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## Draft Legislative Guide on Insolvency Law

### Note by the Secretariat: revisions to A/CN.9/WG.V/WP.70

1. This note sets forth those terms of the glossary included in document A/CN.9/WG.V/WP.70 part I that were considered and finalized by Working Group V (Insolvency Law) at its thirtieth session (29 March-2 April 2004), together with some revisions to the "Notes on terminology". Terms of the glossary that were not finalized by Working Group V (i.e. "claim", "commencement of proceedings", "netting", "ordinary course of business", "preference", "priority") and the terms set forth in A/CN.9/WG.V/WP.70 part I from "related person" to "voluntary restructuring negotiations") will be set forth in a subsequent document for consideration by the Commission at its thirty-seventh session. The terms "application for commencement of insolvency proceedings", "debtor", "government authority", and "priority rules" have been deleted.

### Introduction

#### 2. Glossary

##### A. Notes on terminology

2. The second sentence of paragraph 5 should be revised as follows:

"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~~ some other authority is preferred (see part one, chapter III, Institutional framework)." *[delete second sentence]*

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

\*\* Revised dates.



3. The following text has been suggested for addition to the end of paragraph 6.

“An authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings, would not be regarded as within the meaning of the term “court” as that term is used in the *Guide*.”
4. Paragraph 7, “Reference to “the law”, should be deleted and the word “insolvency” should be re-inserted in the text of the *Guide*, as appropriate, to avoid confusion between references to the insolvency law and references to law other than the insolvency law.

## **B. Terms and definitions**

5. The terms of the glossary should be revised as follows:

### **(a) Administrative claim or expense**

Claims which include costs and expenses of the proceedings such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor, debts arising from the exercise of the insolvency representative’s functions and powers, costs arising from continuing contractual and legal obligations, and costs of proceedings.

### **(b) Assets of the debtor**

Property, rights and interests of the debtor including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor’s interests in assets subject to a security interest or in third party-owned assets.

### **(c) Avoidance provisions**

Provisions of the insolvency law which permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred or their value to be recovered in the collective interests of creditors.

### **(d) Burdensome assets**

Assets that may have no value or an insignificant value to the insolvency estate or that are burdened in such a way that retention would require expenditure that would exceed the proceeds of realization of the asset or give rise to an onerous obligation or a liability to pay money.

### **(e) Cash proceeds**

Proceeds of the sale of encumbered assets, to the extent that the proceeds are subject to a security interest.

### **(f) 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.<sup>1</sup>

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<sup>1</sup> EC Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, recital (13).

**(g) Creditor committee**

Representative body of creditors appointed in accordance with the insolvency law having consultative and other powers as specified in the insolvency law.

**(h) Discharge**

Release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings.

**(i) Disposal**

Every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part.

**(j) Encumbered asset**

An asset in respect of which a creditor has obtained a security interest.

**(k) Equity holder**

The holder of issued stock or a similar interest that represents an ownership claim to a proportion of the capital of a corporation or other enterprise.

**(l) Establishment**

Any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.<sup>2</sup>

**(m) Financial contract**

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.<sup>3</sup>

**(n) Insolvency**

When a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets.

**(o) Insolvency estate**

Assets of the debtor that are subject to the insolvency proceedings.

**(p) Insolvency proceedings**

Collective proceedings, subject to court supervision, either for reorganization or liquidation.

**(q) Insolvency representative**

Person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the insolvency estate.

<sup>2</sup> UNCITRAL Model Law on Cross-Border Insolvency, art. 2 (f).

<sup>3</sup> UNCITRAL Convention on the Assignment of Receivables in International Trade (2002), art. 5 (k).

**(r) Liquidation**

Proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.

**(s) Lex fori concursus**

The law of the State in which the insolvency proceedings are commenced.

**(t) Lex rei situs**

The law of the State in which the asset is situated.

**(u) Netting agreement**

A form of financial contract between two or more parties that provides for one or more of the following:

- (i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;
- (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
- (iii) The set-off of amounts calculated as set forth in subparagraph (ii) of this definition under two or more netting agreements.<sup>4</sup>

**(v) Pari passu**

The principle according to which similarly situated creditors are treated and satisfied proportionately to their claim out of the assets of the estate available for distribution to creditors of their rank.

**(w) Party in interest**

Any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest.

**(x) Post-commencement claim**

A claim arising from an act or omission occurring after commencement of insolvency proceedings.

**(y) Priority claim**

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

**(z) Protection of value**

Measures directed at maintaining the economic value of a security interest during the insolvency proceedings (in some jurisdictions referred to as “adequate

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<sup>4</sup> UNCITRAL Convention on the Assignment of Receivables in International Trade (2002), art. 5 (l).

protection"). Protection may be provided by way of cash payments, provision of security interests over alternative or additional assets or by other means as determined by a court to provide the necessary protection.

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