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New York, 14 June-25 June 2004****Draft Legislative Guide on Insolvency Law****Note by the Secretariat: Revisions to A/CN.9/WG.V/WP.70**

1. This note sets forth revisions and additions to the recommendations in documents A/CN.9/WG.V/WP.70 parts I and II and A/CN.9/WG.V/WP.72 based upon the deliberations of Working Group V at its thirtieth session (March/April 2004) (see A/CN.9/551 for the report of that meeting). The numbering of those recommendations remains unchanged; where the order of recommendations has been changed, the numbering is not in sequence. Numbers such as “(40A)” indicate recommendations that were added during the thirtieth session of Working Group V. The use of square brackets indicates text added or revised subsequent to the thirtieth session of Working Group V.

2. For reasons of economy, recommendations that have not been revised are not reproduced in this document and remain as contained in A/CN.9/WG.V/WP.70 (recommendations 1-187) and A/CN.9/WG.V/WP.72 (recommendations 179-184 on applicable law). Those parts of the recommendations set forth in this document that have not been amended are shown as “(No change)”. Recommendations on reorganization (A/CN.9/WG.V/WP.70, part II chapter IV) are set forth in A/CN.9/559/Add.3. Footnotes to recommendations have not been reproduced in this document, unless they have been amended or deleted.

* This is a late submission due to time required for consultations.

** Revised dates.



Part one. Designing the key objectives and structure of an effective and efficient insolvency law

(1) The text of recommendations (1) is set forth in paragraph 551 of document A/CN.9/551.

(2) The text of recommendation (2) is set forth as recommendation 7 of document A/CN.9/WG.V/WP.70, part I.

(3) The text of recommendation (3) is set forth as recommendation 179 of document A/CN.9/WG.V/WP.72

(4) The text of recommendation (4) is set forth as recommendation 74(a) in document A/CN.9/WG.V/WP.70, part II and should be amended as follows:

The insolvency law should specify that where a security interest is effective and enforceable under other law, it would be recognized in insolvency proceedings as effective enforceable.

(5) The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended.

(6) The text of recommendation (6) is set forth as recommendation 2 in paragraph 112 of document A/CN.9/551.

(7) The text of recommendation (7) is set forth as recommendation 3 in paragraph 113 of document A/CN.9/551. The following 5 subparagraphs should be added:

(..) Identification of the assets of the debtor that will be subject to the insolvency proceedings and constitute the insolvency estate;

(..) Rights and obligations of the debtor;

(..) Duties and functions of the insolvency representative;

(..) Functions of the creditors and creditor committee;

(..) Costs and expenses relating to the insolvency proceedings;

and the following subparagraphs amended as follows:

(d) Protection of the insolvency estate against the actions of creditors, the debtor itself and the insolvency representative, and where the protective measures apply to secured creditors, the manner in which the economic value of the security interest will be protected during the insolvency proceedings;

(j) The treatment of claims and their ranking for the purposes of distributing the proceeds of liquidation;

(k) Delete;

(m) Discharge or dissolution of the debtor.

Part Two: Core provisions for an effective and efficient insolvency law

I. Application and commencement

A. Eligibility and jurisdiction

Eligibility

(1) The insolvency law should govern insolvency proceedings against all debtors that engage in economic activities, whether natural or legal persons, including State-owned enterprises, and whether or not those economic activities are conducted for profit.

B. Commencement of proceedings

Commencement on creditor application

(13) The insolvency law generally should specify that, where a creditor makes the application for commencement:

(a) *(No change)*

(b) The debtor be given the opportunity to respond to the application, by contesting the application, consenting to the application or, where the application seeks liquidation, requesting the commencement of reorganization proceedings; and

(c) *(No change)*

C. Applicable law governing in insolvency proceedings

Recognition of rights and claims arising before commencement

(179)The insolvency law should recognize rights and claims arising under general law, whether domestic or foreign, except to the extent of any express limitation in the insolvency law.

II. Treatment of assets on commencement of insolvency proceedings

A. Assets constituting the insolvency estate

Purpose of legislative provisions

The purpose of provisions relating to the insolvency estate is to:

(a) Identify those assets that will be included in the estate, including the debtor's interests in assets subject to a security interest and in third party-owned assets; and

(b) *(No change)*.

Contents of legislative provisions

Assets constituting the estate

(24) The insolvency law should specify that the estate should include:

(a) Assets of the debtor²⁸ including the debtor's interest in assets subject to a security interest and in third party-owned assets;

(b)-(c) *(No change)*.

(24A) The insolvency law should specify the date from which the estate is to be constituted, being either the date of application for commencement or the effective date of commencement of insolvency proceedings.

B. Protection and preservation of the insolvency estate

Provisional measures

(27) The insolvency law should specify that the court may grant relief of a provisional nature, at the request of the debtor, creditors or third parties, where relief is needed to protect and preserve the value of the assets of the debtor or the interests of creditors, between the making of an application to commence insolvency proceedings and commencement of the proceedings,⁴⁰ including:

(a) Staying execution against the assets of the debtor, including actions to make security interests effective against third parties and enforcement of security interests;

(b)-(c) *(No change)*; and

(d) Any other relief of the type applicable [or available] on commencement of proceedings [under recommendations 34 and 36].

Notice

(31) The insolvency law should specify that where the debtor or other party in interest affected by a provisional measure is not given notice of the application for that provisional measure, the debtor or other party in interest affected by the provisional measures has the right, upon urgent application, to be heard promptly⁴² on whether the relief should be continued.

Termination of provisional measures on commencement

(33) The insolvency law should specify that provisional measures terminate when an application for commencement is dismissed or the measures applicable on

²⁸ Ownership of assets would be determined by reference to the relevant applicable law, where the term "assets" is defined broadly to include property, rights and interests of the debtor, including the debtor's rights and interests in third-party owned assets.

⁴⁰ The insolvency law should indicate the time of effect of an order for provisional measures 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. (See para. 192.)

⁴² Any time limit included in the insolvency law should be short in order to prevent the loss of value of the debtor's business.

commencement take effect, unless the court continues the effect of the provisional measures.

Measures applicable on commencement

(34) The insolvency law should specify that, on commencement of insolvency proceedings:

- (a) *(No change)*;
- (b) Actions to make security interests effective against third parties and to enforce security interests are stayed;⁴⁵
- (c)-(e) *(No change)*.

Relief from measures applicable on commencement

(38) The insolvency law should specify that a secured creditor may request the court to grant relief from the type of measures applicable on commencement on grounds that may include that:

- (a) *(No change)*;
- (b) The value of the encumbered asset is diminishing [as a result of the commencement of insolvency proceedings] and the secured creditor is not protected against that diminution of value; and
- (c) *(No change)*.

Protection of the value of the encumbered asset

(39) The insolvency law should specify that upon application to the court, a secured creditor should be entitled to protection of the value of the assets in which it has a security interest. The court may grant appropriate measures of protection that may include:

- (a)-(c) *(No change)*.

C. Use and disposal of assets

Purpose of legislative provisions

The purpose of provisions on use and disposal of assets is to:

- (a) Permit the use and disposal of assets, including encumbered assets and assets owned by a third party in the insolvency proceedings and specify the conditions for their use and disposal;
- (b) Establish the limits to powers of use and disposal;

⁴⁵ If law other than the insolvency law permits those security interests to be made effective within certain time limits or grace periods, it is desirable that the insolvency law recognize those periods and permit the interest to be made effective where the commencement of insolvency proceedings occurs before expiry of the grace period. Where law other than the insolvency law does not include such grace periods, the stay applicable on commencement would operate to prevent the security interest being made effective (for further discussion see paras. ... above and the UNCITRAL Legislative Guide to Secured Transactions).

- (c) Notify creditors of proposed use and disposal, where appropriate;
- (d) Provide for the treatment of burdensome assets.

Contents of legislative provisions

Power to use and dispose of assets of the estate

(40) The insolvency law should permit:

- (a) The use and disposal of assets of the estate (including assets subject to security interests) in the ordinary course of business, except cash proceeds; and
- (b) The use and disposal of assets of the estate (including assets subject to security interests) outside the ordinary course of business, subject to the requirements of recommendations (41) and (43).

Further encumbrance of encumbered assets

(40A) The insolvency law should specify that assets subject to security interests may be further encumbered, subject to the requirements of recommendations 50, 51 and 52.

Use of third party owned assets

(40B) The insolvency law should specify that the insolvency representative may use assets owned by third parties and in the possession of the debtor provided specified conditions are satisfied, including:

- (a) The interests of the third party will be protected against diminution in the value of the assets; and
- (b) The costs under the contract of [continued performance of the contract][use of the assets] will be paid as an administrative expense.

Procedure for notification of disposal

(41) The insolvency law should specify that adequate notice of any disposal conducted outside the ordinary course of business is given to creditors⁵⁵ and that they have the opportunity to be heard by the court.

(42) The insolvency law should specify that notification of public auctions be provided in a manner that will ensure the information is likely to come to the attention of interested parties.

Ability to sell assets of the estate free and clear of encumbrances and other interests

(43) The insolvency law should permit the insolvency representative to sell assets that are encumbered or subject to other interests free and clear of those encumbrances and other interests, outside the ordinary course of business, provided that:

- (a)-(d) *(No change)*.

⁵⁵ When the assets are encumbered assets or subject to other interests, recommendation (43) applies.

Use of cash proceeds

(43A) The insolvency law should permit the insolvency representative to use [and dispose of] cash proceeds if:

- (a) The secured creditor consents to such use [or disposal]; or
- (b) The secured creditor was given [notice of the proposed use [or disposal] and] an opportunity to be heard by the court; and
- (c) The interests of the secured creditor will be protected against diminution in the value of the cash proceeds.

D. Post-commencement finance*Obtaining post-commencement finance*

(49) The insolvency law should facilitate and provide incentives for post-commencement finance to be obtained by the insolvency representative where the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the assets of the estate. The insolvency law may require authorization by the court or creditors (or the creditor committee).

Recommendation 53 “Priority for post-commencement finance” should be relocated before Recommendation 50 which addresses security for post-commencement finance.

Security for post-commencement finance

(52) The insolvency law should specify that, where the existing secured creditor does not agree, the court may authorize the creation of a security interest having priority over pre-existing security interests provided specified conditions are satisfied, including:

- (a)-(b) *(No change)*;
- (c) The interests of the existing secured creditor will be protected.

Effect of conversion on post-commencement finance

(54) The insolvency law should specify that where reorganization proceedings are converted to liquidation, any priority provided to post-commencement finance in the reorganization should continue to be recognized in the liquidation.

E. Treatment of contracts*Automatic termination [and acceleration] clauses*

(56) The insolvency law should specify that any contract clause that automatically terminates [or accelerates] a contract upon the occurrence of any of the following events is unenforceable as against the insolvency representative and the debtor:

- (a)-(b) *(No change)*.

(62) The insolvency law should specify that where a contract is continued or rejected, the counterparty be given notice of the continuation or rejection, including its rights in respect to submitting a claim and the time in which the claim should be submitted, and permit the counterparty to [object to that decision] [be heard by the court].

Continuation of contracts where the debtor is in breach

(65) The insolvency law should specify that where the debtor is in breach under a contract the insolvency representative can continue the performance of that contract, provided the breach is cured, the non-breaching counterparty is substantially returned to the economic position it was in before the breach, and the estate is able to perform under the continued contract.

Performance prior to continuation or rejection

(66) The insolvency law should specify that the insolvency representative may accept [or require] performance from the counterparty to a contract prior to continuation or rejection of the contract. Claims of the counterparty arising from performance accepted [or required] by the insolvency representative prior to continuation or rejection of the contract should be payable as an administrative expense:

(a) If the counterparty has performed the contract the amount of the administrative expense should be the [costs under the contract of the benefits conferred on the estate] [contractual price of the performance].

(b) If the insolvency representative uses assets owned by a third party that are in the possession of the debtor subject to contract, that party should be protected against diminution of the value of those assets and have an administrative claim in accordance with paragraph (a).

Damages for subsequent breach of a continued contract

(67) The insolvency law should specify that where a decision is made to continue performance of a contract, damages for the subsequent breach of that contract should be payable as an administrative expense.

Assignment of contracts

(70) Where the counterparty objects to assignment of a contract, the law may permit the court to nonetheless approve the assignment provided:

(a)-(c) *(No change)*;

(d) The debtor's default [whether pre- or post-commencement] under the contract is cured before assignment.

(71) The insolvency law may specify that where the contract is assigned, the assignee will be substituted for the debtor as the contracting party with effect from the date of the assignment and the estate will have no further liability under the contract.

F. Avoidance proceedings

Avoidable transactions

(73) The insolvency law should include provisions which apply retroactively and are designed to overturn transactions, involving the debtor or assets of the estate and which have the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors. The insolvency law should specify the following types of transactions as avoidable:

(a) Transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors [or potential creditors] or to otherwise prejudice the interests of creditors;

(b) Transactions where a transfer of an interest in property or the undertaking of an obligation by the debtor was a gift or was made in exchange for a nominal or less than equivalent value or for inadequate value which occurred at a time when the debtor was insolvent or as a result of which the debtor became insolvent (undervalued transactions); and

(c) *(No change)*.

Security interests

(74) The insolvency law should specify that notwithstanding that a security interest is effective and enforceable under other law, it may be subject to the avoidance provisions of the insolvency law on the same grounds as other transactions.

Related person transactions

(76) The insolvency law may specify that the suspect period for avoidable transactions involving related persons is longer than for transactions with unrelated persons.

Conduct of avoidance proceedings

(79) The insolvency law should specify that the insolvency representative have the principal responsibility to commence avoidance proceedings. The insolvency law may also permit any creditor to commence avoidance proceedings with the agreement of the insolvency representative and where the insolvency representative does not agree, the creditor may seek leave of the court to commence such proceedings.

Funding of avoidance proceedings

(79A) The insolvency law should specify that the costs of avoidance proceedings be paid as administrative expenses.

(80) Where the insolvency representative elects not to pursue the avoidance of particular transactions on the basis, for example, of an assessment that the transactions are not likely to be avoided or that pursuing those transactions will

impose excessive costs⁷¹ upon the insolvency estate, the insolvency law may provide alternative approaches to address the pursuit and funding of avoidance proceedings.

Time limits for commencement of avoidance proceedings

(81) The insolvency law or applicable procedural law should specify the time period within which an avoidance proceeding may be commenced. That time period should begin to run on the commencement of insolvency proceedings. In respect of transactions referred to in recommendation (73) which have been concealed and which the insolvency representative could not be expected to discover, the insolvency law may provide that the time period commences at the time of discovery.

Elements of avoidance and defences

(82) The insolvency law should specify the elements to be proved in order to avoid a particular transaction, the party responsible for proving those elements and specific defences to avoidance. Those defences may include that the transaction was entered into in the ordinary course of business prior to commencement of insolvency proceedings, [that the transaction was entered into pursuant to voluntary restructuring negotiations before the commencement of insolvency proceedings] or, [in liquidation proceedings,] or that the transaction was entered into in the course of reorganization proceedings that preceded the liquidation proceedings. The law may also establish presumptions and permit shifts in the burden of proof to facilitate avoidance proceedings.

Liability of counterparties to avoided transactions

(83) The insolvency law should specify that a counterparty to a transaction that has been avoided must return to the estate the assets obtained or, if the court so orders, make a cash payment to the estate for the value of the transaction. The court should determine whether the counterparty to an avoided transaction would have an ordinary unsecured claim.

H. Financial contracts and netting

Purpose of legislative provisions

The purpose of provision on netting and set-off in the context of financial transactions is to reduce the potential for systemic risk that could threaten the stability of financial markets by providing certainty with respect to the rights of parties to a financial contract when one of those parties fails to perform for reasons of insolvency. These recommendations are not intended to apply to transactions that are not financial contracts, which would remain subject to the general law applying to set-off and netting.

⁷¹ This refers to an appraisal of the costs and benefits of an avoidance action and an implicit rule that if the costs of proceedings would exceed the benefits to be recovered for the estate, those proceedings should not go ahead.

Contents of legislative provisions

(92) Financial contracts should be defined broadly enough to encompass existing varieties of financial contracts and to accommodate new types of financial contracts as they appear.

III. Participants

A. The debtor

Obligations

(95) The insolvency law should clearly specify the debtor's obligations in respect of insolvency proceedings. Those obligations should arise on the commencement of, and continue throughout, those proceedings. The obligations should include the obligation:

(a)-(b) *(No change)*;

(i)-(iv) *(No change)*;

(v) Creditors and their claims, prepared in cooperation with the insolvency representative and revised and amended by the debtor as claims are verified and admitted or denied;

(c) To cooperate with the insolvency representative to enable the insolvency representative to take effective control of the estate and to facilitate or cooperate in the recovery by the insolvency representative of the assets, or control of the assets of the estate, wherever located and business records;

(d) *(No change)*.

Confidentiality

(96) The insolvency law should specify protections for information provided by the debtor [or concerning the debtor] that is commercially sensitive or confidential.

The debtor's role in continuation of the business

(97A) The insolvency law should specify that a debtor in possession would have the powers and functions of an insolvency representative, except for the right to remuneration.

B. The insolvency representative

Conflict of interest

(100) The insolvency law should require the disclosure of a conflict of interest, a lack of independence or circumstances that may lead to a conflict of interest or lack of independence by:

(a) A person proposed for appointment as an insolvency representative or a person appointed as an insolvency representative, where the conflict of interest or

the circumstances that may lead to a conflict of interest or lack of independence arises in the course of insolvency proceedings; and

(b) *(No change)*.

Duties and functions of the insolvency representative

(104) The insolvency law should specify that the insolvency representative have an obligation to protect and preserve the assets of the estate. The insolvency law should specify the insolvency representative's duties and functions with respect to the administration of the proceedings and preservation and protection of the estate, [including continued operation of the debtor's business].

Liability

(105) The insolvency law should specify the consequences of the insolvency representative's failure to perform, or to properly perform, its duties and functions under the law and any related standard of liability imposed.

C. Creditors—participation in insolvency proceedings

Convening meetings of creditors

(112) The insolvency law may require a first meeting of creditors to be convened within a specified time period after commencement to discuss certain matters [specified in the law]. The insolvency law may also permit the court, the insolvency representative or creditors holding a specific percentage of the total value of unsecured claims to request the convening of a meeting of creditors generally and specify the circumstances in which such a meeting of creditors may be convened. The insolvency law should specify the party responsible for giving notice to creditors of such a meeting.

Creditor representation

(113) The insolvency law should facilitate the active participation of creditors in insolvency proceedings such as through a creditor committee, special representative or other mechanism for representation.⁸⁶ The insolvency law should specify whether a committee or other representation is required in all insolvency proceedings. Where the interests and categories of creditors involved in insolvency proceedings are diverse and participation will not be facilitated by the appointment of a single committee or representative, the insolvency law may provide for the appointment of different creditor committees or representatives.

- Creditors that may be appointed to a creditor committee

(115) The insolvency law should specify the creditors that are eligible to be appointed to a committee. The creditors who may not be appointed to the creditor committee

⁸⁶ See recommendation (97) and the continuing role of the debtor in reorganization. Where the debtor remains in possession of the business, a creditor committee or other creditor representative will have an important role to play in overseeing and, where necessary, reporting on the activities of the debtor.

would include related persons and others who for any reason might not be impartial. The insolvency law should specify whether or not a creditor's claim must be admitted before the creditor is entitled to be appointed to a committee.

- Rights and functions of a creditor committee

(117) The insolvency law should specify the rights and functions of the creditor committee in insolvency proceedings, which may include:

- (a)-(c) *(No change)*; and
- (d) The right to be heard in the proceedings.

Recommendations on Chapter IV. Reorganization are contained in document A/CN.9/559/Add.3

V. Management of proceedings

A. Treatment of creditor claims

Requirement to submit

(154)(a) The insolvency law should require creditors who wish to participate in the proceedings to submit their claims,¹⁰⁰ and that the basis and amount of the claim be specified. The insolvency law should minimize the formalities associated with submission of claims. The insolvency law should permit claims to be submitted using different means, including mail and electronic means.

(154)(b) The insolvency law may permit claims that are undisputed to be admitted by reference to the list of creditors and claims prepared by the debtor in cooperation with the insolvency representative or the court or the insolvency representative may require a creditor to provide evidence of its claim. The insolvency law should not require that in all cases a creditor must appear in person to prove its claim.

Timing of submission of claims

(158) The insolvency law should specify the time period after commencement in which claims may be submitted, which time period should be adequate to allow creditors to submit their claims.^{105a}

Foreign currency claims

(160) Where claims are denoted in foreign currency, the insolvency law should specify the circumstances in which those claims must be converted and the reasons for conversion. Where conversion is required, the insolvency law should specify that the claim will be converted into local currency by reference to a specified date, such as the effective date of commencement of insolvency proceedings.

¹⁰⁰ Footnote deleted.

^{105a} Where proceedings involve foreign creditors, longer time periods may be required to facilitate submission of claims. Also, it is desirable that claims be made at an early stage of the proceedings so that the insolvency representative will be aware of the claims involved, of the assets subject to security interest and of the value of those assets and claims.

Admission or denial of claims

(162) The insolvency law should permit the insolvency representative to admit or deny any claim, in full or in part. Where the claim is to be denied [or subjected to treatment under recommendation 169 as a claim by a related person], whether in full or in part, notice of the reasons for the decision to deny should be given to the creditor.

(166) The insolvency law should permit unliquidated claims to be admitted provisionally, pending determination of the amount of the claim by the insolvency representative.

(167) The insolvency law should provide that the insolvency representative may determine the portion of a secured creditor's claim that is secured and the portion that is unsecured by valuing the encumbered asset.

(164) The insolvency law should permit an interested party to dispute any submitted claim, either before or after admission, and request review of that claim by the court.

(163) The insolvency law should permit creditors whose claims have been denied [or subjected to treatment under recommendation 169 as a claim by a related person], whether in full or in part, to request, within a specified period of time after notification of the decision to deny the claim, the court to review their claim.

(165) The insolvency law should specify that, claims disputed in the insolvency proceedings can be admitted provisionally by the insolvency representative pending resolution of the dispute by the court.

B. Priorities and distribution of proceeds

Priority claims

(172) The insolvency law should minimize the priorities accorded to unsecured claims. The insolvency law should set out clearly the classes of claims, if any, that will be entitled to be satisfied in priority in insolvency proceedings.

Ranking of claims

(174) The insolvency law should specify that claims other than secured claims, are ranked in the following order:¹¹²

- (a)-(c) (No change);
- (d) Deferred claims or claims subordinated under the law.

¹¹² The insolvency law may provide for further ranking of claims within each of the ranks set forth in paras. (a), (b) and (d). So, for example, workers' claims may be ranked as a class of their own and granted a rank higher than that accorded to claims of the State and the social security system, in accordance with Article 8(1) of the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173). Where all creditors within a rank cannot be paid in full, the order of payment should reflect any further ranking specified in the insolvency law for claims of the same rank.

VI. Conclusion of proceedings

A. Discharge

(185) Where the insolvency law provides that certain debts are excluded from the discharge, those debts should be kept to a minimum to facilitate the debtor's fresh start and should be set forth in the insolvency law. Where the insolvency law provides that the discharge may be subject to conditions, those conditions should be kept to a minimum to facilitate the debtor's fresh start and should also be set forth in the insolvency law.

B. Conclusion of proceedings

Liquidation

(186) The insolvency law should specify the procedures by which liquidation proceedings should be closed following final distribution or a determination that no distribution can be made.

Reorganization

(187) The insolvency law should specify the procedures by which reorganization proceedings should be closed when the reorganization plan is fully implemented or at an earlier date determined by the court.
