Glossary of Terms and Descriptions in Insolvency

The document below froms an Appendix, published in the Global Principles for Cooperation in International Cases ('Global Principles'), drafted by prof. Ian Fletcher and Prof. Bob Wessels, which were published in June 2012 by the American Law Institute (ALI) and International Insolvency Institute (III). See for the full text: http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm.

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APPENDIX

Glossary of Terms and Descriptions

As set out in Section I (Introduction and Overview) many states and regional public institutions, international non-governmental organisations and practitioners' associations have produced many laws, regulations, principles, guidelines and statements of best practices. All these forms of expressions aim for the better coordination of insolvency measures or proceedings concerning economic enterprises which have operations, assets, activities, debtors or creditors in more than one state. In several instances these laws, regulations and principles provide for a list of definitions or terms, employed frequently within the legal context within which they function. This Appendix aims to develop a uniform global legal terminology and therefore to assist legislators, insolvency practitioners and courts in their efforts of improving the components of their respective languages to facilitate and smoothen cross-border communication and coordination. Legislators may find this appendix helpful in their efforts of creating or amending domestic rules relating to international insolvency.

The methodology followed has been a general gathering of these terms and expressions from documents referred to in the footnotes which can contribute to a better understanding and knowledge of insolvency matters in a broader context. Therefore the Glossary also contains terms generally not related to insolvency, such as "contract", "obligation" or "duty".

Certain terms in the Glossary have been adopted by European institutions, especially those terms and definitions stemming from the EU Insolvency Regulation. It is generally accepted that most of these terms or words have "an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation".[1] Such a form of interpretation does not exclude the use of its given meaning for its original purposes while looking for a specific meaning or interpretation in another context. In many instances the

[1] *Eurofood IFSC Ltd v Bank of America N.A, Case* C-341/04, ECJ 2 May 2006, [2006] ECR I-3813, at 31 with regard to the term "centre of main interest".

terms in the Glossary form an inherent part of the Global Principles, which are supported by evaluatory Comments and many times by Reporters' Notes.

The items covered by the Global Principles relate to "insolvency" in an "international" context. The Global Principles are standing on the shoulders of the ALI NAFTA Principles, also international in nature. Such a project in the middle of the last decade of the 20th century was new for the American Law Institute, and the Reporters "had to invent the process as well as the text"[2], at the same time expressing the hope that these Principles "may be helpful to our colleagues in other countries as well".[3] Indeed, the ALI NAFTA Principles have been taken into consideration by the drafters of the European Communication & Cooperation Guidelines for Cross-border Insolvency (2007). In a manner that is possibly unique within practice of the American Law Institute the Reporters have considered other recent (draft) products and the terms and definitions of which the related documents make use. The most relevant in this regard were the ALI/UNIDROIT Principles of Transnational Civil Procedure (2004), the Principles of the Law of Software Contracts (Proposed Final Draft, March 2009) – hereinafter "Law of Software Contracts Principles" – and Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, hereinafter "Intellectual Property Principles", adopted by ALI in 2007, and published in 2008.[4] As the Global Principles, upon final approval, are intended to form part of the cumulative output of the Institute, in several cases that form of definition has been chosen which is similar or most aligned with one that is already used by the Institute. We are in concurrence with the approach followed in the Intellectual Property Principles whereby occasionally a term chosen departs from standard expressions found in U.S. Law so as to pay due regard to the fact that the terms are addressed to an international audience of insolvency practitioners, judges and lawmakers.[5] In addition, the "terms" the Report provides also include descriptions reflecting how existing provisions of soft law instruments explain a certain term.

In private international law (conflict of laws) matters in large parts of the world use is made of technical terms and expressions which have their origin in the Latin language. These terms and expressions provide a convenient shorthand for many concepts which are mentioned with great frequency, and which generally require many more words to state fully and precisely in English. The "definitions" below include Latin terms and expressions which in international insolvency cases are frequently used in practice and in legal discourse.[6]

"Abusive Filings"

The term "abusive filings" is used within the context of the ALI NAFTA Principles where it is introduced as a Procedural Principle. Although it is not specifically defined, this legal

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[2] See American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003 ("ALI NAFTA Principles"), Reporter's Preface, at xix.

[3] Id., at xxi.

[4] American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, American Law Institute Publishers, St. Paul, MN 2008 ("Intellectual Property Principles").

[5] Intellectual Property Principles, at 6.

[6] Most of these Latin terms and expressions have been taken (sometimes in a slightly amended form) from I.F. Fletcher, Insolvency in Private International Law, 2nd ed., Oxford University Press, 2005, at p. xxiii.

instrument regulates that "when a non-main proceeding is filed in a NAFTA country and the court in that country determines that this country has little interest in its outcome as compared to the country that is the centre of the debtor's main interest, the court should (i) dismiss the bankruptcy case, if dismissal is permitted under its law and no legitimate interests would be damaged by dismissal; or (ii) ensure that the bankruptcy stay arising from the non-main proceedings had no effect outside that country."[7]

"Administrative claim or expense"

An administrative claim or expense includes costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative for the purposes of the administration, 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.[8] This type of claims is sometimes alternatively referred to as: "Claim of the estate".

"Applicable"

The term "applicable" has a broad meaning within the scope of insolvency issues. However, it may be considered that its most significant meaning is in relation to the applicable law. The EU Insolvency Regulation provides in Article 4 that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. Articles 5-15 EU Insolvency Regulation provide for exceptions and limitations to this rule.

"Assets"

The term "assets" is referred to in several legal instruments in relation to the debtor's assets. The UNCITRAL Legislative Guide describes "assets of the debtor" as: 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 encumbered assets or in third party-owned assets.[9] The EU Insolvency Regulation provides that this "Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets".[10] Moreover, the European

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[7] ALI NAFTA Principles (2001), Procedural Principle 6.

[8] UNCITRAL Legislative Guide (2004), para. 12, under B "Glossary, Terms and definitions". UNCITRAL uses terms and expressions in the UNCITRAL Legislative Guide (2004) and its addition regarding Treatment of Enterprise Groups (2010), the UNCITRAL Practice Guide (2009) and the UNCITRAL Judicial Perspective (2011) in a consistent way. Although several of these terms appear in all documents mentioned, they will not be mentioned in all cases in the following footnotes.

[9] UNCITRAL Legislative Guide (2004), para. 12, under B "Glossary, Terms and definitions". Similar: UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[10] InsReg (2000), Recital 12.

Communication & Cooperation Guidelines for Cross-border Insolvency (2007) provide that "In particular, these Guidelines aim to promote: The identification, preservation and maximisation of the value of the debtor's assets (which includes the debtor's undertaking or business) on a world-wide basis;"[11]
In addition, the Principles of European Insolvency Law (2003) determine as their first principle that "In an insolvency proceeding the assets of an insolvent debtor are collected and converted into money to be distributed among the creditors ('liquidation'), or the liabilities of an insolvent debtor are restructured in order to re-establish the debtor's ability to meet liabilities ('reorganisation'). The proceeding can be a combination of liquidation and reorganization".[12]
In the context of the Draft Common Frame of Reference (DCFR, 2009), the Study Group on a European Civil Code and the Research Group on EC Private Law (*Acquis* Group) have defined the term "assets" as "anything of economic value, including property; rights having a monetary value; and goodwill".[13]

"Attached right"

An attached right is a quasi property law right, not vested in an asset, but attached to it. See also "vested right".

"Avoidance provisions"

"Avoidance provisions" are described in various ways: (i) Provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations, including the granting of security interests, prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.[14] (ii) More generally, the scope of this expression is not necessarily limited to provisions contained within "the insolvency law", but may extend to provisions within the general law of the system concerned. This wider mode of reference is employed by the terms of Article 13 of the EU Insolvency Regulation. Likewise in the context of the Draft Common Frame of Reference (DCFR), the Study group on a European Civil Code and the *Acquis* Group provides: "Avoidance" of a juridical act or legal relationship is the process whereby a party or, as the case may be, a court invokes a ground of invalidity so as to make

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[11] CoCo Guidelines (2007) Guideline 2.2.ii.

[12] PEIL (2003), Principle 1.1.

[13] Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), Principles Definitions and Model Rules of European Private Law, European Law Publishers (2009), Annex (Definitions), p. 546. The Reporters used the Outline Edition ("DCFR Outline Edition, 2009"). The Full Edition (6500 pages; six Volumes) was published late 2009, see Christian von Bar and Eric Clive (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition, München/Oxford: Sellier. European Law Publishers/Oxford University Press 2009/2010.

[14] UNCITRAL Legislative Guide (2004), para. 12 under B "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations". Presented as a blueprint for future European law of obligations and property law, the DCFR is heavily debated, see e.g. H. Eidenmüller et al., The Common Frame of Reference for European Private Law. Policy Choices and Codification Problems, Oxford Journal of Legal Studies 2008, pp. 659-708.

the act or relationship, which has been valid until that point, retrospectively ineffective from the beginning.[15]

"Burdensome assets"

"Burdensome assets" are 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.[16] Such assets are also sometimes termed "onerous property" for the purpose of disclaimer by the administrator of the insolvency proceeding.

"Business"

The term business means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to that person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity.[17] See also: "Ordinary course of business".

"Cash proceeds"

"Cash proceeds" are proceeds of the sale of encumbered assets to the extent that the proceeds are subject to a security interest.[18]

"Centre of main interests"

In the EU Insolvency Regulation the term "centre of main interests" is employed to demarcate the territorial applicability of the Regulation's provisions (Recital 14) and as the criterion for jurisdiction in the main proceedings (Article 3(1)). Generally the acronym COMI ("Centre of main interests") is used. In the case of a company or legal person, the Insolvency Regulation provides that the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. The Regulation also declares that in general the term "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.[19]
The UNCITRAL Model Law utilises this criterion as well and contains the following presumption: "In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests".[20]

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[15] DCFR Outline Edition 2009, Annex (Definitions), p. 546.
[16] UNCITRAL Legislative Guide (2004), para.12, under B "Glossary, Terms and definitions", .
[17] DCFR Outline Edition 2009, Annex (Definitions), p. 547.
[18] UNCITRAL Legislative Guide (2004), para. 12, under B "Glossary, Terms and definitions".
[19] InsReg (2000), Recital 13.
[20] UNCITRAL Model Law (1997), Article 16.3.

As a further explanation: "A debtor's place of incorporation is not independent from its COMI. Indeed, it is closely related. For example, under Chapter 15 U.S. Bankruptcy Code, the UNCITRAL Model Law and the EU Insolvency Regulation, COMI is legally presumed to be at a corporate debtor's registered office (i.e., its place of incorporation). But precisely because the presumption is rebuttable, COMI and incorporation are only usually, but not always, in the same place".[21] The UNCITRAL Legislative Guide (2004) as well as the UNCITRAL Practice Guide (2009) use a description for COMI, which is similar to the one of the Insolvency Regulation and the UNCITRAL Model Law, "'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."[22] Case law from the European Court of Justice in relation to the Insolvency Regulation is useful. These cases include *Staubitz-Schreiber*[23] and *Eurofood*.[24]

"Claim"

The UNCITRAL Legislative Guide describes a "claim" as a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent, arisen on or before the commencement of the insolvency proceedings.[25] It adds as a "note": "Note: Some jurisdictions recognize the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim". The Draft Common Frame of Reference (DCFR) describes a "claim" as a demand for something based

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[21] See John A.E. Pottow, The Myth and Realities of Forum Shopping in Transnational Insolvency, Brooklyn journal of international law, vol. 32, issue 3, 2007, p. 793.

[22] UNCITRAL Legislative Guide (2004), para. 12, under B: "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[23] *Susanne Staubitz-Schreiber*, Case C-1/04, ECJ 17 January 2006, [2006] ECJ I-701: "Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened."

[24] *Eurofood IFCS Ltd v Bank of America N.A*, Case C-341/04, ECJ 2 May 2006 [2006] ECR I-3813: "Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the EU Insolvency Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation." (paragraph 37, and active proposition 1, of the judgment of the court).

[25] UNCITRAL Legislative Guide (2004), para. 12, under B "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations". The Concordat uses the term "Common Claim" for "A claim which is neither a secured claim nor a privileged claim."

on the assertion of a right,[26] and "claimant" as a person who makes, or who has grounds for making, a claim.[27] A "claim" is held by a "creditor". See "creditor".

"Claim of the estate"

See "Administrative claim or expense".

"Class"

"Class" is used to denominate a group of claims of creditors that have – under an applicable law – a similar legal position, specifically its position in the proceeds to be distributed from the insolvency estate. Although the class relates to the nature of the claim, it is used to nominated the claimants too. Generally the following classes can be distinguished: (i) super-priority creditors, (ii) priority creditors, iii) pari passu ("unsecured" or "ordinary") creditors, (iv) subordinated creditors, which may include equity holders. These shareholders also can form a distinct class of creditors.

"Clause"

"Clause" refers to a provision in a document. A clause, unlike a "term", is always in textual form.[28]

"Commencement of proceedings"

"Commencement of (insolvency) proceedings is the effective date of insolvency proceedings whether established by statute or a judicial decision.[29] See also "Opening of proceedings".

"Communication"

Contact between courts, or between insolvency administrators, or between courts and insolvency administrators, for purposes relating to the conduct of an insolvency proceeding. A potential outcome of such structured "Communication" has been described thus: "To harmonize and co-ordinate the administration of the Insolvency Proceedings, the [Country 1]

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[26] DCFR Outline Edition 2009, Annex (Definitions), p. 547.

[27] DCFR Outline Edition 2009, Annex (Definitions), p. 547.

[28] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 328. The definition is not included in DCFR Outline Edition 2009.

[29] UNCITRAL Legislative Guide (2004), paras. 12, under B "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

Court and the [Country A] Court may coordinate activities with each other [and consider whether it is appropriate to defer to the judgment of the other Court].”[30]

“Composition”

Composition is used as a term to reflect a proceeding with the goal of rehabilitating the business of the entity or individual that is involved in insolvency proceedings, possibly new owners, including arrangement, suspension of payment, reconstruction, reorganization, or similar processes, with distributions to creditors and/or shareholders or other equity holders of cash, property and/or obligations of, or interests in, the rehabilitated business.[31]

“Condition”

A “condition” is a provision which makes a legal relationship or effect depend on the occurrence or non-occurrence of an uncertain future event. A condition may be suspensive or resolutive.[32]

“Conduct”

“Conduct” means voluntary behaviour of any kind, verbal or nonverbal: it includes a single act or a number of acts, behaviour of a negative or passive nature (such as accepting something without protest or not doing something) and behaviour of a continuing or intermittent nature (such as exercising control over something).[33]

“Contract”

A “contract” is the total legal obligation that results from the parties’ agreement. The term is taken from U.C.C. § 1-201 (11). An “agreement” is the bargain of the parties in fact as found in their language or other circumstances, see U.C.C. § 1-201(3).[34] an agreement which gives rise to, or is intended to give rise to, a binding legal relationship or which has, or is intended to have, some other legal effect. It is a bilateral or multilateral juridical (or: legal) act.[35]

“Contractual obligation”

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[30] III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 5(1)(b) (footnote omitted).

[31] Concordat, Glossary of terms.

[32] DCFR Outline Edition 2009, Annex (Definitions), p. 548.

[33] DCFR Outline Edition 2009, Annex (Definitions), p. 548.

[34] The definition for “contract” and “agreement” is followed by the Law of Software Contract Principles (Proposed Final Draft, March 2009), § 1.01(e) and 1.01(b). The Intellectual Property Principles (Proposed Final Draft, March 2007), at 47, refers to the same terms and uses “contract” and “agreement” interchangeably.

[35] DCFR Outline Edition 2009, Annex (Definitions), p. 549.

A "contractual obligation" is an obligation which arises from a contract, whether from an express term or an implied term or by operation of a rule of law imposing an obligation on a contracting party as such.[36]

"Cooperation"

The process of "Cooperation", and its main purpose, has been described thus: "To assist in the efficient administration of the Insolvency Proceedings and in recognizing that any of the Debtors may be creditors of any of the other Debtors' estates, the Debtors and the Estate Representatives shall, where appropriate: (a) cooperate with each other in connection with actions taken in the [Country 1] Court and the [Country A] Court and (b) take any other appropriate steps to coordinate the administration of the Insolvency Proceedings for the benefit of the Debtors' respective estates."[37]

"Coordination"

The ALI NAFTA Principles, Appendix A, Definitions, define "coordination" as referring to a limited harmonization aimed at making two different systems work better together, without being fully harmonized. The definition then refers to "Harmonization".

"Court"

According to Article 2(d) of the Insolvency Regulation "Court" shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings.[38] Recital (10) explains that "insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression "court" in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings."[39] It follows from Article 4(2) of the Regulation that the "law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure".[40] The UNCITRAL Legislative Guide and the UNCITRAL Practice Guide use a rather similar expression for "Court": "a judicial or other authority competent to control or supervise insolvency proceedings"[41], although it does not contain any similar provision attributing exclusive jurisdiction to control the activity of "opening" of insolvency proceedings. Within the context of Article 234 EC Treaty, the European Court of Justice has decided that a

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[36] DCFR Outline Edition 2009, Annex (Definitions), p. 549.

[37] III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 5(1)(a) (footnote omitted).

[38] InsReg (2000), Article 2(d).

[39] InsReg (2000), Recital (10).

[40] InsReg (2000), Article 4(2).

[41] UNCITRAL Legislative Guide (2004), para. 12, under B "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

functional criterion, and not the national definition, should be used in order to decide whether an authority is to be regarded as a court.[42]

"Creditor"

The UNCITRAL Legislative Guide provides for "Creditor": a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings.[43] Within the framework of the DCFR the Study Group on a European Civil Code and the Acquis Group have defined a creditor as "A person who has right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor."[44] The ALI NAFTA Principles, Appendix A, Definitions provide: "Creditor" refers to someone with a claim against a debtor, but also includes other persons with an interest in the proceeding, such as co-owners and others claiming property interests in the debtor's property.

"Creditor committee"

A creditor committee is a representative body of creditors appointed in accordance with the applicable insolvency law, having consultative and other powers as specified in the insolvency law.[45]

"Cross-border agreement"

A cross-border agreement is an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives, and between insolvency representatives, sometimes also involving other parties in interest.[46]

"Debtor"

The ALI NAFTA Principles, Appendix A, Definitions, state as definition: "Debtor" in most contexts refers to a legal person who is the subject of a bankruptcy or insolvency proceeding.

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[42] *HSB Wohnbau*, Case C-86/00, ECJ 10 July 2001.

[43] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[44] DCFR Outline Edition 2009, Annex (Definitions), p. 330.

[45] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations". For an alternative, descriptive definition: "A committee of creditors recognized by the [Country 1 and/or Country A] Court in the [Country 1 and/or 2] Cases shall be referred to herein as "The Creditors' Committee", see III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 2(1)(vii).

[46] UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

The EU Insolvency Regulation states that: "This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual." [47] A further definition is not provided. Within the framework of the DCFR the following definition is provided: "A person who has an obligation, whether monetary or non-monetary, to another person, the creditor."[48]

"Debtor in possession"

The UNCITRAL Legislative Guide provides a description for a certain kind of debtor, namely "debtor in possession", which is a debtor in reorganization proceedings which are so structured that the debtor him- or herself, or itself, (especially the board of a company) retains full control over the business, with the consequence that the court does not appoint an insolvency representative.[49]

"Deferral"

When one court accepts the limitation of its responsibility with respect to certain issues, including for example, the ability to hear certain matters and issue certain orders, in favour of another court, this is named deferral.[50]

"Discharge"

The release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings. [51] Alternative: a court order or provision of an instrument effecting a composition releasing a debtor from all liabilities that were, or could have been, addressed in the insolvency proceeding, including contracts that were modified as part of a composition.[52]

"Disposal"

Every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part, is named "disposal".[53]

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[47] InsReg (2000), Recital (9).

[48] DCFR Outline Edition 2009, Annex (Definitions), p. 550.

[49] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations". The ALI NAFTA Principles, Annex A, Definitions, provide: "Debtor in possession" refers to the person or persons entitled to operate the affairs of a debtor under either a Chapter 11 reorganization in the United States or a concurso mercantil in Mexico, and includes a Mexican debtor in conciliation in Mexico."

[50] UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[51] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[52] Concordat, Glossary of terms.

[53] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

“Distribution”

Distribution means the allocation of estate property among creditors and/or shareholders or other equity interests.[54]

“Domestic assets”

“Domestic assets” refers to assets within the territorial jurisdiction of a court, usually a recognizing court.[55]

“Duty”

A person has a “duty” to do something if the person is bound to do it or expected to do it according to an applicable normative standard of conduct. A duty may or may not be owed to a specific creditor. A duty is not necessarily an aspect of a legal relationship. There is not necessarily a sanction for breach of a duty. All obligations are duties, but not all duties are obligations.[56] See also “obligation”.

“Electronic”

“Electronic” means relating to technology with electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. An “electronic signature” then means data in electronic form which are attached to, or logically associated with, other data and which serve as a method of authentication.[57]

“Enacting State”

An Enacting State is a State that has enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency.[58]

“Encumbered asset”

An “encumbered asset” is an expression for an asset in respect of which a creditor has a security interest.[59]

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[54] Concordat, Glossary of terms.

[55] ALI NAFTA Principles, Appendix A, Definitions.

[56] DCFR Outline Edition 2009, Annex (Definitions), p. 553.

[57] See for both definitions DCFR Outline Edition 2009, Annex (Definitions), p. 553.

[58] UNCITRAL Judicial Perspective (2011), B “Glossary”, under (c).

[59] UNCITRAL Legislative Guide (2004), para. 12, under B, “Glossary, Terms and definitions”. UNCITRAL Practice Guide (2009), under B “Glossary”, in “2. Terms and explanations”.

"Enterprise group"

An "enterprise group" has been described as: "Two or more enterprises that are interconnected by control or significant ownership". In the given description "enterprise" means "any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law", whereas "control" means "the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise".[60]

"Equity holder"

An "equity holder" is 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.[61]

"Establishment"

Article 2(h) of the Insolvency Regulation defines "establishment" as meaning: "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods." This term is used primarily for the purpose of establishing territorial/secondary jurisdiction within the meaning of Article 3(2) Insolvency Regulation. In the *Interedil* case the CJEU provides an interpretation to Article 2(h) of the Insolvency Regulation: "[62] The fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required."[62] This proposition was affirmed explicitly by the CJEU in the *Rastelli Davide* case.[63] In *Interedil* the CJEU continued: "It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment'. [63] Since, in accordance with Article 3(2) of the Regulation, the presence of an establishment in the territory of a Member State confers jurisdiction on the courts of that State to open secondary insolvency proceedings against the debtor, it must be concluded that, in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties."

A similar, though not completely identical, definition as in Article 2(h) of the Insolvency Regulation is also contained in the UNCITRAL Model Law, which provides that "establishment" means "any place of operations where the debtor carries out a non-transitory

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[60] UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups in insolvency (2010), "Glossary", under (a), (b) and (c) repectively.

[61] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[62] CJEU 20 October 2011, Case C-396/09 (*Interedil Srl, in liquidation v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA*).

[63] CJEU 15 December 2011, Case C-191/10 (*Rastelli Davide e C. Snc v. Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre* I*nternational*).

economic activity with human means and goods or services."[64] The use of the term "goods" in the English versions of this definition in both of the quoted texts is arguably inappropriate as an equivalent to the French term "*biens*" or the Dutch term "*goederen*", which can apply to both tangible and intangible property. The English term "assets" would have been a more suitable equivalent. See also "Goods"; "Assets". Although the definition of establishment supplied by the EU Insolvency Regulation has been presented as an independent concept to be followed, separate from the definition of "establishment" as used within the context of construing the right of establishment in another EU Member State,[65] the following case law of the ECJ in relation to the right of establishment under the EC Treaty may be useful. See *Commission v. Austria*[66] and *Schweppes v. Commissioners of Inland Revenue*.[67]

"Estate"

The term estate is used several times in the Insolvency Regulation, thought not in the UNCITRAL Model Law. It is generally used to describe the subject of the insolvency proceedings, being the debtors' assets and liabilities, to which the goal of such proceedings (either liquidation or reorganisation) relate.

"EU-State"

The concept of EU-State is not precisely defined within the EC Treaty or any other applicable instrument. In general, EU-State or EU Member State means one of the twenty-seven countries that are currently, in 2011, members of the European Union (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom).[68] However, Denmark is for the purpose of Private International Law Regulations pursuant to Articles 61(c) and Article 65 not regarded as a Member State. An example of this exclusion is found in Brussels I, which

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[64] UNCITRAL Model Law (1997), Article 2 (f). This definition also is provided in the UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions" and in the UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[65] Virgós / Schmit Report (1996), para. 70.

[66] *Commission of the European Communities v. Republic of Austria,* Case C-161/07, ECJ 22 December 2008: "It should be noted that the concept of establishment within the meaning of the EC Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the European Community in the sphere of activities of self-employed persons." See also *Centro di Musicologia Walter Stauffer*, Case C-386/04, ECJ 14 September 2006.

[67] *Cadbury Schweppes plc. v. Commissioners of Inland Revenue*, Case C-196/04, ECJ 12 September 2006: "The concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there." See also *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others (Factortame II)*, Case C-221/89. ECJ 25 July 1991, [1991] ECR I-3905, paragraph 20, and *Commission* v *United Kingdom*, Case C-246/89, ECJ 4 October 1991, [1991] ECR I-4585, paragraph 21

[68] See Member States, at: http://europa.eu/abc/european_countries/eu_members/index_en.htm

determines: “the term “Member State” shall mean Member States with the exception of Denmark”.[69] Likewise the Service Regulation, in which it is stated that the term "Member State" shall mean the Member States with the exception of Denmark.[70.] Recital 33 of the Insolvency Regulation provides: “Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.”

“Financial contract”

A financial contract is 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.[71]

“Foreign Court”

The UNCITRAL Model Law provides a specific definition of this term as: “A judicial or other authority competent to control or supervise a foreign proceeding.”[72] See also the description of “Court” above.

“Foreign creditor”

In relation to any given jurisdiction, the term refers to a creditor whose address as maintained in the business records of the debtor is outside that jurisdiction.[73]

“Foreign (Insolvency) Proceeding”

A specific definition of the term “foreign proceeding”, in relation to insolvency matters, is found in the UNCITRAL Model Law, Article 2(a), which describes it as: “A collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation”.

“Foreign main proceeding”

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[69] Brussels I (2001), Article 1.3.

[70] Service Reg. (2007), Article 1.3.

[71] UNCITRAL Legislative Guide (2004), para. 12, under B, “Glossary, Terms and definitions”.

[72] UNCITRAL Model Law (1997), Article 2(e).

[73] ALI NAFTA Principles, Appendix A, Definitions.

According to the UNCITRAL Model Law, Article 2(b), "'Foreign main proceeding' means a foreign proceeding taking place in the State where the debtor has the centre of its main interests".

"Foreign non-main proceeding"

According to the UNCITRAL Model Law, Article 2(c), "'Foreign non-main proceeding' means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article".[74] "Non-main proceeding" refers to a full domestic bankruptcy case pending in a country other than the country that is the centre of the debtor's main interests; an ancillary proceeding is not a non-main proceeding: see ALI NAFTA Principles, Appendix A, Definitions.[75]

"Foreign Representative"

The ALI NAFTA Principles, Appendix A, Definitions say: "Foreign representative" refers to an administrator acting in a foreign proceeding." The UNCITRAL Model Law defines this term as: "A person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."[76]

"Forum"

Originally "forum" is a Latin term meaning a market place or commercial centre; hence by derivation the location of a court or tribunal which hears and determines litigious disputes, especially those of a commercial character. The term "forum" is nowadays used in relation to cross-border matters to denote the law district or country in which a case was, is being, or may be heard; hence also to refer to the court by which an application or a legal action is, or was, heard.

"Forum concursus"

The court within whose jurisdiction an insolvency proceeding is currently taking place, or formerly took place.

"Forum non conveniens"

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[74] See UNCITRAL Model Law (1997), Article 2(a-c). UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[75] ALI NAFTA Principles, Appendix A, Definitions, adding: "Ancillary proceeding" refers to a proceeding other than a full domestic bankruptcy proceeding designed to provide assistance to a foreign bankruptcy proceeding.

[76] UNCITRAL Model Law (1997), Article 2(d).

A plea or defence alleging that the forum is inappropriately selected and should refrain from exercising jurisdiction.

"Forum state"

The term "forum state" is the state within which a formal legal proceeding is taking place. Where two or more proceedings are currently taking place in different states in relation to the same debtor or cause of action, the terms "forum" and "forum state" may be applied successively, according to the context, to whichever of them is functioning in accordance with its own rules and practice under circumstances which require consideration to be given to the relative effects of proceedings or determinations emanating from some other state or states. For example, when a court exercises jurisdiction to open an insolvency proceeding it is customary to refer to that court as the "bankruptcy forum" (see "*forum concursus*" below). If, subsequently, the judgment of the first forum (F1) is under consideration by a court of another state (F2) for such purposes as the recognition or enforcement of the judgment of F1, or the possible opening of a concurrent proceeding in F2, it is customary also to refer to the second court as "the forum" in respect of the operation of its laws and practices in relation to external ("foreign") courts and states, and hence the state in which the F2 court is located may also be referred to as the "forum state" in that context.

"Fraud"

A misrepresentation (or: inaccurate impression) represents "fraud" or is fraudulent if it is made with knowledge or belief that it is false and is intended to induce the recipient to make a mistake to the recipient's prejudice. A non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake to that person's prejudice.[77]

"General body of creditors"

A collective expression denoting all those whose claims or rights are affected by the debtor's insolvency, and whose interests are therefore of particular concern to the legal regime under whose auspices an insolvency proceeding is taking place. Acts to which the debtor is or has been a party, or which have taken place in relation to property of the debtor, may be subject to impeachment if they can be characterised as having been detrimental to the interests of the general body of creditors, even if one or more individual creditors' interests have not been harmed or may have benefited thereby.

"Good faith"

[77] DCFR Outline Edition 2009, Annex (Definitions), p. 554.

"Good faith" has been described as a mental attitude characterised by honesty and an absence of knowledge that an apparent situation is not the true situation.[78]

"Goods"

The term "goods" means any material object which can be subject to human control. See also "Assets"; "Establishment"; "Immovable property"; and "Movables".

"Harmonization"

The term "harmonization" refers to efforts to change the laws of two or more countries to be more substantively similar to each other.[79]

"Insolvency"

"Insolvency" generally is described as: when a debtor is generally unable to pay its debts as they mature, or when its liabilities exceed the value of its assets.[80] The term "insolvent" is attributed to: "A debtor having liabilities that exceed the value of assets; having stopped paying debts in the ordinary course of business; or being unable to pay them as they fall due".[81] In the EU Insolvency Regulation the term "insolvency" is not described as such; it only refers to "insolvency proceedings". The term "insolvency" is taken from the national law of the Member State in which insolvency proceedings are opened. An insolvency may be described as: "The condition of being unable to pay debts as they fall due or in the usual course of business. The inability to pay debts as they mature."[82]
Insolvency may be also defined as: "A state of affairs where a debtor is being overwhelmed by liabilities and where, as a consequence, the creditors at large can no longer expect to receive fully and in time what is owed to them from a normal management of the debtor's affairs or business. Viewed by business standards, the debtor tends to act abnormally." [83]
It is important to clarify that in legal literature the terms "bankruptcy" and "insolvency" are used interchangeably,[84] although it should be noted that the terms have acquired in modern usage the separate meanings of procedures to be applied, in the former instance, to

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[78] DCFR Outline Edition 2009, Annex (Definitions), p. 555.

[79] ALI NAFTA Principles, Appendix A, Definitions.

[80] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[81] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 333. The definition is not included in DCFR Outline Edition 2009.

[82] Black's Law Dictionary, Thomson West, 8th Edition (2004).

[83] See W.W. McBryde, A.Flessner and S.C.J.J. Kortmann, Principles of European Insolvency Law, Law of Business and Finance Vol. 4, Kluwer Legal Publishers (2003), p. 15.

[84] See Bob Wessels, Bruce A. Markell and Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters, Oxford University Press Inc., New York, 2009, at 1.

individuals, sole traders and partnerships and, in the latter, to corporate entities. This is not the case in the United States, where bankruptcy is used for all such procedures.[85] See also: "(Insolvency) administrator".

"Insolvency administrator"

The term "Insolvency administrator" refers to the person or entity that the bankruptcy law in a state places in charge of a bankrupt's property, including trustees, liquidators, sindicos, administrators, curators, monitors, interim trustees, court-appointed trustees and debtors in possession.[86] An "insolvency administrator" is a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the insolvent person's assets or affairs.[87] In the EU Insolvency Regulation as a general term of reference to denote any of the recognised species and designations of insolvency office holders the word "liquidator" is used throughout. See also "liquidator" and "office holder".

"Insolvency case"

See "Insolvency proceeding" / "Insolvency proceedings".

"Insolvency estate"

An "insolvency estate" is formed by assets of the debtor that are subject to the insolvency proceedings.[88] See also "estate".

"Insolvency presumption"

The UNCITRAL Model Law determines the following presumption in order to initiate a proceeding: "In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent".[89]

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[85] Paul J. Omar, European Insolvency Law, Ashgate (2004), p. 3.

[86] ALI NAFTA Principles, Appendix A, Definitions. In the NAFTA context "administrator" also includes "sindicos" and "Mexican debtors in conciliations." The same set of definitions provide: "Sindico" refers to an administrator appointed under *La Ley de Quiebras y Concurso mercantil* in Mexico, and "Mexican debtor in conciliation" refers to the person or persons entitled to control the property and affairs of a debtor under a concurso mercantil in Mexico.

[87] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 335. The definition is not included in the DCFR Outline Edition 2009, see footnote 136.

[88] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[89] UNCITRAL Model Law (1997), Article 31.

"Insolvency proceedings"/ "Insolvency proceeding"

An insolvency proceeding (alternatively referred to in the plural form as "insolvency proceedings") means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of a person who is believed to be insolvent are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation.[90] In the NAFTA context "Proceeding" refers to bankruptcy or insolvency proceedings, including a bankruptcy "case" in the United States.[91] The Draft Common Frame of Reference (DCFR) uses a nearly similar description.[92] "Insolvency proceedings" are: collective proceedings, subject to court supervision, either for reorganization or liquidation.[93]
The EU Insolvency Regulation specifies what are to be regarded as insolvency proceedings in the Member States to which this Regulation applies, listed for each Member State in an Annex A to the Regulation. The Regulation excludes insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings from its scope, see Article 1(2). The explanation is that such undertakings should not be covered by the Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.[94] Here the *Eurofood* case and the *Probud* case are relevant too.[95]

"Insolvency representative"

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[90] Black's Law Dictionary, Thomson West, Eight Edition (2004).

[91] ALI NAFTA Principles, Appendix A, Definitions.

[92] DCFR Outline Edition 2009, Annex (Definitions), p. 556.

[93] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations". ALI NAFTA Principles, Appendix A, Definitions: "Bankruptcy proceeding" refers to a collective proceeding for the adjustment, collection, or payment of debts of a legal person on behalf of all creditors and other interested parties and includes proceedings often called "insolvency proceedings." It includes any proceeding under the Bankruptcy and Insolvency Act or the Company Creditors Arrangement Act in Canada, under *La Ley de Concursos Mercantiles* in Mexico, and under the Bankruptcy Code in the United States." And also: "Insolvency proceeding" refers to a bankruptcy proceeding as defined above.

[94] InsReg (2000), Recital (9).

[95] *Eurofood IFCS Ltd v Bank of America N.A*, Case C-341/04, ECJ 2 May 2006 [2006] ECR I-3813: "On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State. On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets." See *MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken*, Case C-444/07, CJEU 21 January 2010, [2010] B.C.C. 453.

An insolvency representative is a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate.[96] The PEIL indirectly defines this term by declaring: "The creditors' collective interests may be represented by a meeting of creditors, a creditors' committee or a creditors' representative."[97]

"Intellectual property right"

An intellectual property right is a right in a product or intellectual creation of the human mind. Intellectual property right means any intellectual property right involving copyrights, neighboring rights, patents, trade secrets, trade marks, geographic indications, other intellectual property rights and agreements related to any of these rights. The description follows § 101 (4) juncto § 102(1) of ALI's Intellectual Property Principles of 2007. Where a national law forms the basis for such a right it is treated as a registered right of the State for which the deposit, registration or grant is deemed to be effective under the applicable international agreement.[98] It is noted that, for the purposes of the Insolvency Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the main insolvency proceedings.[99]

"Immovable property"

"Immovable property" means land and anything so attached to land as not to be subject to change of place by usual human action.[100] These would include unextracted minerals, plants growing on land, buildings and other works durably united with land, either directly or by physical or functional incorporation with buildings or works.

"Incorporeal"

"Incorporeal", in relation to property, means not having a physical existence in solid, liquid or gaseous form.[101]

"Intangible"

See "Incorporeal".

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[96] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[97] PEIL (2003), Principle 3.1.

[98] Intellectual Property Principles, at 48.

[99] InsReg (2002), Article 12.

[100] DCFR Outline Edition 2009, Annex (Definitions), p. 555.

[101] DCFR Outline Edition 2009, Annex (Definitions), p. 556.

“Intermediary” / “Independent intermediary”

An intermediary or independent intermediary is a person who may be appointed by a court to facilitate coordination between insolvency proceedings concerning an insolvent debtor or a group of companies which will be, are, or were subject to insolvency proceedings in different states. An intermediary’s general task is to help ensure that a transnational insolvency proceeding is operated effectively, to establish practical means of conducting communication between the courts concerned, to address the practical issues generated by such factors as the different working languages in which the various courts are able to operate, and the logistical problems caused by the fact (if such is the case) that the courts are situated in different time zones thereby impeding the conduct of live communications during normal working hours. For a person who may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions the UNCITRAL Legislative Guide uses the term “court representative”.[102]

“International insolvency case”

An insolvency case may be said to possess an international character when there are material elements within the case that actually or potentially engage the application of the laws of more than one state and its system of law including its rules of jurisdiction or recognition and its rules of private international law. Such cases are alternatively known as “cross-border” or “transnational” insolvency cases. See also “Insolvency proceeding”.

“International Jurisdiction”

When a court exercises jurisdiction in accordance with principles laid down in the domestic law of the state in which it is established, the validity of such a proceeding for the purposes of international recognition and enforcement will depend on whether the circumstances under which such an exercise of jurisdiction by the first court has taken place are in conformity with the criteria established under the private international law of the recognising state. Where those criteria are met, the first court is said to have had “international jurisdiction” over the matter in question. There can be considerable variation between the private international law rules applied by different states with regard to the criteria which are applied for this purpose, thereby resulting in uneven (or “limping”) levels of recognition and enforcement among the various sovereign states. Under international agreements certain criteria may come to be accepted as giving rise to international jurisdictional competence for the court in relation to which they are met in a given case, thereby transcending the rules of recognition of individual states and giving rise to a more uniform level of acceptance of the proceedings in question. See also “Recognition”.

“Invalid”

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[102] UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups (2010), para. 37.

"Invalid" in relation to a juridical act or legal relationship means that the act or relationship is void or has been avoided.[103]

"Judge"

In UNCITRAL documents a "judge" is "a judicial officer or other person appointed to exercise the powers of a court or other competent authority having jurisdiction under legislation based on the Model Law".[104] Under the application of the EU Insolvency Regulation for a similar function the term "court" is used. See "court".

"Judgment"

The EU Insolvency Regulation provides that in relation to the opening of insolvency proceedings or the appointment of a liquidator, a judgment shall include the decision of any court empowered to open such proceedings or to appoint a liquidator.[105] This term is also defined under Article 32 of Brussels I, which states: For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.[106] This includes provisional and protective measures, as far as they are not granted *ex parte*.[107]

"Jurisdiction"

The EU Insolvency Regulation provides rules on jurisdiction in Article 3. It provides that in accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.[108] The rules of jurisdiction set out in the Insolvency Regulation establish only international jurisdiction, thus they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.[109]The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those

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[103] DCFR Outline Edition 2009, Annex (Definitions), p. 557.

[104] UNCITRAL Judicial Perspective (2011), B "Glossary", under (e).

[105] InsReg (2000), Article 2(e).

[106] Brussels I (2001), Article 27.1 - 27.2.

[107] *Mietz v. Intership Yachting Sneek*, C-99/96, ECJ 27 April 1999.

[108] InsReg (2000), Recital (6).

[109] InsReg (2000), Recital (15).

proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.[110] See also "International Jurisdiction".

"Law"

This term may be considered in the scope of insolvency, departing from the following approaches:

- Substantive Law

The EU Insolvency Regulation acknowledges the fact that as a result of widely differing substantive laws in the Member States it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. [111]

- Soft law

Generally "soft law" is understood to mean a non-enforceable regulation created by the (direct) involvement of members of a certain sector or field (individuals, representative organizations) by means of mutual discussion and agreement. Soft law expresses itself in such forms as model-contracts, precedents, standards, guidelines, principles, requirements, guides, notes of guidance, directions, governance rules, records of certain customs, policies, codes or protocols.[112] These legally unenforceable rules are included in the term "law".

- Conflicts of law

The EU Insolvency Regulation sets out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, the Member States' national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local (territorial, or secondary) proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.[113]

- Applicable law to main insolvency proceedings

Save as otherwise provided in the Insolvency Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened.[114] This law is also referred to as *lex concursus.*

- Applicable law to secondary proceedings

Here, the same rule applies. Save as otherwise provided in the Insolvency Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.[115]

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[110] InsReg (2000), Article 3.1-3.2.

[111] InsReg (2000), Recital (11).

[112] The results of soft law are commonly accompanied by explanations or recommendations, which are based on broad support in the respective sector or group of interested parties, which aim at practical and efficient application of its rules.

[113] InsReg (2000), Recital (23).

[114] InsReg (2000), Article 4.1.

[115] InsReg (2000), Article 28.

"Legislative Recommendations"

"Legislative Recommendations" refers to recommendations for new legislation or international agreements that will go beyond current law to permit a substantially higher level of cooperation and integration.[116]

"Lex causae"

The legal system whose substantive rule governs the matter in issue, as selected by the private international law of the forum.

"Lex concursus"

The system and rules of insolvency law in force in the country where an insolvency proceeding takes place. Sometimes also referred to as "*lex fori concursus*".

"Lex domicilii"

The law of the place where a person is domiciled.

"Lex fori"

The legal system, and rules of law, in force in the country where the forum sits.

"Lex loci -" The law of the place where -

- *actus*	- the act is performed.
- *contractus*	- the contract is made.
- *delicti*	- the wrong is committed.
- *laboris*	- the work is performed.
- *registri*	- the company is registered.
- *rei sitae*	- the property is situated.
- *solutionis*	- the contract is to be performed, or the debt is due to be paid.

"Lex patriae"

The law of the State of which the person possesses nationality.

"Liquidator"

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[116] ALI NAFTA Principles, Appendix A, Definitions.

In general a liquidator may be defined as "a person appointed to wind up a business's affairs, by selling off its assets".[117] The EU Insolvency Regulation, however, provides under its General provisions that "liquidator" shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C.[118] The European Communication & Cooperation Guidelines for Cross-border Insolvency (2007) have adopted this provision, providing that "A liquidator is any appointed person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of its affairs, either in reorganisation or in liquidation proceedings".[119]

With reference to the powers of the liquidator, the EU Insolvency Regulation determines that: the liquidator appointed by a court which has opened main insolvency proceedings (pursuant to Article 3(1) InsReg) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State.[120] See also: "(Insolvency) administrator" and "Office holder".

"Liquidation"

Proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.[121]

"Lis alibi pendens"

Plea that the defendant is currently being sued by the same plaintiff before some other forum on the basis of the same cause of action.

"Local creditor"

"Local creditor" refers to a person who has an interest with an important and specific connection to a jurisdiction, a definition that includes a creditor secured in assets located in that jurisdiction or another person with a property (in rem) interest in assets located in the domestic jurisdiction, regardless of that person's nationality, residence, or domicile.[122]

"Local law"

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[117] Black's Law Dictionary, Thomson West, Eighth Edition (2004).

[118] InsReg (2000), Article 2(b).

[119] CoCo Guidelines (2007), Guideline 4.1.

[120] InsReg (2000), Article 18.

[121] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[122] ALI NAFTA Principles, Appendix A, Definitions.

"Local law" denotes the body of rules, including both procedural and substantive rules, which together comprise the system of law applicable within a discrete territorial area or region – variously referred to as a "jurisdiction", "law district", "country" or "state". The local law thus provides the basis for the conduct and determination of any formal legal process which takes place before a court or tribunal, or other body or official endowed with quasi-judicial authority, operating within the territorial area in question.

"Main Insolvency Proceeding" / "Main insolvency proceedings"

Main insolvency proceeding refers to a full domestic bankruptcy case brought in the country that is the centre of the main interests of a debtor, so the ALI NAFTA Principles, Appendix A, Definitions. In the EU Insolvency Regulation the term "main insolvency proceedings" refers to the primary proceedings opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets.[123] Moreover, the UNCITRAL Model Law defines "foreign main proceeding as: a foreign proceeding taking place in the State where the debtor has the centre of its main interests."[124]
See also: "(Foreign) non-main proceedings".

"Moratorium"

See "Stay of proceedings".

"Movables"

"Movables" means corporeal and incorporeal property other than immovable property.[125] Movable property includes all movable things serving as household or business objects,

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[123] InsReg (2000), Recital 12. See *MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken*, Case C-444/07, CJEU 21 January 2010, [2010] B.C.C. 453: "22 …. it should be noted first of all that Article 3 of the Regulation makes provision for two types of insolvency proceedings. Insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within the territory of which the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings', produce effects which are restricted to the assets of the debtor situated in the territory of the latter State (see Case C-341/04 Eurofood IFSC [2006] ECR I-3813, paragraph 28)." Referring affirmatively to the cited passage, see CJEU 17 November 2011, Case C-112/10 (*Procureur-generaal bij het hof van beroep te Antwerpen v ZaZa Retail BV*) and CJEU 15 December 2011, Case C-191/10 (*Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international*).
[124] UNCITRAL Model Law (1997), Article 2(b). UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".
[125] DCFR Outline Edition 2009, Annex (Definitions), p. 560.

upholstery or furniture, including collections of art, books or DVD's and objects of a scientific or historical nature.

"Netting"

Netting is the setting-off of monetary or non-monetary obligations under financial contracts.[126]
The UNCITRAL Legislative Guide continues for "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.[127]

"Non-EU-State"

As explained in the context of the term "EU-State" there is not a concrete definition of EU-State within the EC Treaty or any other applicable instrument. It is self-evident that countries that do not form part of the European Union are Non-EU-States. Concerning the question whether Denmark is to be regarded as a Member State within the context of the EU Insolvency Regulation, see under "EU-State" above.

"Non-registered movables"

Non-registered movables are movables that are not recorded in a public register designated for the registration of rights.

"Obligation"

An obligation is a duty to perform which one party to a legal relationship, the debtor, owes to another party, the creditor.[128] See also: "Duty".

"Office holder"

The EBRD Insolvency Office Holder Principles includes detailed rules on office holders, but do not include a clear definition. In Annex A to the EU Insolvency Regulation nearly one hundred national names are listed for those persons or bodies that in the context of the

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[126] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".
[127] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".
[128] DCFR Outline Edition 2009, Annex (Definitions), p. 338.

Regulation have been given one designation, namely "liquidators". See also "Insolvency Administrator". Because of the tasks that an office holder might be expected to perform, the responsibilities that an office holder will have and the trust that is reposed in an office holder, it should be the case that an office holder should have some fundamental qualifications. These include general ability and intelligence, experience, professional knowledge and good character. Further, in several countries professions are regulated by a system of licensing. Office holders should be regarded as a professional body of persons and licensed accordingly.[129] Under the application of the EU Insolvency Regulation a liquidator "is required to act with the appropriate knowledge of the Insolvency Regulation and its application in practice", a liquidator "is required to act honestly, objectively, fairly and expeditiously in dealing with all parties concerned, including the courts."[130]

"Opening of Proceedings"

The relevant instruments do not provide a complete or precise definition of the "opening" of insolvency proceedings. The EU Insolvency Regulation only refers to "the time of the opening of proceedings", which means the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.[131] The Principles of European Insolvency Law (2003) ("PEIL") provide that a proceeding can be opened when the debtor is unable or is likely to become unable to pay his debts as they become due. The debtor or a creditor or a public authority can apply for the opening of the proceeding.[132] According to the PEIL the effect of the opening of proceedings is that assets belonging to the debtor at the time of the opening of the proceeding and assets acquired thereafter are included in the proceeding. When the debtor is a natural person certain assets are excluded from the proceeding.[133]

"Ordinary course of business"

With "ordinary course of business" generally is meant transactions consistent with both: (i) the operation of the debtor's business prior to insolvency proceedings; and (ii) ordinary business terms.[134]

"Ownership"

"Ownership" is the most comprehensive right a person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property.[135]

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[129] EBRD Principles (2007), Principle 1.

[130] CoCo Guidelines (2007), Guideline 4.2 – 4.3.

[131] InsReg (2000), Article 2(f).

[132] PEIL (2003), Principle 1.2-1.3.

[133] PEIL (2003), Principle 3.1.

[134] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[135] DCFR Outline Edition 2009, Annex (Definitions), p. 561.

“Par est condicio omnium creditorum”

(Literally: ‘The condition of all creditors is: equal’). This maxim is widely employed to express the principle of equality of treatment and status to be accorded to all creditors generally. It is a principle which admits of numerous exceptions, which vary according to the provisions contained in the laws of the various countries.

“Parallel Insolvency Proceedings”

The EU Insolvency Regulation provides the possibility to open a secondary insolvency proceeding parallel to the main insolvency proceeding. The fundamental principle is that, where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.[136]Furthermore, the Regulation provides that the opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognized in another Member State (main proceedings) shall permit the opening of secondary proceedings in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.[137]

According to the EU Insolvency Regulation the opening of secondary proceedings may be requested by the liquidator in the main proceedings, or any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.[138]

In the NAFTA context “Parallel proceedings” refers to full liquidation or reorganization cases pending in two or three countries involving the same bankrupt debtor; an ancillary proceeding is not a parallel proceeding.[139] The UNCITRAL Model Law also provides for parallel proceedings: “After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.”[140]

It should be stressed, however, that main proceedings and secondary proceedings under the application of the EU Insolvency Regulation do not operate on the same footing: “Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by

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[136] InsReg (2000), Article 3.2.

[137] InsReg (2000), Article 27.

[138] InsReg (2000), Article 29.

[139] ALI NAFTA Principles, Appendix A, Definitions.

[140] UNCITRAL Model Law (1997), Article 28.

exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended".[141]

"Pari Passu" Principle

Latin for "equally and without preference" (literally "on an equal footing", hence "proportionately"). This term is often used in bankruptcy proceedings where creditors are said to be paid pari passu, that is each creditor is paid pro rata in accordance with the amount of his claim.[142]
The EU Insolvency Regulation provides that in order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.[143] The same principle is reflected in the ALI NAFTA Principles: "A creditor should not be able to use distributions in multiple countries to recover in any country more than the percentage recovered by other creditors of the same class in that country."[144] Likewise for "Pari passu" the UNCITRAL Legislative Guide: 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.[145]

"Party"

In the context of a legal proceeding, the term "party" may bear a narrow, technical meaning or a broader, more general one. In its narrow, technical sense, more fully expressed as "party to proceedings", the term denotes any person (whether natural or legal) who is formally joined in the legal process, either voluntarily or involuntarily. Such persons may be identified by name in the formal documentation relating to the conduct of the proceeding, or alternatively they may be referred to in less specific terms. In the more general sense, the term "party" may be used to denote any persons who are, or who may be, in some way materially affected by the outcome of the proceeding. Such persons are more aptly referred to as "parties in interest" (see below).

"Party in interest"

A party in interest is any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the

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[141] InsReg (2000), Recital (20).
[142] Sands & Associates, Insolvency Dictionary (2000). Available at www. sands-trustee.com/pq.htm.
[143] InsReg (2000), Article 20.2.
[144] ALI NAFTA Principles (2001), General Principle VII.
[145] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

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.[146]

"Plan of reorganization"

See "reorganization plan".

"Plenary proceeding"

A forum or insolvency proceeding which addresses, on a plenary basis, administrative matters, including, on the one hand, operation of the debtor's business or assets, and, on the other hand, the filing, processing and allowance of claims and distributions to creditors.[147]

"Post-commencement claim"

A claim arising after commencement of insolvency proceedings.[148]

"Preference"

A transaction which results in a creditor obtaining an advantage or irregular payment.[149]

"Preservation Measures"

In relation to this term the EU Insolvency Regulation provides that the court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings serve as an important guarantee to the effectiveness of the insolvency proceedings.[150] Further, the court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. Provisional measures are governed by the principle of proportionality.[151]

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[146] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[147] Concordat, Glossary of terms.

[148] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[149] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[150] InsReg (2000), Recital (16).

[151] ALI / UNIDROIT Principles (2004), Principle 8.1.

“Presumption”

A “presumption”, means that the existence of a known fact or state of affairs allows the deduction that something else should be held true, until the contrary is demonstrated.[152]

“Priority”

The right of a claim to rank ahead of another claim where that right arises by operation of law.[153]

“Priority claim”

“Priorities” (or “privileges”) refers to rights to a distribution in a bankruptcy proceeding prior to or with a priority over the rights of other creditors.[154] A “priority claim” is a claim that will be paid before payment of general unsecured creditors.[155]

“Privileged claim”

A “privileged” claim is a claim that, pursuant to statutory or other law, or pursuant to ranking rules, is given a preference or priority over common claims, including a public law claim arising from the public law of a nation.[156]

“Procedural coordination”

Coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct. See also “enterprise group”.[157]

“Protection of value”

“Protection of value” reflects measures directed at maintaining the economic value of encumbered assets and third party owned assets during the insolvency proceedings (in some jurisdictions referred to as “adequate protection”). Protection may be provided by way of cash

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[152] DCFR Outline Edition 2009, Annex (Definitions), p. 562.

[153] UNCITRAL Legislative Guide (2004), para. 12, under B, “Glossary, Terms and definitions”. UNCITRAL Practice Guide (2009), under B “Glossary”, in “2. Terms and explanations”.

[154] ALI NAFTA Principles, Appendix A, Definitions.

[155] UNCITRAL Legislative Guide (2004), para. 12, under B, “Glossary, Terms and definitions”.

[156] Concordat, Glossary of terms.

[157] UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups in insolvency (2010), “Glossary”, under (d).

payments, provision of security interests over alternative or additional assets or by other means as determined by a court to provide the necessary protection.[158]

"Protocol"

American Law Institute's Procedural Principle 14 ("Cooperation") reads as follows: "A. The administrators in parallel proceedings should cooperate in all aspects of the case. Such cooperation is best obtained by way of an agreement or "protocol" that establishes decision making procedures, but many decisions may be made informally as long as the essentials are agreed. B. A protocol for cooperation among proceedings should include, at a minimum, provisions for coordinated court approvals of decisions and actions when required and for communication with creditors as required under each applicable law. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings." From its elucidation, it follows that Procedural Principle 14A goes to the first level of cooperation (cooperation between administrators), while Procedural Principle 14B (interpreted as "Protocols approved by the courts") is regarded as a superior method of cooperation.[159] In the European Communication & Cooperation Guidelines for Cross-border Insolvency a similar description is used: "Cooperation may be best attained by way of an agreement or "protocol" that establishes decision-making procedures, although decisions may continue to be made informally as long as they are compatible with the substance of any such (insolvency) agreement[160] or "protocol"."[161]

"Property"

"Property" means anything which can be owned: it may be movable or immovable, corporeal or incorporeal.[162]

"Public Policy"

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[158] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[159] See Westbrook (reporter), International Statement of United States Bankruptcy Law (2nd volume in: American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries, 4 Volumes), JP Juris Publishing, Inc., 2003, p. 66ff.

[160] UNCITRAL Practice Guide (2009), under B "Glossary", in "1, Notes on terminology": "Cross-border agreements are most commonly referred to in some States as "protocols", although a number of other titles have been used including insolvency administration contract, cooperation and compromise agreement, and memorandum of understanding. These Notes attempt to compile practice with respect to as many forms of cross-border agreement as possible and, since the use of the term 'protocol' does not necessarily reflect the diverse nature of the agreements being used in practice, these Notes use the more general term 'cross-border agreement'".

[161] CoCo Guidelines (2007) Guideline 12.4. For a sample of a protocol, see III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), available through www.iiiglobal.org. See for clausele which can be used in drafting a protocol UNCITRAL Practice Guide 2009.

[162] DCFR Outline Edition 2009, Annex (Definitions), p. 563.

The UNCITRAL Model Law provides that "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."[163] The EU Insolvency Regulation follows the same concept, adding some examples: "Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual."[164] See also the *Eurofood* case[165] and the *Probud* case.[166]

"Public Register"

In general a public register means a register, open for the public, in which the legal status of property (assets, goods) is registered. The EU Insolvency Regulation provides that the liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States. However, any Member State may require mandatory registration.[167]

"Ranking"

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[163] UNCITRAL Model Law (1997), Article 6.

[164] InsReg (2002), Article 26.

[165] *Eurofood IFCS Ltd v Bank of America N.A*, Case C-341/04, ECJ 2 May 2006 [2006] ECR I-3813: "On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys."

[166] *MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken*, Case C-444/07, CJEU 21 January 2010, [2010] B.C.C. 453: "In accordance with recital 22 in the preamble to the Regulation, which states that grounds for refusal are to be reduced to the minimum necessary, there are only two such grounds. First, under Article 25(3) of the Regulation, the Member States are not obliged to recognise or enforce a judgment concerning the course and closure of insolvency proceedings which might result in a limitation of personal freedom or postal secrecy. Second, under Article 26 of the Regulation, any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. With regard to this second ground for refusal, the Court stated initially in the context of the Brussels Convention that, since recourse to the public policy clause contained in Article 27(1) of that Convention constitutes an obstacle to the achievement of one of the fundamental aims of the Convention, namely to facilitate the free movement of judgments, such recourse is reserved for exceptional cases (Case C-7/98 Krombach [2000] ECR I-1935, paragraphs 19 and 21, and Eurofood IFSC, paragraph 62). The case-law relating to Article 27(1) of the Convention is transposable to the interpretation of Article 26 of the Regulation (Eurofood IFSC, paragraph 64)."

[167] InsReg (2000), Article 22.1-22.2.

"Ranking" in relation to claims means putting the claims in an order of priority or subordination, which is determined by the law applicable.[168]

"Receiving court"

In UNCITRAL contexts, a "receiving court" is the court in the enacting State from which recognition and relief is sought. See "enacting State".[169]

"Recognition"

Within the field of recognition of judgments the ALI / UNIDROIT Principles require that a final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise. A provisional remedy must be recognized in the same terms.[170] Moreover, as a general principle of recognition, the ALI NAFTA Principles demand that the bankruptcy of a debtor in one NAFTA country should be recognized and given appropriate effect under the circumstances in each of the other NAFTA countries. Recognition should be granted as quickly and inexpensively as possible, with a minimum of legal formalities.[171]
The UNCITRAL Model Law for Cross-Border Insolvency establishes criteria for determining whether a foreign proceeding is to be recognized (Articles 15-17) and provides that, in appropriate cases, the court of an enacting State may grant interim relief pending a decision on recognition (Article 19). The decision includes a determination whether the jurisdictional basis on which the foreign proceeding was commenced was such that it should be recognized as a "main" or a "non-main" foreign insolvency proceeding.

The EU Insolvency Regulation provides its own system of recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings and which are handed down by another Member State. The system is based on immediate recognition. Such an automatic recognition means that the effects attributed to the insolvency proceedings by the law of the State in which the proceedings were opened extend to all other Member States, as recognition of judgments delivered by the courts of a Member State should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary.[172] Further, the Regulation states that any judgment opening insolvency proceedings handed down by a court of a Member State which has

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[168] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 339. The definition is not included in DCFR Outline Edition 2009, "Ranking rules" are the rules by which claims and equity interests are ranked, see Concordat, Glossary of terms.

[169] UNCITRAL Judicial Perspective (2011), B "Glossary", under (f).

[170] ALI / UNIDROIT Principles (2004), Principle 30.

[171] ALI NAFTA Principles (2001), General Principle II A-B.

[172] InsReg (2000), Recital 22.

jurisdiction pursuant to Article 3 shall be recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.[173] The Regulation establishes as an effect of recognition of judgments that the judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings, unless the Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.[174]

"Recognizing state"

"Recognizing state" is thus the expression used to refer to the state in accordance with whose law, or by the instrumentality of whose court, tribunal or other officially sanctioned process, a foreign judgment or proceeding has been, or is in the process of being, recognized.

"Related person"

The term "related person" as to an insolvent debtor is used to express that in the case that the debtor is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity.[175]

"Relief"

"Relief" means assistance provided by the court in one state to a court, or to a foreign representative, of another state in which an insolvency proceeding has been commenced. Such

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[173] InsReg (2000), Article 16.

[174] InsReg (2000), Article 17. See *MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken*, Case C-444/07, CJEU 21 January 2010: "Furthermore, it follows from Article 16(1) of the Regulation, read in conjunction with Article 17(1), that the judgment opening insolvency proceedings in a Member State is to be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings and that it is, with no further formalities, to produce the same effects in any other Member State as under the law of the State of the opening of proceedings. In accordance with Article 25 of the Regulation, recognition of all judgments other than that relating to the opening of insolvency proceedings also occurs automatically. As is shown by recital 22 in the preamble to the Regulation, the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust (Eurofood IFSC, paragraph 39). It is indeed that mutual trust which has enabled not only the establishment of a compulsory system of jurisdiction which all the courts within the purview of the Regulation are required to respect, but also as a corollary the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favour of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings (Eurofood IFSC, paragraph 40, and by analogy, with regard to the Brussels Convention, Case C-116/02 Gasser [2003] ECR I-14693, paragraph 72, and Case C-159/02 Turner [2004] ECR I-3565, paragraph 24)."

[175] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

assistance is predicated on the recognition of the foreign proceeding by the court by which assistance is provided.

"Remuneration"

In general "remuneration" is the compensation (honorarium) for an insolvency office holder: "Except as otherwise provided ….., each Country's Representatives and their respective employees, members, agents and professionals: (a) shall be compensated for their services solely in accordance with the legislation and other applicable laws of that Country or orders of that Country's Court and (b) shall not be required to seek approval of their compensation in the Court of the other Country."[176]

"Reorganization"

A "reorganization" is the 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.[177]

"Reorganization plan"

A "reorganization plan" (or: plan of reorganization) is thus a plan by which the financial well-being and viability of the debtor's business can be restored.[178]

"Res judicata"

"Res judicata" is the plea that the matter in issue has already been the subject of a final adjudication by a court of competent jurisdiction.

"Right"

Depending on the context, a "Right" may mean (a) the correlative of an obligation or liability (as in "a significant imbalance in the parties' rights and obligations arising under the contract"); (b) a proprietary right (such as the right of ownership); (c) a personality right (as in a right to respect for dignity, or a right to liberty and privacy); (d) a legally conferred power to bring about a particular result (as in "the right to avoid" a contract); (e) an entitlement to a particular remedy (as in a right to have performance of a contractual obligation judicially

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[176] III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 6.4.

[177] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[178] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

ordered) or (f) an entitlement to do or not to do something affecting another person's legal position without exposure to adverse consequences (as in a "right to withhold performance of the reciprocal obligation").[179]

"Rights in Rem"/In Rem Security Rights

In general this term may be defined as "A right exercisable against the world at large".[180]
Within the context of insolvency proceedings, the EU Insolvency Regulation provides special rules for protecting the rights in rem of third parties in connection with the opening of insolvency proceedings. In this sense, the Regulation states in Article 5:
"1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
2. The rights referred to in paragraph 1 shall in particular mean:
(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
(d) a right in rem to the beneficial use of assets.
3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem."
According to the Principles of European Insolvency Law a security right continues to exist after the opening of the proceeding. Enforcement, however, may be subject to special rules. An asset subject to a security right is realized by the administrator or the secured creditor. The secured creditor is entitled to the proceeds of such asset, up to the amount of the secured claim and subject to the rights of creditors with higher ranking claims.[181]

"Sale as a going concern"

Sale as a going concern is the sale or transfer of a business in whole or substantial part, as opposed to the sale of separate assets of the business.

"Secondary Insolvency Proceedings"

The EU Insolvency Regulation aims to protect the diversity of interests, for which reason secondary proceedings can be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an "establishment".

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[179] DCFR Outline Edition 2009, Annex (Definitions), p. 565.
[180] Black's Law Dictionary, Thomson West, Eight Edition (2004).
[181] PEIL (2003), Principle 9.1-9.2.

See "establishment". The effects of secondary proceedings under the EU Insolvency Regulation are limited to the assets located in that State.[182] The major features of this concept in connection with main insolvency proceedings in the Regulation have been included above in the description of "Parallel Insolvency Proceedings". See also "(Foreign) non-main proceedings."[183]

"Secured Claim"

A "secured" claim is a claim that is a valid charge upon or interest in collateral to the extent of the value of the collateral.[184] Another description is: a "secured claim" is a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default.[185] Logically, the expression "Secured creditor" means: a creditor holding a secured claim.[186]

"Security interest"

"Security interest" means: a right in an asset to secure payment or other performance of one or more obligations.[187]

"Service List"

A "Service List" is the list of interested parties that are given notice of a particular proceeding or step in a proceeding in accordance with the law and/or practice in such state.[188]

"Set-off"

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[182] *MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken*, Case C-444/07, CJEU 21 January 2010: "…. it should be noted first of all that Article 3 of the Regulation makes provision for two types of insolvency proceedings. Insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within the territory of which the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings', produce effects which are restricted to the assets of the debtor situated in the territory of the latter State (see Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 28)."

[183] UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations" provides for "secondary proceedings": "non-main proceedings conducted in European Member States under the EC Regulation".

[184] Concordat, Glossary of terms.

[185] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[186] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[187] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[188] See III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 2(1)(x).

This term may be defined as follows: “Set-off is the process by which a person uses a right to performance held against another person to extinguish in whole or in part an obligation owed to that person”.[189] With different language the UNCITRAL Legislative Guide expresses the same process: for “Set-off”: where a claim for a sum of money owed to a person is applied in satisfaction or reduction against a claim by the other party for a sum of money owed by that first person”.[190]
In literature it is said that “Set-offs are not exactly another example of a security interest, but the Regulation treats them in a similar way. In other words, this is another exceptional limitation to the scope of the *lex concursus.* It only applies to those cases where the creditor is also simultaneously a debtor to the insolvent state and where the *lex concursus* would lead to the conclusion that a set-off would not be allowed in this particular case.”[191]

“Shall/should”

The word “shall”, as well as such terms as “should” or “may consider” have been used throughout the text as though they were interchangeable. The Reporters have not intended to use a different meaning, where the language of all principles, as a matter of course, is not legally binding or enforceable. The words express a similar meaning and many times fit into the context of the chosen principle, e.g. in as far as addressed to courts the words “may consider” seemed more appropriate.

“Shall not affect”

In the context of the EU Insolvency Regulation this phrase is employed in several provisions. These are the Articles 5 - 7:
- The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets.[192]
- The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.[193]
- The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.[194]

With regard to Articles 5 – 7 of the Regulation, “shall not affect” means that the *lex concursus* of the main insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of certain assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. The majority of

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[189] DCFR Outline Edition 2009, Annex (Definitions), p. 566.
[190] UNCITRAL Legislative Guide (2004), para. 12, under B, “Glossary, Terms and definitions”.
[191] Paul Torremans, Cross Border Insolvencies in EU, English and Belgian Law, Kluwer Law International (2002), p. 178.
[192] InsReg (2000), Article 5.1.
[193] InsReg (2000), Article 6.1.
[194] InsReg (2000), Article 7.1.

legal commentary explains the wording "shall not affect" as meaning that the secured creditor may exercise all his rights, undisturbed and unaffected by any legal consequence of the *lex fori concursus.* This is sometimes referred to as the "hard and fast rule" or the "maximalist view", as it also allows an exercise which is not limited by the law applicable to the security right itself.[195]

"Share"

In general a share means the right to a proportional share in the capital of a company.

"Situs"

The place where a thing (i.e. an item of property) is situated.

"Solely"

To delimitate the meaning and scope of this term in the context of insolvency may be an ambiguous task. It may be regarded as denoting "by this alone, and by no other …". Thus, in the EU Insolvency Regulation it may be found as follows:
- The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.[196]
- Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.[197]
- The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.[198]
- The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.[199]
- A person should not be required to provide security for costs, or security for liability for pursuing provisional measures, solely because the person is not a national or resident ofthe forum state.[200]

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[195] Claudia Naumann, *Die Behandlung dinglicher Kreditsicherheiten und Eigentumsvorbehalte nach den Artikeln 5 und 7 EuInsVo sowie nach autonomem deutschen Insolvenzkollisionsrecht*, Europäische Hochschulschriften, Reihe II, Rechtswissenschaft, Vol. 4011, 2004, at 214, submits, based on a detailed analysis of Articles 5 and 7 and its translation into fourteen languages (however not including Dutch literature) that the wording "shall not affect" *('onverlet' laat; 'nicht berührt', 'n'affecte pas', etc*) in nearly all languages can be read as to mean either "no affect whatsoever on the right in rem" or "not to be influenced to the detriment of the holder of the right in rem."

[196] InsReg (2000), Article 8.

[197] InsReg (2000), Article 9.1.

[198] InsReg (2000), Article 10.

[199] InsReg (2000), Article 15.

[200] ALI / UNIDROIT Principles (2004), Principle 3.3.

In these provisions "Solely" can be interpreted as meaning that only the law of the Member State, including its insolvency laws, will determine such effects.[201]

"State"

In general the term "State" (or: country) may be defined as "The political system of a body of people who are politically organized; the system of rules by which jurisdiction and authority are exercised over such a body of people."[202] "State" means an entity with a defined territory and a permanent population, under the control of its own government, that engages in, or has the capacity to engage in, foreign relations with other such entities. The allocation of authority between a State and its territorial subdivisions is determined under the law of that State.[203] Within the scope of international law, it may be said that "State is an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals. Particularly because of the principle of equality the definition of State can only be of a rudimentary and simplifying character because it must embrace all kind of States."[204] The concept of State within the European context has been previously referred to in the explanations of the concepts "EU-State" and "Non-EU-State".

"State in which assets are situated"

The Insolvency Regulation defines "states in which assets are situated" as, in the case of:
- tangible property, the Member State within the territory of which the property is situated,
- property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
- claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1).[205]

"Stay"

The procedural effect of a stay or a stay of the proceedings is recognized in several legal instruments.
Brussels I determines that "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established and 2 Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction

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[201] See Virgós / Schmit Report (1996), para. 118.

[202] Black's Law Dictionary, Thomson West, Eight Edition (2004).

[203] Intellectual Property Principles, § 101(5).

[204] Encyclopedia of Public International Law, Vol. 4, published under de auspicies of the Max Planck Institute of Compartative Public Law and International Law under the direction of Rudolf Bernhardt, North-Holland (2000). The Reporters acknowledge that the concept of "state" under certain circumstances may be problematic to determine, examples being Abkhazia and South Ossetia (self proclaimed states, broken away from Georgia), Kosovo, Western Sahara or Northern Cyprus. It is beyond this report to further discuss this topic.

[205] InsReg (2000), Article 2(g).

in favor of that court."[206] In the context of insolvency the ALI NAFTA Principles establishes as a recommendation for legislation or international agreement that: "The NAFTA countries should provide that a bankruptcy case that is a main proceeding in any of them will produce an automatic stay under domestic law in all three countries."[207] The UNCITRAL Legislative Guide: "Stay of proceedings": a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a 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."[208]

"Substantive consolidation"

The expression "substantive consolidation" is used to describe the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.[209] See "enterprise group".

"Suspect period"

"Suspect period" is an expression for 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 actual date of commencement.[210]

"Term"

"Term" means any provision, express or implied, of a contract or other juridical act, of a law, of a court order or of a legally binding usage or practice: it includes a condition.[211]

"Termination"

"Termination", in relation to an existing right, obligation or legal relationship, means bringing it to an end with prospective effect except in so far as otherwise provided.[212]

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[206] Brussels I (2001), Article 27.1 - 27.2.

[207] ALI NAFTA Principles (2001), Recommendation 2.

[208] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". Ditto: UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

[209] UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups in insolvency (2010), "Glossary", under (e).

[210] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[211] DCFR Outline Edition 2009, Annex (Definitions), p. 568.

[212] DCFR Outline Edition 2009, Annex (Definitions), p. 568.

“Time of Opening of Proceedings”

The EU Insolvency Regulation provides that "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.[213]

“Unsecured creditor”

A creditor without a security interest.[214]

“Valid”

“Valid”, in relation to a juridical act or legal relationship, means that the act or relationship is not void and has not been avoided.[215]

“Vested right”

A vested right is an absolute right, vested in an asset.

“Vis attractiva concursus”

(Literally: ‘The attractive force of the bankruptcy proceeding’). A rule of jurisdiction, based on the premise that the court in which bankruptcy proceedings are taking place should exercise jurisdiction over any related or concurrent proceedings concerning the same debtor.

“Void”

“Void”, in relation to a juridical act or legal relationship, means that the act or relationship is automatically of no effect from the beginning.[216] “Voidable”, in relation to a juridical act or legal relationship, means that the act or relationship is subject to a defect which renders it liable to be avoided and hence rendered retrospectively of no effect.[217]

“Voluntary restructuring negotiations”

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[213] InsReg (2000), Article 2(f).

[214] UNCITRAL Legislative Guide (2004), para. 12, under B, “Glossary, Terms and definitions”.

[215] DCFR Outline Edition 2009, Annex (Definitions), p. 569.

[216] DCFR Outline Edition 2009, Annex (Definitions), p. 569.

[217] DCFR Outline Edition 2009, Annex (Definitions), p. 569. The Concordat, Glossary of terms, uses “Voiding rules”, for “Rules relating to voidness, voidability or enforce-ability of claims or pre-insolvency transactions.”

Negotiations that are not regulated by the insolvency law and generally will involve negotiations between the debtor and some or all of its creditors aiming at a consensual modification of the claims of participating creditors.[218]

"Winding-Up Proceedings"

The EU Insolvency Regulation provides a definition of this term, and states that these are insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator: involving realizing the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B of the Insolvency Regulation.[219]

[218] UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

[219] InsReg (2000), Article 2(c) combined with Article 1(1).