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Draft legislative guide on insolvency law

Note by the Secretariat

[The Glossary to the Guide appears in A/CN.9/WG.V/WP.63/Add.1; Part One of the Guide appears in A/CN.9/WG.V/WP.63/Add.2; Part Two of the Guide appears in documents A/CN.9/WG.V/WP.63/Add.3-16]

Applicable law governing in insolvency proceedings

Recommendations

Purpose of legislative provisions

The purpose of provisions on the applicable law governing in insolvency proceedings is to:

- (a) Promote cross-border financing, commerce and trade;
- (b) Facilitate commercial transactions by providing a clear and transparent basis for predicting the rules of law that will apply to the legal relationships with the debtor;
- (c) Provide courts with clear and predictable rules for the enforcement of choice of law provisions in contracts with a debtor; and
- (d) In the absence of a choice of law provision in a contract with the debtor, to provide courts with clear and predictable rules for determining the rules of law applicable to legal relationships with the debtor.

* This document was submitted late because of the need to complete the twenty-seventh session of the Working Group (9-13 December 2002) and finalize revision of the document.



Contents of legislative provisions

Administration of insolvency proceedings

- Law of the forum

(1) The general insolvency law [of the State] should [apply] [be the law that applies] to all aspects of the commencement, conduct, administration and termination of insolvency proceedings, [in particular] [including]:

- (a) Eligibility and commencement criteria;
- (b) Creation and scope of the insolvency estate;
- (c) Treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;
- (d) Powers of the debtor, insolvency representative, creditors and creditors' committee;
- (e) Costs and expenses;
- (f) Proposal, acceptance, confirmation and enforcement of a plan of reorganization;
- (g) Treatment of legal acts detrimental to creditors;
- (h) Conditions under which set-off can occur after commencement of insolvency proceedings;
- (i) Effect of the commencement of the proceedings upon contracts and leases under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts and leases;
- (j) Claims and their treatment; and
- (k) Resolution and conclusion of the proceedings.

- Law other than the law of the forum

[Note: The Working Group may wish to consider whether recommendations of a general nature should be included here to indicate those cases where the law of another jurisdiction should apply, for example that insolvency proceedings should not affect the validity of a security interest which should be governed by the law applicable to the security interest (which could include a cross-reference to the secured transactions guide); employment contracts and relationships, which should be dealt with in accordance with the law governing those contracts.]

(2) As an exception to recommendation (1), the [general insolvency] law [of a State] may provide that the law of another State applies to [the avoidability of a transaction or set-off that occurred or an obligation that was incurred before the commencement of those proceedings] [whether or not a transaction or set-off that occurred or an obligation that was incurred before the commencement of those proceedings is avoidable].

[Note: This recommendation does not state the circumstances in which the law of another State would be recognized with respect to avoidability. The Working Group may wish to consider the circumstances in which such recognition would be accorded or specify the connecting factor between the law of the other State and the transaction in question.]

(3) [As a further exception to recommendation (1),] the general insolvency law should provide that the [acceleration,] [closeout,] set-off or netting of financial obligations and transactions pursuant to the rules of a payment or settlement system or a financial market, should not be subject to avoidance [except to the extent that recommendation (70)(a) would apply] [or unwinding]. The general insolvency law [of the State] should recognize the [acceleration,] [close-out,] set-off or netting pursuant to similar rules of a payment or settlement system or a financial market in another State.

[Note: The Working Group may wish to consider whether a recommendation of this nature should be included in this section of the Guide or in chapter III.E or F. In this regard see document A/CN.9/WG.V/WP.63/Add.9 and the reference to possible additional recommendations.]

Validity of contractual choice of law provisions

(4) The general insolvency law should recognize contractual provisions in which the debtor and its counterparty expressly agree that the law applicable to their legal relationship under the contract will be the law of a specified jurisdiction without regard to the nexus between the transaction or the parties at issue and the chosen applicable law, except where:

- (a) Consumer or employment transactions are involved;
- (b) Such a provision is viewed as manifestly contrary to a public policy of the jurisdiction whose law would apply in the absence of such a provision; or
- (c) Those provisions pertain to the priority, creation, perfection or enforceability of a security interest as against third parties.

Determining the applicable law

(5) The general insolvency law should clearly indicate when the rules of the insolvency law would be [subordinate to] [affected by] other laws of the jurisdiction. The insolvency law should recognize and respect rights, claims and other entitlements valid under non-insolvency law except to the extent it may be necessary to modify or postpone those rights, claims and entitlements in order to achieve the specific goals of the insolvency process.

[Note: The Working Group may wish to consider whether a recommendation to this effect should be included in the Guide, bearing in mind that it reflects several key objectives as well as principles generally agreed and already mentioned in several chapters of the commentary. If such a recommendation is to be included, the Working Group may wish to consider whether it should be located in this section or elsewhere in the guide.]

(6) Where the general insolvency law or other applicable law [of the State] does not provide the governing legal rule, the insolvency court [before which insolvency

proceedings have been commenced] should apply non-insolvency law. Where the law of more than one State is relevant to the application of the non-insolvency law, the insolvency court will need to apply a conflict of laws rule of the forum to determine which State's non-insolvency law should apply. The conflict of laws rules should be clear and predictable and should follow modern conflict of laws rules embodied in international treaties and legislative guides sponsored by international bodies.

[Note: The Working Group may wish to consider, depending upon its decision with respect to recommendation (4), whether examples of the approaches adopted by modern conflicts of laws rules could be included in recommendation (6), for example, respect for the choice of the parties of the law applicable without undue restriction or without requiring a nexus between the transaction or the parties and the chosen applicable law. Such examples could be helpful in clarifying what is intended by the third sentence of the recommendation.]
