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## **Draft legislative guide on insolvency law**

### **Note by the Secretariat**

### **Glossary**

#### **A. Notes on the terminology used in the Guide**

1. The following terms are intended to provide orientation to the reader of the Guide—many terms such as “secured creditor”, “liquidation” and “reorganization” may have fundamentally different meanings in different jurisdictions and the inclusion of a definition in the Guide may assist in ensuring that the concepts as discussed in the Guide are clear and widely understood.

##### *- References in the Guide to the “court”*

2. The Guide assumes that there is reliance on court supervision throughout the insolvency proceedings which may include the power to commence insolvency proceedings, to appoint the insolvency representative, to supervise its activities and to take decisions in the course of the proceedings. Although this reliance may be appropriate as a general principle, alternatives may be considered where, for example, the courts are unable to handle insolvency work (whether for reasons of lack of resources or lack of requisite experience) or supervision by an administrative agency is preferred (see Part two, chapter IV. D, Institutions).

3. For the purposes of simplicity the Guide uses the word “court” in the same way as article 2 (e) of the UNCITRAL Model Law on Cross-Border Insolvency to refer to a judicial or other authority competent to control or supervise an insolvency proceeding.

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\* This document was submitted late to enable finalization of consultations.



*- Reference to the “law”*

4. References in the Guide to “the law” are to the insolvency law unless otherwise specified.

*- Rules of interpretation*

5. “Or” is not intended to be exclusive; use of the singular also includes the plural; and “include” and “including” are not intended to indicate an exhaustive list.

## **B. Terms and definitions**

### **Administrative claim or expense**

Claims that are generally accorded priority over unsecured claims and which relate to costs and expenses of the proceedings such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, debts arising from the proper exercise of the insolvency representative’s functions and powers, costs arising from continuing contractual obligations, and costs of proceedings [see para. 426, A/CN.9/WG.V/WP.63/Add.14].

### **Application for commencement of insolvency proceedings**

An application for the commencement of an insolvency proceedings which may be made by the debtor, creditors or a government authority. Under some insolvency laws, the application may operate to automatically commence insolvency proceedings; under other laws the court must determine whether the commencement criteria are met (sometimes referred to as the commencement or insolvency decision) before proceedings can commence.

### **Assetless estate**

An insolvency estate which does not have sufficient assets to pay for its administration under the insolvency law.

### **Avoidance action**

Action which allows transactions occurring prior to the application for commencement of insolvency proceedings or commencement of insolvency proceedings to be cancelled or otherwise rendered ineffective. Transactions that may be avoided include transactions intended to defeat, hinder or delay creditors; undervalued transactions, preferential transactions; and transactions involving related persons.

### **Burdensome assets**

Assets that may have a negative or insignificant value, such as where the value of the secured claim exceeds the value of the encumbered asset; where the assets are not essential to a reorganization; where the asset is burdened in such a way that retention would require excessive expenditure that would exceed the proceeds of realization of the asset or give rise to an onerous obligation or a liability to pay money; or where the asset is unsaleable or not readily saleable by the insolvency

	representative, such as where the asset is unique or does not have a readily apparent market or market value.
Centre of main interests	The place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties [EC Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, recital (13)].
Claim	Enforceable right to money or assets which may be based upon a judgement, may be liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent.
Close-out netting	A contractual provision [or, in the absence of any such provision, any statutory rule that supersedes a contractual arrangement] by which, on the occurrence of an event of default, whether through the operation of netting or set-off or otherwise: (i) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or (ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party [see EU Directive on financial collateral arrangements (2002/47)].
Commencement of proceedings	The date as of which the effects of insolvency are applicable or [date as of which the judicial decision to commence insolvency proceedings becomes effective, whether it is a final decision or not], in some jurisdictions referred to as “opening” of proceedings.
Court	A judicial or other authority competent to control or supervise an insolvency proceeding [UNCITRAL Model Law on Cross-Border Insolvency, art. 2 (e)]. <i>[Definition to address issues of locality and subject matter jurisdiction]</i>
Cram-down	A mechanism that will enable the support for a reorganization plan of one class of creditors to be used to make the plan binding on other classes without their consent.
Creditor committee	Representative body appointed by [the court] [the insolvency representative] [creditors as a whole] to act on behalf and in the interests of creditors and having consultative and other powers as specified in the insolvency law.
Debtor	A natural or legal person, including the management or other persons in control of the legal person, engaged in a business, which meets the criteria for commencement of insolvency

	proceedings; [or a natural or legal person that is indebted to a creditor].
Discharge	A court order releasing a debtor from all liabilities that were, or could have been, addressed in the insolvency proceedings, including contracts that were modified as part of a reorganization.
Disposition	Any transfer of title whether outright or by way of security [or lease] and any grant of a security interest whether possessory or non-possessory [Hague Conference on Private International Law: Preliminary Draft Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, April 2002].
Encumbered asset	An asset or property, movable or immovable, in respect of which a security interest has been granted to a creditor. If an obligation is not satisfied the asset or property subject to the security interest may be recovered or held, or the value realized by the creditor holding the security interest.
Establishment	Any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services [UNCITRAL Model Law on Cross-Border Insolvency, art. 2 (f)].
Estate	See Insolvency estate.
Financial contract	Means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above [UNCITRAL Convention on the Assignment of Receivables in International Trade (2002), art. 5 (k)].
Going concern	The sale of a business as a “going concern” is where the business is continued after commencement of insolvency proceedings and sold as a working whole, as opposed to a piecemeal sale of individual assets of the business.
Insolvency	When the debtor is unable to pay its debts and other liabilities as they [fall due] [mature] or when the value of debts and liabilities of the debtor exceeds the value of its assets.
Insolvency estate	Assets and rights of the debtor that are controlled by the insolvency representative and subject to the insolvency proceedings and which is constituted on commencement of proceedings. The estate would include [from chapter III. A. 2 (a)] assets and rights in which the debtor has an interest, whether or not they are in the possession of the debtor at the time of commencement or insolvency proceedings, including all tangible (whether movable or immovable) and intangible assets. [From

footnote 4 to rec. (27) A/CN.9/WG.V/WP.63/Add.5, p. 7.] Intangible assets may be differently defined according to national law, but may include intellectual property, bills of lading, securities and financial instruments, policies of insurance, contract rights (including those relating to property owned by third parties), and rights of action arising from a tort.

**Insolvency proceedings** Collective judicial or administrative proceedings, including an interim proceeding, for the benefit of creditors and others conducted according to the insolvency law [in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority] [which involve the [partial or total] divestment of the debtor and the appointment of an insolvency representative] for the purpose of either liquidation or reorganization of the business.

**Insolvency processes** Insolvency processes are informal processes that are not regulated by the insolvency law and will generally involve negotiation between the debtor and some or all of its creditors. Often these processes have been developed through the banking and commercial sectors and typically provide for some form of reorganization of the insolvent debtor. Whilst not regulated by an insolvency law, these informal reorganization processes nevertheless depend for their effectiveness upon the existence of an insolvency law which can provide some indirect incentive or persuasive force to achieve a reorganization. Also referred to as informal or out-of-court processes.

**Insolvency representative**

A person or body including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the debtor's assets or affairs [UNCITRAL Model Law on Cross Border Insolvency, art. 2 (d)] (see also "interim insolvency representative"). An interim insolvency representative may be appointed by the insolvency court in case of a serious crisis of the debtor which prevents the normal operation of its business, and is required to ensure, temporarily, the further operation of the business in connection with suspension of the debtor or of the debtor's management (possibly in connection with reorganization).

**Involuntary proceedings** Insolvency proceedings commenced on the application of a party other than the debtor such as creditors or a public authority.

**Liquidation** Process of assembling and selling a debtor's assets in an orderly and expeditious fashion in order to distribute the proceeds of sale to creditors according to established law and dissolve (where the debtor is a corporate or other legal entity) or discharge (where the debtor is an individual) the debtor either by way of a piecemeal sale or a sale of all or most of the debtor's assets in productive operating units or as a going concern [see World Bank Principles and Guidelines, 2001]. Other terms for

	this type of proceeding include winding up, bankruptcy, <i>faillite</i> , <i>quiebra</i> , and <i>Konkursverfahren</i> .
Margin	The process of posting additional cash or securities as a security interest for the transactions in accordance with a contractual formula that accounts for fluctuations in the market value of the contract and the existing security. For example, on a swap, a margin of 105 per cent might be required to maintain the termination value of the contract. If the security position falls to 100 per cent, an additional margin might be required to be posted.
Netting	In one form it can consist of set-off (see “set-off”) of non-monetary fungibles (such as securities or commodities deliverable on the same day, known as settlement netting) and in its more important form it consists of a cancellation by a counterparty of open contracts with the debtor, followed by a set-off of losses and gains either way (close-out netting).
Netting agreement	<p>An agreement between two or more parties that provides for one or more of the following:</p> <p>(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;</p> <p>(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or</p> <p>(iii) The set-off of amounts calculated as set forth in subparagraph (ii) of this definition under two or more netting agreements. [UNCITRAL Convention on the Assignment of Receivables in International Trade (2002), art. 5 (I)].</p>
Ordinary course of business	The usual manner and range of a business especially considered in relation to the amount, circumstances, and validity of a particular transfer.
<i>Pari passu</i>	The principle according to which creditors of the same class are treated equally [and are paid proportionately out of the assets of the estate].
Perfection	Completion of any steps necessary to render a disposition effective against persons who are not parties to that disposition: [Hague Conference on Private International Law: Preliminary Draft Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, April 2002].

## Post-commencement creditor

A creditor whose claim arises after commencement of the insolvency proceedings.

## Preference

A payment or other transaction made by an insolvent debtor which places a creditor in a better position than it would have been otherwise to the detriment or prejudice of the general body of creditors [other than in the normal course of trade].

## Priming lien

A priority given to lenders of post-commencement finance which ranks ahead of all creditors, including secured creditors.

## Priority

The right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination of whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied [UNCITRAL Convention on the Assignment of Receivables in International Trade, art. 5].

## Priority claim

A claim that will be paid out of available assets before payment of general unsecured creditors.

## Priority rules

The rules by which distributions are ordered among creditors and equity interests.

## Protection of the value of encumbered assets

Measures directed at maintaining the economic value of a security interest during the insolvency proceedings (in some jurisdictions referred to as “adequate protection”). This protection may be particularly relevant where the value of the secured claim is greater than the value of the encumbered asset or even where the value of the encumbered asset exceeds the value of the secured claim, but the value of the encumbered asset is diminishing and ultimately may be insufficient to satisfy the secured claim. Such diminution in value may be affected by the application of the stay to secured creditors or by the use of the encumbered asset in the insolvency proceedings (see recommendation (42)). Protection may be provided by way of cash payments, provision of alternative or additional security or by other means as determined by a court to provide the necessary protection. Where the value of the encumbered asset exceeds that of the secured claim, and is unlikely to diminish, protection may not be required.

## Related person

A person who is or has been in a position of control of the debtor including a director or officer of a legal entity, a shareholder or member of such legal entity, a director or officer or shareholder of a legal entity that is related to the debtor, including any relative of such a person; a “relative” in relation to a related

	person means the spouse, parent, grandparent, son, daughter, brother or sister of the related person.
Reorganization	Process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern. Other terms for this type of proceeding include rescue, restructuring, turnaround, rehabilitation, arrangement, composition, <i>concordat préventif de faillite</i> , <i>suspensión de pagos</i> , <i>administración judicial de empresas</i> , and <i>Vergleichsverfahren</i> .
Reorganization plan	A plan by which the financial well-being and viability of the debtor's business can be restored. The insolvency law may provide for the plan to be submitted by various parties (the debtor, the creditors, the insolvency representative) and may require confirmation of the plan by the court following its approval by the requisite number of creditors. The plan may address issues such as timing of the process, commitments to be undertaken, terms of payment and securities to be offered to creditors, avoidance actions to be filed and treatment of pending contracts including employment contracts.
Retention of title (title financing)	Provision of a contract for the supply of goods which purports to reserve ownership of the goods with the supplier until payment of the purchase price.
Secured claim	A claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default when the debt falls due.
Secured creditor	A creditor holding either a security interest covering all or part of the debtor's assets or a security interest in a specific asset entitling the creditor to priority ahead of other creditors with respect to the secured asset.
Secured debt	[Aggregate amount of secured claims] or [claims pertaining to secured creditors].
Security interest	A right or interest granted by a party committing the party to pay or perform an obligation. Whether established voluntarily by agreement or involuntarily by operation of law, a security interest generally includes, but is not necessarily limited to, mortgages, pledges, charges and liens [World Bank Principles and Guidelines, 2001]; c.f. "Securities" means any shares, bonds or other financial instruments or assets (other than cash), or any interest therein [Hague Conference on Private International Law: Preliminary Draft Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, April 2002].



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Set-off	Where a claim for a sum of money owed to a person is “set-off” (balanced) against a claim by the other party for a sum of money owed by that first person. A set-off may operate as a defence in whole or part to a claim for a sum of money.
Settlement payment	<i>[to be completed]</i>
State-owned enterprise	<i>[to be completed]</i>
Stay of proceedings	A measure which prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor’s assets, rights, obligations or liabilities, including the perfection or enforcement of any 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 (recommendation (35)).
Superpriority	A priority that will result in claims to which the superpriority attaches being paid before administrative claims.
Suspect period	The period of time by reference to which certain transactions may be subject to avoidance. The period is generally calculated retroactively from the date of the application for commencement of insolvency proceedings or from the date of commencement.
Unsecured creditor	Any creditor who does not hold security or any ordinary creditor who has no preferential rights.
Unsecured debt	Aggregate amount of claims not supported by security.
Voluntary proceeding	Insolvency proceedings commenced on the application of the debtor.

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