determination that the commencement criteria have been met, applicants may be required by the court to provide evidence that the measure is necessary to preserve the value of the insolvency estate and avoid dissipation of assets. Where the application is made by a creditor, some form of security for costs or damages that may be incurred may also be required in case proceedings are not subsequently commenced. The insolvency law may also need to consider the question of provision of notice of an order for provisional measures and the parties to whom that notice needs to be given. Bearing in mind the need to avoid unnecessary damage to a debtor against whom insolvency proceedings are not subsequently commenced, that notice may need to be limited to parties directly affected by the order. Relief from the application of provisional measures, such as modification or

termination, may also be appropriate in cases where the interests of the persons affected are being harmed. Such relief might be available on the application of the affected party, the insolvency representative or on the motion of the court itself.

*(ii) From the time of the application for commencement*

88. [66] A different approach is for the stay to apply from the making of an application for either liquidation or reorganization proceedings, irrespective of whether it is a debtor or creditor application. This approach may avoid the need to consider the availability of interim or provisional measures of protection to cover the period between the making of the application and the commencement of proceedings, but will require the application of the stay at a time when a number of factual matters are not necessarily clear, in particular whether the debtor will satisfy the commencement criteria. To balance against the risk of abuse in this situation, it is desirable if this approach is followed, that clear procedures for seeking relief from the application of the stay on an expedited basis be included in the insolvency law.

*(iii) Specifying the exact time of application of the stay*

89. Whether the stay is to be applicable by reference to the time of application or commencement, it is important that an insolvency law address the question of the exact time at which the stay will become effective to ensure protection of the estate, especially in relation to payments. Different approaches are taken to this issue. In some laws, the stay becomes effective as of the time of the court's decision to commence proceedings, in others when the decision as to commencement becomes publicly available, while in yet other laws the stay has effect retroactively from the first hour of the day of the commencement order. A similar diversity of approaches is taken where the stay has effect upon the making of the application for proceedings.

**(c) Duration of application of the stay**

*(i) Unsecured creditors*

90. Many insolvency laws provide for the stay to apply to unsecured creditors for the duration of both liquidation and reorganization proceedings.

*(ii) Secured creditors*

*- Reorganization*

91. [74] In some cases it may be desirable for the stay to apply to secured creditors for the duration of the proceedings<sup>1</sup> to ensure that the reorganization can proceed in an orderly manner without the possibility of assets being separated before the reorganization can be finalised. However, to avoid delay and encourage a speedy resolution of the proceedings, there may also be some advantage in limiting the application of the stay to the time that it may reasonably take for a reorganization plan to be approved to avoid application of the stay for an uncertain or unnecessarily lengthy period. Such a limitation may also have the

<sup>1</sup> This provision will be affected by the time at which the insolvency law treats proceedings as completed: under some laws proceedings are treated as completed when the plan is approved (and confirmed where this is required under the insolvency law); under other laws on completion of implementation of the plan.

advantage of providing secured creditors with a degree of certainty and predictability as to the duration of the period of interference with their rights. The difficulty with establishing a fixed time limit, however, is that it may not always be sufficiently long, depending on the size and complexity of the reorganization, and may be difficult to enforce. A solution may be to establish clear time limits, with the possibility of extension (see below). Provision may also be made in an insolvency law for relief from the stay to be provided to secured creditors in certain circumstances. (see below).

*- Liquidation*

92. [72] Some insolvency laws which apply the stay to secured creditors adopt the approach that the stay automatically applies upon commencement of liquidation proceedings but only for a brief period, such as 30 or 60 days, except in those cases where the security is essential to the sale of the business as a going concern (in which case the stay may be extended). This period would allow the insolvency representative to assume its duties and take stock of the assets and liabilities of the estate. Where the secured asset was not required for the sale of the business, the stay could be lifted (see below). Another approach extends the stay to secured creditors for the duration of the liquidation proceedings, subject to a court order for relief where it can be shown that the value of the security is being adversely affected.

**(d) Extension of the duration of the stay**

93. [73] Where the stay is limited to a specified period, the law may include provision for extension of the stay. This could be on application of the insolvency representative when it can be demonstrated that an extension is required in order to maximize value (e.g. there is a reasonable possibility that the debtor, or business units of the debtor, can be sold as a going concern) provided that secured creditors will not suffer unreasonable harm. To provide additional protection and avoid the stay being applied for an uncertain or unnecessarily lengthy period, an insolvency law may limit the period for which the stay can be extended.

**(e) Relief from the stay**

94. [81] In liquidation and reorganization proceedings, circumstances may arise where it is appropriate to provide relief from the stay by providing that the secured creditor can apply to the court or that the insolvency representative can be given the power to release the security without approval of the court. Relevant circumstances may include where the secured creditor is not receiving protection for the value of its security, where the provision of protection may not be feasible or would be overly burdensome to the estate; where the security is not needed for the reorganization or sale of the business as a going concern in liquidation; or where the asset is of no value to the estate. There may be other circumstances where it may be appropriate to provide relief from the stay, such as actions involving perishable goods.

95. [82] While provisions on relief from the stay principally address the interests of secured creditors, there are examples of insolvency laws which provide that relief from the stay may be granted to an unsecured creditor. This may be relevant, for example, in those cases where the insolvency law does not allow commencement or continuation of claims, to allow a claim to be determined in another forum where litigation may be well advanced and it would be efficient for it to be completed, or a claim against an insurer of the debtor to be pursued.

## 5. Protection of secured creditors

96. It is desirable that an insolvency law address the issue of protection of the value of the secured creditor's interest against erosion in value or improper conduct during the period of application of the stay.

97. [76] One of the set of measures designed to address the negative impact of the stay on secured creditors is that directed at maintaining the economic value of secured claims during the period of the stay (in some jurisdictions referred to as "adequate protection"). One approach is to protect the value of the security itself on the understanding that, upon liquidation, the proceeds of sale of the security will be distributed directly to the creditor to the extent of the value of the secured portion of their claim. This approach may require a number of steps to be taken.

98. [77] During the period of the stay it is possible that the value of the creditor's security will diminish. Since, at the time of eventual distribution, the extent to which the secured creditor will receive priority will be limited by the value of the secured asset, such a depreciation can prejudice the secured creditor's interests. Some insolvency laws provide that the insolvency representative should compensate secured creditors for the amount of this diminution either by providing additional or substitute security or making periodic cash payments corresponding to the amount of the diminution in value. This approach is only necessary where the value of the security is less than the amount of the secured claim. If the value exceeds the claim, the secured creditor will not be harmed by the erosion of value until that value becomes insufficient to pay the secured claim. [77] Some countries that preserve the value of the security as outlined also allow for payment of interest during the period of the stay to compensate for delay imposed by the proceedings. Provision of interest may be limited however to the extent that the value of the security exceeds the value of the secured claim. [78] Otherwise, compensation for delay may deplete the assets available to unsecured creditors. [77] Such an approach may encourage lenders to seek adequate security that will exceed the value of their claims.

99. [77] In some liquidation cases the insolvency representative may find it necessary to use or sell encumbered assets (see Part two, chapter II.C) in order to maximize the value of the estate. For example, to the extent that the insolvency representative is of the view that the value of the estate can best be maximized if the business continues to operate for a temporary period, it may wish to sell inventory that is partially encumbered. Thus, in cases where secured creditors are protected by preserving the value of the security, it may be desirable for an insolvency law to allow the insolvency representative the choice of providing the creditor with substitute equivalent security or paying out the full amount of the value of the assets that secure the secured claim.

100. [78] Another approach to protecting the interests of secured creditors is to protect the value of the secured portion of the claim. Immediately upon commencement, the encumbered asset is valued and, based on that valuation, the amount of the secured portion of the creditor's claim is determined. This amount remains fixed throughout the proceedings and, upon distribution following liquidation, the secured creditor receives a first-priority claim to the extent of that amount. During the proceedings, the secured creditor could also receive the contractual rate of interest on the secured portion of the claim to compensate for delay imposed by the proceedings.

101. A further means of protecting the secured asset is to provide for relief from the stay, as noted above (see Part two, chapter III.C), and to allow the secured creditor to enforce its security.

102. [79] The desirability of the types of approaches that provide protection for the security may need to be weighed against the potential complexity and cost of those measures and the need for the court to be able to make difficult commercial decisions on the question of appropriate protection. Where protection is provided, it may be desirable for an insolvency law to provide guidance to determine when and how creditors holding some type of security over the debtor's assets would be entitled to the types of protection described above.

## **6. Limitations on disposal of assets by the debtor**

103. [83] In addition to measures designed to protect the insolvency estate against the actions of creditors and third parties, insolvency laws generally adopt measures which are intended to limit the extent to which the debtor can deal with the assets of the estate, both after an application for commencement is made and after proceedings have commenced. Where an interim insolvency representative is appointed as a provisional measure before commencement of the proceedings, the debtor may be subject to supervision or control of that insolvency representative, and will have limited powers to deal with its assets.

104. Where an insolvency representative is appointed on commencement of the insolvency proceedings, many insolvency laws provide that the debtor will lose either all control of the insolvency estate and will not be able to enter into any transactions after commencement, or will have continuing, but limited, powers in relation to the day-to-day conduct of the business and can enter into transactions in the ordinary course of business. Transactions which do not fall into that category, such as the sale of significant assets, may require authorization by the insolvency representative, the court or in some cases, the creditors.<sup>2</sup> Some insolvency laws address contracts entered into and transactions implemented by the debtor between application and commencement and after commencement that are not authorized, whether by the insolvency law, the insolvency representative, the court or creditors (as required), in terms of avoidance provisions (see Part two, chapter III.E).

## **Recommendations**

### **Purpose of legislative provisions**

The purpose of provisions on protection and preservation of the insolvency estate is to:

- (a) provide for the application of measures that will ensure the assets are not diminished by the actions of the [various interested parties] [debtor, creditors or third parties];
- (b) determine the scope of those measures and the parties to whom they will apply;

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<sup>2</sup> Further aspects of these transactions are discussed in Part two, chapters III.A.4(b), III.D.7 and IV.

- (c) establish the conditions for application of those measures, including method, time and duration of application;
- (d) establish the grounds for relief from the application of those measures.

## Content of legislative provisions

### *Provisional measures*<sup>3</sup>

(30) [(26)] The insolvency law should provide that the court may grant relief of a provisional nature, at the request of any interested party, [where relief is urgently needed to protect the assets of the debtor or the interests of the creditors,] between the making of an application to commence an insolvency proceeding and commencement of the proceedings, including:

- (a) staying execution, enforcement and steps to create valid security rights against the debtor's assets;<sup>4</sup>
- (b) entrusting the administration or supervision of the debtor's business [including the power to use and dispose of assets in the ordinary course of business] to an interim insolvency representative or other person designated by the court[, in order to protect and preserve the value of assets];
- (c) entrusting the realization of all or part of the debtor's assets<sup>5</sup> to an interim insolvency representative or other person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
- (d) any other relief of the type applicable automatically on commencement of proceedings (recommendation (35)(d)).<sup>6</sup>

(31) The insolvency law should clearly indicate the balance of the [powers][responsibilities] of the debtor and any interim insolvency representative appointed as a provisional measure (recommendation (30)). Between the time of an application for commencement of insolvency proceedings and commencement of those proceedings, the debtor should be able to continue to operate its business and to use and dispose of assets in the ordinary course of business unless those powers have been granted to an interim insolvency representative.

(32) The insolvency law may provide for appropriate notice to be given to those parties affected by a court order for provisional measures.

<sup>3</sup> See Art. 19 UNCITRAL Model Law on Cross-Border Insolvency

<sup>4</sup> The reference to assets is intended to be limited to assets that would be part of the insolvency estate upon commencement of insolvency proceedings.

<sup>5</sup> Ibid.

<sup>6</sup> The application, on a provisional basis, of the relief mentioned in recommendation (35)(d) would be limited to assets that would constitute the insolvency estate once insolvency proceedings were commenced.

### *Modification or termination of provisional measures*

(33) [(34)] The insolvency law should provide that the court, at the request of the insolvency representative or any person affected by provisional measures (of the kind referred to in recommendation (30) ~~and 28~~), or at its own motion, may modify or terminate those measures [if such modification would not be detrimental to the estate or the interests of creditors and if the party seeking such modification would be harmed by the continuation of such measures].

(34) [(27)] Where provisional measures (of the kind referred to in recommendation (30) are not terminated by the court (recommendation (33)), the insolvency law should provide that they terminate when the measures automatically applicable on commencement (recommendation (35) take effect, unless they are continued by the court (recommendation (36)).

### *Measures automatically applicable on commencement*

(35) [(28)] Upon the commencement of an insolvency proceeding, the insolvency law should provide that:

- (a) commencement or continuation of individual actions or proceedings<sup>7</sup> concerning the assets of the insolvency estate and the rights, obligations or liabilities of the debtor, including perfection or enforcement of security interests, are stayed except to the extent those individual actions or proceedings [are considered necessary by the court] [may be necessary] to preserve or quantify a claim against the debtor;
- (b) execution or other enforcement against the assets of the insolvency estate is stayed;
- (c) termination of any contract with the debtor is stayed;<sup>8</sup> and
- (d) transfer, encumbrance or other disposition of any assets of the insolvency estate is suspended.<sup>9</sup>

### *Additional measures available on commencement*<sup>10</sup>

(36) [(29)] The insolvency law should provide that, where necessary to protect the interests of the creditors, assets of the debtor, or the ability to reorganize the debtor's business, the court may, following the commencement of an insolvency proceeding, grant

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<sup>7</sup> See Art. 20 UNCITRAL Model Law on Cross-Border Insolvency. It is intended that the individual actions referred to in paragraph (a) of recommendation (35) would also cover actions before an arbitral tribunal. It may not always be possible, however, to implement the automatic stay of arbitral proceedings, such as where the arbitration does not take place in the State but in a foreign location. In any event, the interests of the parties may be a reason to allow the arbitral proceedings to continue, a possibility that is envisaged in paragraph (a).

<sup>8</sup> See Part two, chapter III.D(2)(a) and recommendation (53) [(42)].

<sup>9</sup> The limitation on the right to transfer or dispose of assets of the estate may be subject to an exception for those cases where the continued operation of the business by the debtor is authorised and the debtor can transfer, encumber or otherwise dispose of assets in the ordinary course of business.

<sup>10</sup> See Art. 21 UNCITRAL Model Law on Cross-Border Insolvency.

relief additional to the measures automatically applicable on commencement (of the kind referred to in recommendation (35)).

(37) The insolvency law may provide for appropriate notice of any additional measures ordered by the court to be given to parties affected by those additional measures.

#### *Time and duration of application of measures of protection*

(38) [(30)] The insolvency law should clearly state the specific time at which provisional measures (recommendation (30)) and measures automatically applicable on commencement (recommendation (35)) become effective.<sup>11</sup>

(39) [(31)] The insolvency law should provide that the measures automatically applicable on commencement of insolvency proceedings (recommendation (35)), will apply (subject to recommendation (40) and its application to secured creditors) for the duration of the insolvency proceedings.

#### *Secured creditors*

(40) [(32)] The insolvency law should provide that measures automatically applicable on commencement of insolvency proceedings (recommendation (35)) will apply to secured creditors:

(a) in respect of a reorganization proceeding, for the duration of that proceeding:

(b) in respect of a liquidation proceeding, for a period of [30-60] days, unless the court extends that period [for an additional [...] day period] upon a showing that:

(i) an extension is necessary to maximize the value of assets for the benefit of creditors; and

(ii) the secured creditor will not [suffer unreasonable harm] [be harmed] as a result of an extension.

(41) [32)] A secured creditor is entitled to relief from the type of measures automatically applicable on commencement referred to in recommendation (35)(a) and (b) on grounds that may include:

(a) that the secured asset has no value to the estate<sup>12</sup> and is not necessary,

(i) to a reorganization of the debtor's business that is in prospect;  
or

(ii) to a sale of the business as an ongoing business concern that is in prospect;

(b) that, in reorganization, a reorganization plan is not approved within [...] days (where the reorganization law includes such a time limitation); or

(c) that the economic value of the secured asset is eroding and the asset is not protected against the erosion of its value.

<sup>11</sup> E.g. at the time of the making of the order, retrospectively from the commencement of the day on which the order is made or some other specified time.

<sup>12</sup> See also recommendations on burdensome, no value and hard to realize assets: chapter III.C.

~~(d) that there is no reasonable prospect for a reorganization of the debtor's business.~~

(42) [(33)] The insolvency law should address the diminution of the value of secured assets and provide appropriate protections. Where the value of the secured assets exceeds the amount of the secured claim and will be sufficient to meet the secured claim, protection may not be required. Where the value of the secured assets does not exceed the amount of the secured claim or will be insufficient to meet the secured claim if the value of the secured asset erodes, protection against diminution of the value of secured assets may be provided by, for example,

- (a) cash payments;
- (b) provision of additional security; or
- (c) such other means as the court determines will provide appropriate protection.