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Draft legislative guide on insolvency law

Note by the Secretariat

[Part One, Chapters I and II of the Guide appear in document 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.3-17]

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.



B. Terms and definitions

Administrative claim	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].
Appropriate protection	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 secured asset or even where the value of the secured asset exceeds the value of the secured claim, but the value of the secured 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 and by the use of the secured asset in the insolvency proceedings (see recommendation (42)). Appropriate 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.
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 [<i>terms of recommendation (70) to be added</i>].
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	See Netting

Commencement of proceedings	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.
[Composition	[In the context of reorganization,] an agreement between the debtor and the [majority of] creditors where the creditors agree with the debtor and between themselves to accept from the debtor payment of less than the amount due to them in full satisfaction of their claims or to a reduction or postponement of debts or the redefinition of payment terms]
Court	A judicial or other authority competent to control or supervise an insolvency proceeding [UNCITRAL Model Law on Cross-Border Insolvency, art. 2(e)].
Cram-down provision	A mechanism that will enable the support of one class of creditors for a reorganization plan 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 the general body of creditors and having consultative and other powers as specified in the insolvency law.
Debtor	A person or entity, engaged in a business, which meets the criteria for commencement of insolvency proceedings; or [an individual or legal entity 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.
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)].
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)].
Formal insolvency proceedings	Insolvency proceedings commenced under the insolvency law and governed by that law, generally including both a liquidation and a reorganization process.

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.
Informal insolvency proceedings	Insolvency 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.
Initiation of proceedings	The making of an application for commencement of insolvency proceedings by the debtor; one or more creditors; and in rare cases by a public authority. Such an application may affect the legal rights of the debtor and creditors before commencement of the insolvency proceedings.
Insolvency	When the debtor is unable [or is likely to be unable] to pay its debts and other liabilities as they fall due or when the value of debts and liabilities of the debtor exceeds the value of assets.
Insolvency estate	Assets and rights of the debtor that are controlled by the insolvency representative and subject to the insolvency proceedings.
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 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”).
Insolvency decision	Decision of the court to commence an insolvency proceeding [and to appoint an insolvency representative] (see also “commencement of proceedings”).

Interim insolvency representative	Person or entity 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) (see also "insolvency representative").
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> .
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	An agreement between two or more parties that provides for one or more of the following: <ul style="list-style-type: none"> (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. [UNCITRAL Convention on the Assignment of Receivables in International Trade (2002) art. 5(1)].
Ordinary course of business	[<i>Note: is a definition required in the Guide?</i>]

<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].
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.
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 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. Other terms include collateral and encumbered asset.
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].
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.
State-owned enterprise	[<i>Note: is a definition required in the Guide?</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.
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.
