LATHAM & WATKINS LLP

The BOOK of JARGON®

Global Restructuring

The Latham & Watkins Glossary of Global Restructuring Slang and Terminology

First Edition

The definitions contained here are designed to provide an introduction to the applicable terms. The terms included herein raise complex legal issues on which specific legal advice will be required, and users rely on The Book of Jargon Global Restructuring *at their own risk. The terms are also subject to change as applicable laws and customary practice evolve. As a general matter,* The Book of Jargon Global Restructuring *is (as the name suggests) drafted from a global practice perspective but we confess to having liberally plagiarised where applicable from the original* Book of Jargon, *and from* The Book of Jargon European Markets*. Readers might also like to check out another publication in this series* The Book of Jargon Project Finance – The Latham & Watkins Glossary of Project Development, Acquisition and Finance Slang and Terminology"*.*

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If you have any suggestions for additional terms or expanded or clarified definitions for the current terms, please send an email to globalrestructuringglossary@lw.com.

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This publication follows in the footsteps of the already well-known and successful original Book of Jargon: *The Book of Jargon*, subtitled “The Latham & Watkins Glossary of Corporate and Bank Finance Slang and Terminology”.

The purpose of the original book was to be a sort of “Berlitz Course” for recent law school and business school graduates seeking initiation into the world of Wall Street, and a desktop reference for not-so-recent graduates. *The Book of Jargon Project Finance* was published soon after and was followed by the popular and equally successful *The Book of Jargon European Markets*, subtitled “The Latham & Watkins Glossary of European Capital Markets and Bank Finance Slang and Terminology”. And now, we bring you this publication, which as with the other publications, is also available in the form a convenient app.

Although by no means universal in scope, this publication is a glossary of terms and jargon commonly used in the global restructuring market. With major restructurings and insolvencies almost always having a cross-border dimension, we hope this glossary gives you some flavour of local insolvency laws and processes and demystifies some of the terms and jargon typically bandied around in those cases.

Welcome to our world!

Acknowledgements

Latham & Watkins would like to thank the following law firms for their kind assistance with the explanations of restructuring jargon in connection to the jurisdictions listed next to their names:

Advokatfirmaet Thommessen AS (Norway)
Arthur Cox (Ireland)
BBA Legal (Iceland)
Creel Garcia-Cuellar, Aiza y Enrequez S.C. (Mexico)
Goodmans LLP (Canada)
Kromann Reumert (Denmark)
NautaDutilh (The Netherlands, Belgium and Luxembourg)
Wistrand Advokatbyra (Sweden)

105 Injunction: an injunction — meaning an Order directing an entity to take a particular action or to refrain from taking a particular action — issued by a US Bankruptcy Court pursuant to Bankruptcy Code Section 105(a). Section 105(a) is a multi-purpose provision that allows a US Bankruptcy Court to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. Generally, a 105 Injunction extends the protection of the Automatic Stay to entities other than the Debtor in order to protect the Debtor. For example, a Debtor might seek a 105 Injunction to protect members of management from litigation that would consume their time and resources and prevent them from focusing on the restructuring of the Debtor.

1111(b) Election: an election made by a Class of Creditors under Bankruptcy Code Section 1111(b) that would allow a non-recourse Secured Creditor in the Class to be treated as a recourse Creditor with a Deficiency Claim. As stated in Bankruptcy Code Section 1111(b)(2), if the 1111(b) Election is made, "then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed."

1145: reference to Bankruptcy Code Section 1145, which exempts the offer or sale of securities under a Plan of Reorganisation from registration under Section 5 of the Securities Act and state laws if three principal requirements are satisfied: (i) the securities must be issued "under a plan" by the Debtor, by the Debtor's successor under a plan or by an affiliate participating in a joint plan with the Debtor; (ii) the recipients of the securities must hold a Pre-petition Claim or Administrative Expense Claim against the Debtor or an Interest in the Debtor and (iii) the securities must be issued entirely in exchange for the recipient's Claim against or Interest in the Debtor, or "principally" in such exchange and "partly" for cash or property.

2004 Exam: an examination of and production of documents by any entity pursuant to Bankruptcy Rule 2004, relating to the acts, conduct, property or liabilities and financial condition of the Debtor, or to any matter that might affect the administration of the Estate, or to the Debtor's right to a Discharge. The right to take a 2004 Exam is generally obtained by Order pursuant to a Motion filed by any Party in Interest, but applicable Local Rules may dictate particular requirements or procedures.

2019 Statement: a reference to Bankruptcy Rule 2019, which requires that in a case under Chapter 9 or Chapter 11, "any entity or committee representing more than one creditor or equity security holder…" file a statement providing, inter alia, who that entity or Committee represents, the Claims or Interests held by the Creditors or Equity Security Holders, and certain other information. Failure to file a 2019 Statement can result in serious sanctions as detailed in Bankruptcy Rule 2019.

[1] *If the country of origin of a given term is not identified, the country of origin is the US.*

21 Day Rule: a German Insolvency rule that also translates into English as "everybody panic". Management of a German company must file for Insolvency no later than three weeks after the company becomes Insolvent and face criminal sanctions and personal liability if they fail to do so. In a restructuring there are often ways found to address the state of Insolvency and thus avoid the need to file. Not to be confused with Day 21, which has its own separate meaning under the City Code on Takeovers and Mergers.

3(a)(10): a provision of the US securities laws that allows for a quiet, flexible and relatively inexpensive exchange offer without registration with the Securities and Exchange Commission and is often tax free.

341 Meeting: a meeting of Creditors convened by the United States Trustee as required by Bankruptcy Code Section 341(a) or a meeting of Equity Security Holders if optionally convened by the United States Trustee under Bankruptcy Code Section 341(b). Under Bankruptcy Code Section 343, a Debtor is required to appear at a meeting of Creditors and submit to examination by Creditors, any Indenture Trustee, any Trustee or Examiner or the United States Trustee.

363 Sale: a sale of the Debtors' assets Outside the Ordinary Course of Business pursuant to Bankruptcy Code Section 363(b), subject to notice and a hearing.

365(n): provision of the Bankruptcy Code that allows the non-Debtor licensor to avoid the effect of a Rejection of a license of intellectual property (as defined in the Bankruptcy Code) by paying the applicable royalties and continuing to use the intellectual property notwithstanding a Rejection of the license by the Debtor.

382: section of the Internal Revenue Code (26 U.S.C. § 382(a)) that imposes "limitations on using the purchase of a company as the basis for deducting the company's net operating losses from the purchaser's taxable income." *In re South Beach Securities, Inc.*, 606 F.3d 366, 374 (7th Cir. 2010).

502(b)(6) Cap: a Cap imposed by a provision of the Bankruptcy Code on Claims by Creditors for damages resulting from termination of a lease of real property; the cap is equal to the greater of the rent under the lease without acceleration or 15 per cent, not to exceed three years, of the remaining term of the lease following the earlier of the Petition Date or the date the lease was repossessed or surrendered.

503(b)(9) Claim: an Administrative Claim for the value of goods received by the Debtor within 20 days before the Petition Date and sold to the Debtor in the Ordinary Course of Business. Also referred to as a Twenty-day Goods Claim.

506(c) Surcharge: situation in which Administrative Claims incurred in preserving or disposing of a Secured Creditor's Collateral are paid from the value of that Collateral to the extent they benefit the Secured Creditor. This is an exception to the usual rule that Administrative Claims

are paid only from Unencumbered Assets. In the DIP loan context, the DIP Lender may demand a waiver of all rights of the Debtor to surcharge its Collateral.

510(b) Claim: a Claim that is subject to and Subordinated under Bankruptcy Code Section 510(b), that arises from rescission of a purchase or sale of a security, that is for damages arising from the purchase or sale of such a security, or that is for reimbursement or contribution on account of such a Claim. For example, if the Debtor is a defendant in securities fraud litigation relating to its common stock, and the common stock will have no value and will be wiped out in Bankruptcy, the Claim for securities fraud will be similarly wiped out.

Abandonment: the relinquishment of Property of the Estate, placing it outside of the scope of the Bankruptcy. Bankruptcy Code Section 554 allows for Abandonment of property that is "burdensome to the estate or that is of inconsequential value and benefit to the estate." Abandonment revests property in the Pre-petition Debtor. There are certain limitations on the ability to abandon property, particularly when it contains toxic waste or other environmentally hazardous material.

ABC: acronym for Assignment for the Benefit of Creditors.

Absolute Priority Rule: the mandated pecking order of Claims and Interests in Chapter 11. The rule derives from Bankruptcy Code Section 1129(b). It states that when a company is reorganised or liquidated under a Plan, senior Classes of Claims must receive full distributions on account of their Claims before junior Classes of Claims, first, and Interests, last, may receive any distributions, unless senior Classes consent by acceptance of the Plan.

Abstention: a US Bankruptcy Court's decision not to entertain or hear a particular case or proceeding. Bankruptcy Code Section 305 deals with abstention, and provides that, After Notice and a Hearing, a court may dismiss a Bankruptcy case or "suspend all proceedings in a case…" under certain circumstances. Additionally, 28 U.S.C. § 1334(c)(1) allows a US Bankruptcy Court to abstain permissively from hearing a proceeding that is based on a state law claim or state law cause of action.

Abusiva Concessione del Credito: (meaning "granting credit unlawfully"), the civil offence under the Italian civil code imposing liability on a lender that grants credit to a Borrower facing imminent insolvency, so that the Borrower continues to trade whilst fostering the false belief in the market that it is in a good financial state. The lender faces liability, following the grant of credit, whether or not the Debtor is eventually declared bankrupt. See also *(Ricorso Abusivo al Credito)*.

Accelerated Financial Safeguard: see the French term *Sauvegarde Financière Accélérée*.

Acceleration: the end of the line in bond and loan world. The definitions of Default and Event of Default describe how we get there. Following an Event of Default, the bondholders (in accordance with the terms and

conditions of the bond offering or with the Indenture) or lenders (under a credit agreement) have the right to "accelerate" the due date of their debts; in other words, they have the right to declare their bonds or loans immediately due and payable. Note that practice in the US and Canada (and in European Indentures) is for Insolvency Events of Default to lead automatically to Acceleration, although this is uncommon in European bank financings, which typically require direction to the agent by lenders holding two-thirds or more of the debt. Note that Acceleration can lead to an obligation on the officers of the issuer/Borrower to file for Insolvency, thereby precluding the ability to agree to a consensual Out-of-Court Restructuring.

Accord Amiable: (*Minnelijk Akkoord* in Dutch) a type of Voluntary Composition under Belgian law involving an amicable settlement between a Debtor and any two or more of its Creditors that can be concluded as an Out-of-Court Restructuring or in the context of the Belgian *Réorganisation Judiciaire* (judicial reorganisation) procedure. In each case, the *Accord Amiable* is confidential. In a judicial reorganisation procedure, any payments or acts made pursuant to the *Accord Amiable* during the *Période Suspecte/Verdachte Periode* (the Suspect Period) before the commencement of the *Faillite/Faillissement* procedure will be enforceable against the trustee if the Debtor is declared Insolvent. Such an amicable settlement is negotiated during the Suspension of Payments *(Sursis de Paiement/Opschorting van Betaling)*. Once an agreement is reached between the Debtor and the Creditors, the competent commercial court notes the settlement and terminates the judicial reorganisation procedure and, consequently, ends the Suspension of Payments. As to the out-of-court *Accord Amiable*, it will not affect third party rights and is protected if there is an Insolvency proceeding later on, provided a copy of the settlement was filed with the court registry.

Accordo di Ristrutturazione: a debt restructuring agreement that forms the basis of an Italian pre-Insolvency procedure for company restructuring. The Debtor and the Creditors negotiate the agreement out of court during the first phase. This is followed by another phase in which the Debtor files the petition and an interim opinion of the *Esperto* on the suitability of the proposed agreement for ensuring the regular payment of the claims of dissenting Creditors with the *Tribunale Fallimentare* (Italian bankruptcy court) and the Companies Register. This filing brings about a Moratorium on Creditor action for 60 days. The Debtor can also request a Moratorium during the first phase by filing certain documents. In order to be sanctioned *(omologato)* by the court, the debt restructuring agreement must be approved by Creditors representing at least 60 per cent of the credits. Once the restructuring plan has been ratified through the *Omologazione* issued by the court, the transactions outlined in the agreement will not be subject to Clawback by means of the *Revocatoria Fallimentare*. New finance made available during the implementation of a sanctioned *(omologato)* restructuring agreement and new finance provided in order to obtain the *Omologazione* are allowed subject to

certain conditions; the new loans would be treated as super-senior. See *Crediti Prededucibili*.

Ackord: a financial settlement between a Debtor and its Creditors in Sweden. The *Ackord* can be a Voluntary Composition *(Underhandsackord)*, or a composition within the scope of *Konkurs* proceedings or a judicial composition *(Offentligt Ackord)* within the scope of Swedish reorganisation proceedings. If the *Ackord* is obtained via a judicial composition, minority Creditors will be bound by the arrangement made by the Debtor and the majority of Creditors.

Acreedores con Garantía Real: in Mexico, Creditors whose credits are secured by a mortgage or a pledge (i.e., Secured Creditors).

Acreedores Reconocidos: a Mexican term; see Recognised Creditors.

Actio Pauliana: with origins in Roman law, under Dutch, French, Belgian and Luxembourg law this is an action on the basis of Preference. The *Actio Pauliana* can be invoked by any Creditor of the Debtor where the Debtor has entered into Suspect Transactions on a voluntary basis, for example, for the purpose of decreasing the value of assets. In bankruptcy, only the Dutch *Curator* (bankruptcy trustee) or, in Luxembourg, the *Curateur* is authorised to invoke the *Actio Pauliana.* The *Curator* may in exceptional circumstances invoke the *Actio Pauliana* where the Debtor has entered into a Suspect Transaction pursuant to a contractual or Dutch statutory obligation to enter into that transaction. The *Actio Pauliana* is not limited to transactions falling within a Preference Period. In a limited number of Dutch statutory cases, a one-year period applies during which knowledge of prejudice to the counterparty's Creditors (an important test as to whether the *Actio Pauliana* can be invoked) is presumed, subject to proof to the contrary.

Acto en Fraude de Acreedores: means, under the Mexican Insolvency Act, any actions of the Mexican Debtor taken with the intent of defrauding Creditors. In Mexico, it is the equivalent of Fraudulent Transfer. Specific rules exist under the Mexican Insolvency Act. Any action will be deemed fraudulent (i) if consummated prior to the date of the Insolvency Judgment, when the Insolvent entity is knowingly defrauding its Creditors and the third party participating in any such action had actual knowledge of such fraudulent intent; if the action is gratuitous, however, it will be deemed fraudulent even if the third party had no actual knowledge of the fraudulent intent or (ii) if consummated after the *Fecha de Retrotracción* (the effective date), when, among other things, the Insolvent entity (a) receives no consideration, or the consideration received or paid by the Insolvent entity, or the terms and conditions of the transaction, are materially below market, or (b) makes a payment of indebtedness not yet due, or writes off debts owed to it. It will also be presumed fraudulent, unless the interested third party proves that it was acting in good faith, when the Insolvent entity (a) grants or increases Collateral that was not originally contemplated, and (b) makes any payments that were not originally contemplated. See Fraudulent Transfer.

Acuerdo de Refinanciación: a refinancing agreement which is negotiated by a Debtor on the verge of Insolvency and which temporarily puts on hold the obligation to file for Insolvency when the fact of its preparation is communicated to the Insolvency court by the Debtor. After three months from such communication, the Debtor must file for Insolvency unless it is no longer Insolvent.

Additional Assistance: in the US, a Foreign Representative may seek Additional Assistance (limited by sections of Chapter 15) — in other words, relief that is not otherwise granted under Chapter 15 — from a US Bankruptcy Court once a Foreign Proceeding has been recognised. Bankruptcy Code Section 1507.

Adequate Assurance of Future Performance: before a Debtor can assume an Executory Contract or Unexpired Lease that is in default, in addition to curing the Defaults, it must show that it will be able to perform its obligations under such contract or lease in the future. The terminology for that requirement, contained in Bankruptcy Code Section 365(b)(1)(C), is Adequate Assurance of Future Performance.

Adequate Assurance of Payment: under Bankruptcy Code Section 366, a Utility must receive Adequate Assurance of Payment for Post-petition services as a condition to providing Post-petition services to a Debtor. The means of "assurance of payment" are described in Bankruptcy Code Section 366(c).

Adequate Protection: certain rights or actions by the Debtor, most notably under Bankruptcy Code Sections 362, 363 or 364, are limited by the requirement that affected Entities receive Adequate Protection of their interests in property. Bankruptcy Code Section 361 describes the means by which the Debtor can provide Adequate Protection: (1) cash payments, (2) additional or replacement Liens or (3) such other relief that constitutes the "indubitable equivalent" of an entity's interest. Additionally, an Equity Cushion may be used to show that the interest in property of a Secured Creditor is adequately protected. In the context of Chapter 12 cases, however, a different definition exists as set forth in Bankruptcy Code Section 1205.

Ad Hoc Committee: in the US, an unofficial committee, which is made up of Creditors or Equity Security Holders voluntarily coming together to form a committee. Unofficial committees can request that the United States Trustee or the US Bankruptcy Court recognise them as Official Committees. If a committee is an unofficial committee, it is critical that the committee representatives file a 2019 Statement. Unless a showing of Substantial Contribution can be made under Bankruptcy Code Section 503(b)(4), Professionals hired by unofficial committees are reimbursed by their constituents, not by the Estate. In Canada, it is common for the holders of bond debt and former employees or retirees to organise Ad Hoc Committees in large CCAA cases. Ad Hoc Committees in Canada are generally informal and may be self-funded or be funded by the Debtor.

In some cases, the Debtor under CCAA protection has been directed by the Canadian court to fund an Ad Hoc Committee where, for example, such committee represents the interests of former employees or retirees.

Adjusted EBITDA: EBITDA on steroids. Refers to EBITDA, adjusted to eliminate the impact of certain unusual or non-cash items that the issuer or Borrower (or its Sponsor) believes are not indicative of the future performance of its business. In credit agreements, this term can also refer to EBITDA adjusted on a pro forma basis for acquisitions and disposals, (i.e., when measuring EBITDA for a particular period), any acquisition or disposal in that period is deemed to have happened on the first day of such period so the EBITDA of the acquired/disposed-of asset is gained/lost for the whole period. A form of Adjusted EBITDA is also a component of the leverage ratio and fixed-charge-coverage ratio definitions.

Administrador Concursal: person appointed by a Spanish Insolvency court either to supervise or fully manage an Insolvent company. In most Insolvencies there must be three administrators: (i) a lawyer; (ii) an auditor or economist and (iii) a Creditor holding an ordinary or non-secured generally privileged claim. For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, "Spanish Insolvency Act Changes — Paving the Way for Restructurings" (29 May 2009), available at www.lw.com.

Administration: a formal Insolvency process in England designed to facilitate the rescue of an Insolvent company or achieve a better return to Creditors than if the company immediately went into Liquidation. It involves the executive control of the company passing from the directors to an Administrator and a Moratorium on most Secured Claims and Unsecured Claims. The procedure has gained notoriety through the use of Pre-packs.

Administrative Agent: the lending institution that serves as the principal agent administering the credit facilities documented in a credit agreement and another name for the Facility Agent. The Administrative Agent is responsible for processing interest payments to lenders, posting notices delivered by the Borrower, and acting as the primary representative of the lenders under a credit agreement in dealings with the Borrower. An Indenture Trustee performs an analogous role in bond land. In US Bankruptcy cases, the Administrative Agent may also be the entity that holds the Claim on behalf of the lenders, consents to a 363 Sale, and, in some cases, may even be the entity that votes on the Plan.

Administrative Claim or Administrative Expense Claim: a Claim under US Bankruptcy law that is an actual, necessary cost and expense of preserving the Bankruptcy Estate. Bankruptcy Code Section 503 deals with the allowance of such administrative expenses. More specifically, Bankruptcy Code Section 503(b) provides a non-exclusive list of the types of Claims that are considered administrative expenses. Most, but not all, Administrative Claims arise Post-petition. An example of

an Administrative Claim that arises Pre-petition is a 503(b)(9) Claim. Administrative Claims are entitled to Administrative Priority for payment purposes under Bankruptcy Code Section 507(a)(2).

Administrative Convenience Claim: a small Claim in a Chapter 11 case in the US. The Bankruptcy Code generally requires that all Unsecured Claims be placed in the same Class under a Plan. Administrative Convenience Claims are an exception to this rule. They are Unsecured Claims in *de minimus* amounts (what is considered *de minimus* in one case may not be *de minimus* in another case) that are classified separately from other Unsecured Claims, and receive Unimpaired treatment (essentially for this purpose, a lump sum cash payment in full) under the Plan. The basis for this exception is that the complexity and cost and expense of the voting and distribution processes often outweigh the value of small Claims, and thus it is more administratively convenient and cost effective to pay such Claims with cash, in full.

Administrative Manager: a term used in Russia; see *Administrativniy Upravlyaushiy*.

Administrative Priority: Bankruptcy Code Section 507, titled "Priorities," identifies the types of Claims that are entitled to Priority in payment and the order of Priority for such types of Claims. Under Bankruptcy Code Section 507(a)(2), Administrative Claims generally have second Priority over all other Claims. First Priority is reserved for domestic support obligations that arise only in individual cases. Moreover, under Bankruptcy Code Section 507(b), certain types of administrative expenses have Super-priority over and above other Administrative Claims.

Administrative Receivership: an English Insolvency law term; see Receivership.

Administrativniy Upravlyaushiy: a Russian term meaning Administrative Manager or Financial Rehabilitation Administrator. This is an Arbitration Administrator appointed by the Arbitrazh Court to maintain the Register of Creditors' Claims and to supervise the satisfaction of Creditors' claims according to the debt repayment schedule during the Financial Rehabilitation (*Finansovoye Ozdorovleniye* — see Financial Rehabilitation) procedure.

Administrator: a licensed UK Insolvency practitioner (usually an accountant) who is appointed by the court, the company's directors or by certain qualifying Secured Parties for the purposes of an Administration.

Adversary Proceeding: within a US Bankruptcy case, certain matters must be resolved in what amounts to a full-blown separate civil lawsuit (involving a complaint, answer, discovery and trial), which in Bankruptcy is called an Adversary Proceeding. Adversary Proceedings are separate cases associated with the main Bankruptcy case and have separate case numbers and Dockets. They are distinguishable from Contested Matters, which may also be litigated matters, that are handled within the main Bankruptcy case. Part VII of the Bankruptcy Rules, which

governs Adversary Proceedings, specifies the types of matters that must be resolved through an Adversary Proceeding.

Affiliate: defined slightly differently in different types of agreements and jurisdictions, but generally refers to a parent or subsidiary of the Debtor. This is also the case under US Bankruptcy law, but the Bankruptcy Code provides its own definition of the term in Bankruptcy Code Section 101(2), which may differ from the definition in non-Bankruptcy statutes.

Affiliate Rule: in the context of proper venue for the filing of Petitions in the US by Affiliates, it provides that if venue is proper for one it is proper for all. See 28 U.S.C. § 1408(2). It allows a corporate family to select the location of its Bankruptcy filing from a number of different venue options, including the Domicile, residence, principal place of business or place of principal assets of each member of the corporate family that will be filing a Petition. See Forum Shopping.

Affirmative Covenant: requires an issuer or Borrower to do something affirmatively. These are contractual provisions contained in the terms and conditions of the bond issue, the Indenture or the credit agreement that itemise certain actions the issuer or Borrower must take to be in compliance with the applicable document. Think of these as the "Thou Shalt" covenants. Affirmative Covenants cover such things as a promise by the Borrower to pay interest and fees, maintain insurance, pay taxes, provide quarterly operating reports and other information, and similar style obligations and in a credit agreement are typically more extensive than in the terms and conditions of the bond issue or in an Indenture.

Afkoelingsperiode: a Moratorium granted by the court during Dutch Suspension of Payment *(Surseance van Betaling)* or *Faillissement* proceedings, pursuant to which all Creditors are prevented from taking any enforcement action against the Debtor. The *Afkoelinsperiode* is granted for an initial maximum period of two months and may be extended once by a maximum period of two months.

After Notice and a Hearing: a phrase used throughout the US Bankruptcy Code to describe when certain relief can be granted. It is defined in Bankruptcy Code Section 102(1) as follows: "(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but (B) authorizes an act without an actual hearing if such notice is given properly and if—(i) such a hearing is not requested timely by a party in interest; or (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act."

Akkoord: an arrangement between the Debtor and its Creditors to reorganise the Debtor's debts, proposed by the Debtor during Dutch *Faillissement* proceedings or simultaneously with or after the request for *Surseance Van Betaling* (Suspension of Payments) proceedings. The composition must be approved by a certain majority of Unsecured Creditors and, upon confirmation by the court, becomes binding on all

Unsecured Creditors. An *Akkoord* will never be binding on Secured Creditors.

Alix Protocol: a protocol named for restructuring consulting firm AlixPartners and predecessor Jay Alix & Associates that is followed by most United States Trustees in connection with the retention of certain Professionals in US Bankruptcy. Broadly speaking, under the Alix Protocol, a Professional required to be retained by Order of the US Bankruptcy Court may not act in more than one of the following capacities: crisis manager (hired under Bankruptcy Code Section 363), financial advisor (hired under Bankruptcy Code Section 327), claims agent/administrator and investor/acquirer. Furthermore, a Professional selected to perform any of these duties may not switch roles once it has been retained.

Allowed Claim: a valid Claim that is entitled to receive distributions in US Bankruptcy, if any distributions are available for Claims of its ranking. An Allowed Claim is either (i) listed in the Debtor's Schedules but not designated therein as contingent, unliquidated or disputed, (ii) filed as a Proof of Claim to which the Debtor does not file an objection or (iii) filed as a Proof of Claim to which the Debtor does file an objection but such objection is denied by the US Bankruptcy Court. A Claim asserted in a Proof of Claim is deemed to be an Allowed Claim until and unless it is objected to.

Amend and Extend: a phrase used globally to describe debt restructuring in which maturities of debt instruments are extended through out-of-court agreements without the deleveraging of the company, often in return for better terms for the lenders. Amend and Extend forms of restructuring allow investors to delay write-downs and allows private equity to avoid contributions of new money. See Amend and Pretend and Delay and Pray.

Amend and Pretend: slang for entering into an Amendment or waiver of Defaults rather than fixing more fundamental problems with a capital structure through a full restructuring process. The Amendment or waiver is approved by the requisite lenders, and everyone then pretends all is OK. Sometimes a "head in the sand" approach is vindicated by the passage of time; often, however, it is not. See Zombie.

Amendment: a change to the provisions of an existing agreement. For instance, a Borrower might agree with its lenders to amend its credit agreement to allow for more indebtedness to be incurred.

Amministrazione Straordinaria: Italian special proceedings providing for the reorganisation of large Italian companies in a State of Insolvency. Introduced by the "*Prodi*" law in 1979 (named after the Ministry of Industry at that time) but now governed by Legislative Decree no. 270/99 (the "*Prodibis*"), as further amended by the so-called Marzano Law. Extraordinary administrations under *Prodibis* are still available but are not suitable for massive insolvency crises such as Parmalat. (See also *Concordato Preventivo* and *Piano Attestato di Risanamento*).

Ancillary Proceeding or Case: the filing of a petition under Chapter 15 commences an ancillary proceeding or case. Bankruptcy Code Section 1504. Note that an Estate is not created and, generally, the effects of a recognised Ancillary Proceeding only apply to the Debtor's assets within the territorial jurisdiction of the United States.

Antecedent Debt: a pre-existing debt or obligation of the Debtor. In the US, in the context of Avoidance Actions under the US Bankruptcy Court, an Antecedent Debt is a debt or obligation that existed before the date of the transfer that is the subject of the Avoidance Action.

Anti-Cookson Clause: in private placement transactions, a clause included in the note purchase agreement that prevents the issuer from using its Lien basket or its ability to grant subsidiary Guarantees for the purpose of granting security and/or Guarantees to its bank lenders unless the same is provided to its noteholders. Inclusion of this clause in note purchase agreements became customary practice after one issuer, Cookson Group plc, was able to grant security and Guarantees to its banks without the consent of its noteholders (whose debt was intended to rank *Pari Passu* with the bank debt) in reliance on the negative pledge basket and subsidiary Guarantee test in its note purchase agreement.

Anti-deprivation Principle: an English common law principle that a company cannot enter into a contract if the effect of that contract is, upon the company's Insolvency, to transfer an asset of the company to a third party or otherwise deprive that company's Creditors of the benefit of that asset. According to recent English case law that considered the scope of the Anti-deprivation Principle, if the transfer occurs before the Insolvency of the company, it cannot fall foul of the Anti-deprivation Principle.

Anti-layering Covenant: a covenant that prohibits an issuer or Borrower from layering in another level of debt between the Senior Debt and the Subordinated Debt. This is essentially a no-cheating rule. In bond world, it is only used in senior Subordinated deals and in loan world has become more common in transactions with Senior Debt and mezzanine financing. Back in bond world, senior notes include an analogous provision that requires that all debt that Subordinates itself to any senior secured credit facilities, also Subordinates itself to the senior notes. The Anti-layering Covenant ensures that the Subordinated Debt occupies the second-class slot and not the third or fourth. This clause is an important consideration when looking to add a Second Lien facility, "sandwiched" in-between the First Lien Facilities and unsecured bonds, as it may be prohibited by an Anti-layering Covenant.

Appeal: a request to a higher court to overrule a decision of the lower court. In the US, orders of the US Bankruptcy Court are appealable either to the District Court or a Bankruptcy Appellate Panel if one exists in the district, by the timely filing of a notice of appeal. The appeals process is governed by Bankruptcy Rule 8001, *et seq.* The complexity surrounding the various different types of Appeals could fill the pages of an entire

book. Suffice to say, however, that the law surrounding the Appeal of US Bankruptcy Court Orders may be different than what exists outside of Bankruptcy.

Application: a written request for relief from a court that is titled as an Application rather than as a Motion, as determined by a code section, a rule or local practice. In US Bankruptcy, requests for retention of Professionals or for payment of Professionals are normally made by Application rather than by Motion, although the practice in some courts may be different. In some courts, an Application is used for Ex Parte or procedural requests.

Arbitrage: to take advantage of a price differential between two or more markets, such as by buying an investment in one market and then immediately selling it at a higher price in another market.

Arbitration Administrator: See *Arbitrazhniy Upravlyaushiy*.

Arbitrazh Courts: despite what the name might suggest, these are not arbitration courts but rather state commercial courts with jurisdiction over economic disputes between Russian legal entities, foreign legal entities and individual entrepreneurs. Insolvency hearings in Russia are held before Arbitrazh Courts.

Arbitrazhniy Upravlyaushiy: a Russian professional Insolvency administrator who is a member of a self-regulated organisation of Insolvency practitioners, appointed by the Arbitrazh Court to supervise and administer various stages of the bankruptcy procedure. See also Interim Administrator, Administrative Manager, External Administrator and Bankruptcy Administrator.

Article I Judge: a judge appointed pursuant to congressional authorisation under Article I of the US Constitution. In the US, a Bankruptcy Judge is an Article I Judge. Despite the fact that Bankruptcy Judges are "federal" judges, they are not appointed by the US President under Article III but by the Circuit Court for the Circuit in which they sit. Additionally, Bankruptcy Judges are not appointed for life and instead have 14-year terms, although, if approved by the Circuit Court, they can be appointed for more than one term.

Article III Judge: a judge that serves pursuant to Article III of the US Constitution. An Article III judge is appointed by the President pursuant to Article III of the US Constitution, and, with certain exceptions, holds his or her position for life. Judges of District Courts and Circuit Courts are Article III judges.

Article 9: the article of the UCC that governs secured transactions and the validity and Perfection of Security Interests in most personal property.

Article 180: Article 180 of the Companies Regs, which provides that when the losses of a Saudi Arabian limited liability company reach 50 per cent of its capital, the managers of the company must within 30 days convene a meeting of the shareholders who must unanimously resolve either to (i)

dissolve the company, or (ii) continue its existence provided they commit to pay its debts; such resolution must be published in the Umm Al-Qura; if the company continues to operate without the shareholders having so resolved and acted, the shareholders become jointly liable to pay all of the company's debts and any "interested party" can commence judicial proceedings for the company's dissolution.

Article 395 Interest: is usually referred to when dealing with Russian bonds or Russian law-governed loans and refers to the statutory penalty interest rate that should apply if no such penalty rate is provided in the agreement. This rate is equal to the Refinancing Rate, which is usually lower than the original interest rate.

Assemblée des Obligataires: (meaning "bondholders' committee") in France, Luxembourg and Belgium, this is the "third" Creditors' Committee (because the statute refers to a general meeting of the bondholders and not strictly to a bondholders' committee). Subject to variations under applicable law, it consists of all bondholders of the Debtor, irrespective of the terms and conditions of the respective bond issues. In France, it is required to approve a restructuring plan in *Sauvegarde Financière Accélérée, Sauvegarde* or *Redressement Judiciaire* proceedings. Something to think about if you are a lender subscribing for mezzanine bonds issued by a French bidco and the sponsor will also be putting in part of its "equity" by way of bonds.

Asset-backed Security: a generic term describing tranched, exchanged-listed bonds issued by Special Purpose Entities backed by financial assets as mundane as residential mortgages (residential mortgage-backed securities or RMBS), commercial mortgages (commercial mortgage-backed securities or CMBS), automobile loans and leases, and credit card obligations, or as esoteric as casualty insurance claims (catastrophe bonds or cat bonds), life insurance claims (viatical settlement bonds) or changes in survival rates (longevity bonds). CBOs, CDOs, CFOs and CLOs are all also types of Asset-backed Securities.

Asset Stripping: not nearly as exciting as it sounds, this is buying a business whose market value is below its asset value with the intention of breaking it up (rather than running it), selling the most profitable assets. Think Richard Gere's character in "Pretty Woman" (Touchstone Pictures 1990).

Assignment: a transfer of rights and obligations. In US Bankruptcy, an Assignment by the Debtor may be a "use, sale, or lease" subject to Bankruptcy Code Section 363, requiring approval of the US Bankruptcy Court if Outside the Ordinary Course of Business. With respect to an executory contract or unexpired lease, Bankruptcy Code Section 365(f) governs the right of the Debtor to make an Assignment of such contract or lease to a third party, which may occur in conjunction with a sale of assets under Bankruptcy Code Section 363. Claims in Bankruptcy may also be the subject of an Assignment or transfer, pursuant to Claims Trading or otherwise, subject to Bankruptcy Rule 3001(e). Under the

CCAA, a Canadian Court may make an Order assigning a contract, provided that the proposed assignee can perform the contract and all monetary Defaults will be remedied. The assignment provisions under the CCAA do not apply to Post-Filing contracts, Eligible Financial Contracts, collective bargaining agreements or contracts that are not assignable by their nature.

Assignment for the Benefit of Creditor: a US state law equivalent of a Chapter 7 Bankruptcy under which all the assets and liabilities are assigned by a Debtor to a trustee called the "assignee" who liquidates the assets and pays Creditors in the order of state law Priority.

Assignment in Bankruptcy: a voluntary bankruptcy assignment by a Debtor under the Canadian BIA. The Debtor may commence voluntary bankruptcy proceedings under the BIA by filing an Assignment for the benefit of its Creditors. To do this, the Debtor must be an Insolvent Person as defined in the BIA. The Debtor would retain the services of a Trustee in Bankruptcy prior to commencing bankruptcy proceedings and would assist such trustee in preparing a preliminary statement of affairs. The commencement of voluntary bankruptcy proceedings under the BIA may be completed expeditiously as there are no burdensome substantive or procedural requirements. On bankruptcy, the BIA imposes a stay of proceedings against the Debtor, but the stay does not generally apply to Secured Creditors, who are free to exercise their secured rights outside of the BIA.

Assumption: taking on and becoming bound by obligations. In the US, under Bankruptcy Code Section 365(a), with certain exceptions, a Debtor, with approval of the US Bankruptcy Court, may assume or reject an Executory Contract or Unexpired Lease. If the Debtor assumes the contract or lease, it takes on and becomes bound by all the obligations of the contract or lease. If the Debtor has previously defaulted under a contract or lease that it wishes to assume, then, as a condition to approval, the Debtor, generally, must (i) Cure the Default and (ii) provide Adequate Assurance of Future Performance of the contract or lease.

Auction: a procedure for selling assets through a bidding process. In US Bankruptcy, an Auction may, but need not necessarily, take place in connection with a 363 Sale for the purpose of obtaining the highest or best offer for the assets proposed to be sold. If an Auction is to be held, the US Bankruptcy Court is usually requested, pursuant to the Motion of the sale proponent, to approve the manner in which the Auction is to take place and the rules under which bidders will be permitted to bid on the assets, and then, after the conclusion of the Auction, to approve the sale to the winning bidder.

Automatic Stay: the stay that protects the Debtor and its Estate upon the filing of the Petition in the US. It is called an Automatic Stay because it goes into effect immediately upon the filing of the Petition, without the need for any Order of the US Bankruptcy Court. Notably, the Automatic Stay is effective regardless of whether a party gets notice of the filing

of the Petition. The types of actions that are subject to the Automatic Stay are listed in Bankruptcy Code Section 362(a). The types of actions that are not subject to the Automatic Stay are listed in Bankruptcy Code Section 362(b). The Automatic Stay can be terminated, annulled, modified or conditioned by Order of the US Bankruptcy Court pursuant to Bankruptcy Code Section 362(d). Willful violations of the Automatic Stay that are harmful to individuals are punishable under Bankruptcy Code Section 362(k).

Avoidable Transactions: see Suspect Transactions. See also Avoidance Action.

Avoidance Action: an action commenced in a US Bankruptcy Court, via an Adversary Proceeding, to avoid, set aside and recover, for the benefit of the Estate, certain types of transfers that the Debtor made, either Pre-petition or Post-petition. Avoidance Actions — for both Fraudulent Transfers, Preferential Transfers and unauthorised Post-petition transfers — and the limitations thereon are addressed in Bankruptcy Code Sections 544, 545, 546, 547, 548, 549 and 550.

Badges of Fraud: as one can imagine, if a lawyer is not litigating in the movies, actual fraud is extremely difficult to prove, because it is based upon intent or state of mind. Thus, courts generally allow Badges of Fraud to be used to assist courts to infer bad intent based upon circumstantial evidence.

BAFJA: Bankruptcy Amendments and Federal Judgeship Act of 1984.

Bagel: the indispensable item served at all critical, early-morning restructuring meetings, preferably with cream cheese. During moments of extreme stress, participants have been known to throw one or more Bagels against the wall of a conference room or, in the alternative, at one or more of the other participants in the meeting.

Balance Sheet Insolvency: Insolvency based on the Balance Sheet Test.

Balance Sheet Insolvent: when a company is Insolvent because it has failed to satisfy the Balance Sheet Test.

Balance Sheet Test: see Insolvency.

Ballot: the document used by Classes of Claims or Interests in Chapter 11 in the US to submit votes on the Plan. Official Form 14 prescribes a form of Ballot, but it can be tailored as necessary with approval of the US Bankruptcy Court to meet the particular needs of any case. The Debtor or an agent of the Debtor will send out Ballots to eligible holders of Claims and Interests that are entitled to vote under the Plan. To have their vote counted, those holders must complete the Ballots — either accepting or rejecting the Plan — and send them back to the Debtor or an agent by the Voting Deadline.

Bancarotta Fraudolenta: the major criminal offence under Italian Insolvency Law (think Tanzi — founder and CEO of Parmalat and famously convicted in 2010 of this crime). When a company has been

or is subsequently declared bankrupt, the offence imposes liability for actions such as removing, concealing, disguising, destroying or dissipating all or part of its assets. The penalty for this crime is three to 10 years' imprisonment and a ban for 10 years on conducting a business enterprise and disqualification from holding any managerial position in an enterprise for the same period. The Italian Insolvency Law was recently amended so that payments and transactions in a court-approved *Concordato Preventivo* or an *Accordo di Ristrutturazione* ratified through the *Omologazione* or a *Piano Attestato di Risanamento*, are not caught within the scope of the offence of *Bancarotta Fraudolenta* (meaning "fraudulent bankruptcy"). This eliminates the risk that relevant Creditors will be prosecuted.

Bancarotta Semplice: meaning "simple bankruptcy", this is a criminal offence under Italian Insolvency Law, punishable by six months to two years' imprisonment and imposing liability on a bankrupt who, for example, carries out seriously imprudent transactions in order to delay bankruptcy. The penalty involves the person concerned being banned from conducting a business enterprise for up to two years and disqualified from holding managerial positions in any enterprise for the same period of time. A bankrupt who, prior to or during the *Fallimento* procedure, makes payments or creates sham security interests in favour of some Creditors with the aim of favouring them over others, will be liable to the offence of *Bancarotta Semplice*. Where payments or transactions are made in order to carry out a court-approved *Concordato Preventivo* or an *Accordo di Ristrutturazione* ratified through the *Omologazione* or a *Piano Attestato di Risanamento*, recent legislation dictates that such payments and transactions do not fall within the scope of this criminal offence This has eliminated the risk that relevant Creditors are prosecuted for participation in *Bancarotta Semplice*. See *Bancarotta Fraudolenta* (fraudulent bankruptcy).

Bank Bail-in: the proposed solution to the problems caused by systemically important banks (i.e., firms that are "too big to fail"), which is currently under consideration by global regulators. Bank Bail-ins would provide an alternative to bank bail-outs which involve taxpayers' money. On the occurrence of specific trigger events and in accordance with a pre-agreed framework, a failing bank would be forced to recapitalise itself through, for example, debt-for-equity swaps. This would then allow for further action, such as a consortium of lending banks providing facilities ranking ahead of any existing senior debts. The advantage of Bank Bail-ins is that banks would be rescued earlier using their own funds and those of private investors; wider economic damage would be avoided and bank bail-outs would no longer be necessary.

Bankrupt: in Canada, a Debtor who has made an Assignment in Bankruptcy or against whom a Bankruptcy Order has been made under the Canadian BIA. In Canada, bankruptcy generally means a Liquidation of the Debtor's assets by the Trustee in Bankruptcy of the Bankrupt's estate.

Bankruptcy: in the US, this is a federal court process conducted under the provisions of Chapter 7, Chapter 9, Chapter 11, Chapter 12, Chapter 13 or Chapter 15 of the Bankruptcy Code. The process may result either in Liquidation or reorganisation. Restructuring debts in Europe is typically an out-of-court process although court-based procedures such as Schemes of Arrangement are used as implementation tools, with Insolvency being the end of the line and typically court-driven. Outside of the US, a "bankruptcy" usually means Liquidation or Insolvency procedure for individuals. For more information, see the series of Latham & Watkins webcasts broadcast in 2010 on global restructurings and insolvencies with spotlights on the Middle East, the UK, the US, France and Germany, all available at www.lw.com. See also Insolvency.

Bankruptcy and Insolvency Act: Canada's federal bankruptcy and insolvency legislation that addresses corporate and personal bankruptcy and restructuring matters. The BIA provides a mechanism for the orderly Liquidation of a Bankrupt's estate and the distribution of the value of the assets in that estate to the Bankrupt's Creditors. The BIA also offers Debtors the option of making a Proposal to their Creditors, which allows Debtors, including companies and individuals, the opportunity to restructure.

Bankruptcy Appellate Panel or BAP: only five of the 12 Circuits within the US currently have BAPs; in the Circuits in which they exist, BAPs are the first level of appellate review of a US Bankruptcy Court Order and act in place of the District Court. Under 28 U.S.C. § 158(b), Bankruptcy Judges of the districts in the Circuit in which they are appointed are empanelled to sit on the BAP, and three of those judges hear the Appeal. A BAP decision is then appealed to the Circuit Court for its Circuit. Any appeal from a US Bankruptcy Court Order in any of the five circuits in question is initially referred to the BAP within the particular circuit, although parties can opt out and have their appeal heard in the first instance by a District Court.

Bankruptcy Avoidance Regulations: regulations in the Kingdom of Saudi Arabia, promulgated under Royal Decree No. M/16, 4/9/1416 H., which provide a framework under which a Debtor may (a) seek "amicable conciliation" with Creditors to avoid Insolvency under the supervision of a conciliation committee formed by the Minister of Commerce and Industry, or, if no amicable solution is possible (b) apply to the Board of Grievances for an order to convene "settlement procedures" with Creditors under the supervision of the Board of Grievances, to avoid the possible operation of the Bankruptcy Code; understood not to be used in corporate bankruptcies or insolvencies in practice due to uncertainty of results.

Bankruptcy Code: under Article I, § 8 of the US Constitution, Congress was given the power to "establish ... uniform Laws on the subject of Bankruptcies throughout the United States;" Congress codified those laws in 11 U.S.C. § 101, et. seq.

Bankruptcy Crime: conduct in connection with a US Bankruptcy that can land a person in jail for varying lengths of time and/or subject an entity to fines, such as concealment of assets, false oaths, bribery, embezzlement, fraud or destruction of records, all as more particularly set forth in Title 18 of the United States Code. For example, the filing of a false Proof of Claim may result in a fine of up to US$500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§ 152 and 3571.

Bankruptcy Judge: an Article I Judge appointed in the US by the Circuit Court in the Circuit in which the Bankruptcy Judge sits. A Bankruptcy Judge is assigned to handle a Bankruptcy case when filed.

Bankruptcy Jurisdiction: 28 U.S.C. §§ 157 and 1334 govern jurisdiction over US Bankruptcy matters. District Courts have original but not exclusive jurisdiction over matters that arise in, arise under, or are related to a Bankruptcy case. In turn, 28 U.S.C. § 157 provides that a District Court may "refer" a Bankruptcy case to a Bankruptcy Court. Bankruptcy jurisdiction exists over cases under 28 U.S.C. § 1334(a), as well as "civil proceedings arising under title 11, or arising in or related to cases under title 11." § 1334(b). Notably, some courts believe that a matter either arises under, arises in, or is related to a Bankruptcy case. Other courts believe that a matter may arise under, arise in and be related to a Bankruptcy case. See e.g. *Simmons v. Johnson, Curney & Fields, P.C. (In re Simmons)*, 205 B.R. 834, 841 n.3 (Bankr. W.D. Tex. 1997) (discussing the three types of § 1334 jurisdiction (other than cases under title 11 jurisdiction) not in terms of concentric circles but intersecting circles).

Bankruptcy Order: an involuntary bankruptcy order against a Debtor under the Canadian BIA. One or more Creditors may file an application for involuntary bankruptcy against the Debtor which, if granted, results in a Bankruptcy Order being made against the Debtor. For this application to be granted, the applicant must establish that it is owed a debt of at least CA$1,000 and that the Debtor has committed an act of bankruptcy under the BIA (e.g. ceasing to meet liabilities generally when they become due) within the six months preceding the filing of the application. Obtaining a Bankruptcy Order takes longer than an Assignment in Bankruptcy, given that applicable notice periods must be observed and Canadian court proceedings must be commenced and completed (which, if defended by the Debtor, requires a trial of the issue). On bankruptcy, the BIA imposes a stay of proceedings against the Debtor, but the stay does not generally apply to Secured Creditors, who are free to exercise their secured rights outside of the BIA.

Bankruptcy Power: not to be confused with Bankruptcy Jurisdiction. Bankruptcy Power is the ability of a judge to rule on a given Bankruptcy issue, and is determined by whether a matter is within the court's Bankruptcy Jurisdiction, and, if so, in the case of a Bankruptcy Judge, whether a matter is a core proceeding or not.

Bankruptcy Preparer: a "person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such

attorney, who prepares for compensation a document for filing[.]" Bankruptcy Code Section 110(a). Bankruptcy Preparers are subject to certain rules and requirements, as articulated in the Bankruptcy Code. If a Bankruptcy Preparer does not follow those rules, he or she may be subject to, in some cases, severe sanctions. Bankruptcy Preparers would be most commonly used by individuals.

Bankruptcy Register (the Unified Federal Register of Information on Bankruptcy): a publicly available register in Russia containing various Insolvency-related information, including information on Russian Debtors against whom Insolvency proceedings have been commenced, and information on any terminations of Insolvency proceedings. The information contained in the Bankruptcy Register is accessible via its official website at http://www.fedresurs.ru/.

Bankruptcy Remote Vehicle: a company whose governing documents restrict its ability to seek Bankruptcy relief and whose debt obligations and operations are intended to be separate and distinct from those of Affiliates, such that the Insolvency of Affiliates will not affect the company. A Bankruptcy Remote Vehicle is often created for a limited corporate purpose. A typical example would be when a Bankruptcy Remote Vehicle is set up for the purposes of acquiring or operating a particular real estate project or making investments. Also known as a Special Purpose Vehicle (SPV) or Special Purpose Entity (SPE). It is noteworthy, however, that a recent US Bankruptcy Court decision refused to dismiss for bad faith the Chapter 11 bankruptcies of a number of SPVs that filed for Bankruptcy after their parent also filed for Bankruptcy. *In re Gen. Growth Properties, Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

Bankruptcy Rules: the Federal Rules of Bankruptcy Procedure.

BAPCA: Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Bar Date: the date set by Order of the US Bankruptcy Court, or depending on the type of case or the district in which filed, the date established by the Bankruptcy Rules or Local Rules, as the deadline for Creditors to file their Proofs of Claim or, if applicable, for Equity Security Holders to file their Proofs of Interest. Creditors whose Claims are listed in the Schedules of Liabilities in the correct amount and are not designated as contingent, unliquidated or disputed need not file Proofs of Claim. Failure to file by the Bar Date, when required, will prevent the holder of the Claim or Equity Interest from voting and receiving distributions.

Bar Date Order: the Order entered by the US Bankruptcy Court setting the Bar Date. The Bar Date established by the Bar Date Order will be noticed to all Parties in Interest in the Bankruptcy so that they have an opportunity to file a Proof of Claim or, if applicable, Proof of Interest.

Basis Trader: a trader who invests in an asset by purchasing the asset in the cash market and selling the same asset at the same time via Credit Default Swap. The result of such position is that the trader is not taking

a view on the credit risk of the underlying asset but rather focuses on the difference in pricing of the asset in the cash and synthetic markets.

BBA: acronym for the British Bankers' Association.

Beauty Contest: a process by which prospective Professionals, including law firms, investment banks and restructuring consultants, compete for the business of the Debtor, the Committee or other Party in Interest.

Best Interests of Creditors: a requirement for Confirmation of the Debtor's Plan in Chapter 11 that mandates that each holder of a Claim or Interest in an Impaired Class either accept the Plan or receive under the Plan at least as much as such holder would receive under a Chapter 7 Liquidation.

Betalingsstandsning: the former Suspension of Payments procedure in Denmark. In the comprehensive changes to the Danish Bankruptcy Act that took effect on 1 April 2011, the *Betalingsstandsning* procedure was replaced by the new *Rekonstruktion* procedure.

Bewindvoerder: the administrator appointed by the court usually within one working day of receipt by the court of the application to open Dutch *Surseance Van Betaling* (Suspension of Payments) proceedings. The *Bewindvoerder* is usually a lawyer experienced in Insolvency law and supervises the actions of the management of the company during the *Surseance Van Betaling* proceedings.

BIA: an acronym for Bankruptcy and Insolvency Act in Canada.

BIA Distribution Scheme: a distribution and Priority scheme under the Canadian BIA for the payment of claims against a Bankrupt. Generally, Secured Creditors can look to the assets charged by their security for payment. Thereafter, the BIA provides a list of preferred Unsecured Claims (e.g. certain costs of administration of the bankruptcy process) that are paid in Priority to the claims of the general body of Unsecured Creditors. Non-preferred Unsecured Creditors (including Secured Creditors with a deficiency claim) are paid on a without-preference basis.

Bid/Offer Spread: the difference between the highest buying price that a purchaser is prepared to offer ("offer") and the lowest selling price that a seller is prepared to accept ("bid"). Sometimes referred to as the Bid/Ask Spread or Bid/Ask.

Big Boy Letter: a letter sometimes entered into in connection with a secondary trade of securities where one party to the trade has more information about the issuer than the other. A Big Boy Letter says something to the effect that one party may have more information than the other about the issuer, but because they are both "big boys", they are still knowingly and willingly entering into the transaction. Big Boy Letters raise a number of interesting legal issues, including whether the letter itself is enforceable and whether or not the letters work as a defence against insider trading liability. Thus far, there is more legal authority in the US than in Europe to help answer these tricky questions. For more

information on loan trading and the use of information, see Latham & Watkins Client Alert No. 1216, "New LMA Guidelines on Transparency and the Use of Information in Debt Trading" (18 July 2011), available at www.lw.com.

BISO: acronym for Buy-in/Sell-out; see Distressed BISO.

Blocked Account: a bank account where monies cannot be withdrawn without the Facility Agent/Security Agent or lender's specific consent.

Board Observer Rights: rights given to lenders or minority investors to attend (but not vote) at board meetings of a particular Borrower or appropriate other group companies. The board observer attends but is not appointed as a director or board member. Often used in mezzanine financings, in particular if the deal has an equity kicker and/or VCOC Rights.

Board of Directors: a body of people elected or appointed to govern a company or organisation.

Board of Grievances: the commercial court of general jurisdiction in the Kingdom of Saudi Arabia (in circumstances where the *Shari'ah* Courts, the NIO, SAMA Committee or other specialised judicial fora do not have jurisdiction); to be replaced with new commercial courts under yet-to-be-implemented legislation; under the Saudi Arabian Bankruptcy Code, the Board of Grievances has jurisdiction over Insolvency proceedings; Bankruptcy Avoidance Regulations.

Bona Fide Purchaser: a purchaser of property that gives fair value, and does not have any notice of adverse claims against such property; also called a BFP.

Bondholders' Committee: see *Assemblée des Obligataires*.

Borrower: a company that borrows money. In larger deals, a credit agreement is generally used to establish the terms of the borrowing.

Breakup Fee: a fee payable to one party in certain transactions if the other party fails to complete the transaction. In the context of a 363 Sale in US Bankruptcy, a Breakup Fee may be awarded to a party that agrees to be the Stalking Horse Bidder in an Auction if such party loses to a higher or better offer. The Breakup Fee must be approved by the Bankruptcy Court in advance of the Auction.

Bridge Order: an interim Order that grants temporary relief, often extending a deadline, until the Court can consider the matter on the matters. For instance, if an Interim Order is entered in a US Bankruptcy case granting the Debtor use of its Cash Collateral subject to a final hearing on the matter on X date, and the hearing is moved to Y date, which is a later date, a Bridge Order will be necessary to extend the Debtor's permission to use Cash Collateral to Y date.

Brønnøysundregistrerne: popular name for the Company Register in Norway, based on its location: *Brønnøysund* in Northern Norway. The

opening of debt settlement proceedings *(Gjeldsforhandling)* and *Konkurs* is documented in this register.

Budget: exactly what it sounds like — a forecast of a company's expected revenues and expenditures. In US Bankruptcy, it is used in a variety of instances, such as authorisation to use Cash Collateral consistent with the Budget, authorisation to use DIP Financing proceeds consistent with the Budget, and the demonstration of Plan Feasibility.

Buitengerechtelijk Akkoord: an arrangement between the Debtor and its Creditors to reorganise the Debtor's debts out of court in the Netherlands. In general, approval of all Creditors is necessary for an out of court composition to be effective.

Bullet Maturity: when the entire principal of a bond or Term Loan is due and payable on the maturity date (i.e., there is no amortisation prior to maturity). Typical for Facility B Loans, Facility C Loans, Second Lien Loans and mezzanine loans.

Business Judgment Rule: a presumption in the law that a Debtor made a business decision on an informed basis, in good faith, and with a belief that the action taken was in the best interest of the parties to whom it owes a duty. So long as the Debtor can articulate a legitimate business reason for its actions, the court will not interfere. The presumption is rebuttable, however, the parties opposing the action have the duty of rebutting the presumption. In US Bankruptcy, the Business Judgment Rule makes an appearance when the Debtor is seeking authorisation to sell its assets under Bankruptcy Code Section 363(b) or when the Debtor is seeking to assume or reject an Executory Contract or Unexpired Lease under Bankruptcy Code 365(a).

Business MAC: definitions vary, but this is a reference to the condition precedent in a commitment letter, sale and purchase agreement or credit agreement that there has been no Material Adverse Change in the operations, business or (more controversially) prospects of the Borrower or the target company/group. This should not be confused with a Market MAC, which deals with Material Adverse Changes in market conditions that could adversely affect Syndication. See also Material Adverse Change and Company MAC.

Business Rescue Procedure: a reference to Chapter 6 of the new South African Companies Act (as amended with effect from 1 May 2011) providing a rehabilitation procedure for financially distressed companies.

Buy Back: name given to the act of a Borrower (or a member of its group or its shareholders) acquiring part of a credit facility, often at a discount. Credit agreements now typically include an absolute prohibition on this (on the basis that all lenders should receive the benefit of voluntary prepayments on a pro rata basis and to prevent affiliates of the Borrower holding debt and disrupting the workings of the syndicate of lenders) or set out the regime that must be followed for any Buy Back (which may involve a dutch Auction). Sponsors that Buy Back debt of a company that

has been previously purchased by it and sits in that sponsor's "portfolio" are now often subject to disenfranchisement. The European trade association for the syndicated loan markets, the Loan Market Association, provides a recommended form of credit agreement for leveraged buyouts, which provides suggested Buy-Back wording. Also used to describe the purchase by an issuer of its securities in the open market or pursuant to a more formalised tender offer or private agreement.

Call: sometimes referred to as a "call option", meaning a financial contract between two parties, the buyer and the seller of this type of option. The buyer has the right, but not the obligation, to buy an agreed quantity of a particular commodity or financial instrument from the seller by a certain time (the expiration date) for a certain price (the strike price). The seller is obligated to sell the commodity or financial instrument should the buyer exercise its option.

Callable: applying to bonds and other convertible securities, this term means that they are redeemable by the issuer prior to the maturity date under specific conditions and at a price which is usually the par value together with accrued interest. The Issuer might call a bond when interest rates fall to the point that it makes financial sense to issue new bonds at lower rates.

Canada Business Corporations Act: Canada's federal corporate legislation that allows companies to restructure certain debt (e.g. bond debt) and equity through the corporate arrangement provisions of the CBCA. Similar corporate legislation also exists in certain Canadian provinces.

Canadian Reorganisation Regimes: the primary statutory regimes for reorganizing a financially troubled company in Canada are the CCAA, the CBCA (or similar provincial corporate legislation) and Part III of the BIA (Proposal).

Carve-out: in the context of the Post-petition Liens and Super-Priority Administrative Claims granted in connection with the use of Cash Collateral or DIP Financing, a Carve-out is an exception to such grants that operates to preserve Estate Assets for other uses, primarily the payment of the Debtors' Professionals, the Committee's Professionals and Quarterly Fees owed to the United States Trustee. Carve-outs are usually limited in negotiated amounts and carry restrictions on adversarial uses of Cash Collateral and DIP Financing proceeds.

Cases Under Title 11: the term is used in the US in 28 U.S.C. § 1334(a), and refers to the case commenced by the Bankruptcy Petition itself.

Cash Collateral: as defined in Bankruptcy Code Section 363, "cash, negotiable instruments, documents of title, securities, deposit accounts or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other

public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in Bankruptcy Code Section 552(b) of this title, whether existing before or after the commencement of a case under this title." In order to use Cash Collateral, a Debtor normally will get the US Bankruptcy Court's (and its Secured Creditor's) permission. Under Bankruptcy Code Section 363(c)(1), however, if the Secured Creditor consents, the Debtor need not request the Court's permission to use Cash Collateral in the Ordinary Course of Business. Normally, when the Debtor uses Cash Collateral, the Debtor provides the Secured Creditor with Adequate Protection of its Security Interest. Notably, if it receives Court approval to do so, a Debtor may use Cash Collateral over the objection of the Secured Creditor, but, in any such event, the Secured Creditor must receive Adequate Protection.

Cash Flow Insolvent: when a company is Insolvent because it fails to satisfy the Cash Flow Test.

Cash-Flow Statement: a statement indicating the projected cash flow of a company. In Canada, the Debtor must file a projected weekly Cash-Flow Statement in its initial CCAA application. Typically, this Cash-Flow Statement is for a 13-week period despite the 30-day initial stay period under the CCAA. Updated Cash-Flow Statements are filed in support of further stay extension motions by the Debtor before the Canadian court.

Cash Flow Test: see Insolvency.

Cash Sweep: another name for Excess Cash Flow Sweep.

CBCA: acronym for Canada Business Corporations Act. CBCA Arrangement: a plan of arrangement under the CBCA. To become effective, a CBCA Arrangement must meet the statutory requirements of the CBCA (i.e. it must meet the definition of "arrangement", the applicant must not be Insolvent (although Canadian case law has permitted a new company to be incorporated to act as the solvent applicant) and it must not be practicable to effect the desired changes under any other provision of the CBCA (i.e. it must be something more than simply an amalgamation)) and be approved by the Canadian court. The CBCA does not mandate class votes or any particular level of approval. Rather, the Canadian court is authorised to make any interim or final order it thinks fit and to require the applicant to conduct meetings in such manner as it directs. The Canadian court will take the views of affected classes into account, but the votes are not determinative. A Canadian court asked to approve a CBCA Arrangement must be satisfied that: (i) the statutory requirements have been fulfilled; (ii) the arrangement is put forward in good faith and (iii) the arrangement is fair and reasonable.

CBIR: acronym for Cross-Border Insolvency Regulations 2006.

CBO: acronym for collateralised bond obligation.

CCAA: acronym for Companies' Creditors Arrangement Act (Canada).

CCAA Claims Process: a claims process used in CCAA proceedings for calling and verifying claims against the Debtor under CCAA protection. The CCAA provides no formal rules for calling for claims and verifying them. Instead, the practice has evolved whereby the Monitor will work with the Debtor to prepare and recommend a complete claims process, including proof of claim forms, notices and a dispute mechanism, for approval by the Canadian court pursuant to a Claims Process Order. The Claims Process Order granted by the Canadian court will also set a claims bar date.

CCAA Plan: a plan of compromise or arrangement under the CCAA. To become effective, a CCAA Plan must be accepted by the affected Creditors and then approved by the Canadian court. The statutory majority for each class of Creditors under the CCAA is 50% plus one in number and two-thirds in value of the claims of that voting class. While a voting CCAA Plan can be "crammed-down" on the dissenting minority of an accepting class, there are no provisions under the CCAA permitting "cram-down" on non-accepting, impaired classes. The Canadian court will only approve a CCAA Plan if it is satisfied that all statutory requirements have been complied with and the CCAA Plan is fair and reasonable. Once the CCAA Plan is approved by the Canadian court and implemented, it becomes binding on all members of all classes of Creditors affected by the CCAA Plan, as if it were a contract between the Debtor and those Creditors.

CCAA Stay: a stay of proceedings granted by a Canadian court in an Initial Order. Generally, a CCAA Stay will be imposed against all Creditors, secured and unsecured, and non-Creditors of the Debtor to prevent them from exercising contractual rights (including the right to terminate contracts and leases) that would make it difficult for the Debtor to proceed with its reorganisation. The CCAA provides that the initial stay of proceedings can only be for 30 days, after which extensions are in the discretion of the Canadian court on notice to interested parties. There is no practical expectation that a CCAA restructuring will be completed in 30 days, but the shorter initial period is intended to ensure that affected parties have an opportunity to address the Canadian court early in the CCAA proceedings.

CDO: acronym for collateralised debt obligation.

C-3PO: robot in the "Star Wars" films; notably, along with R2-D2, the only character to have been included in all six of such films.

CDS: acronym for Credit Default Swap.

Centre of Main Interests: known colloquially as COMI, under the EU Insolvency Regulation it is the test used to determine in which country a Debtor is able to initiate Main Proceedings. Under the Model Law, COMI is essential to the recognition of a Foreign Main Proceeding and to the ascertainment of the level of relief to be conferred to the Foreign Proceeding. If the Debtor opens Foreign Proceedings where it has its

COMI, certain relief is automatically conferred on the Debtor (e.g. a statutory Moratorium in an English Administration): see Foreign Main Proceeding and Foreign Non-main Proceeding. COMI is not defined in the EU Insolvency Regulation nor the Model Law and is therefore open to some interpretation, which has led to the development of criteria to determine COMI by the national courts. Presumptively, COMI will be the location of a Debtor's registered office but the presumption can be rebutted by various factors showing that the Debtor's main interests are centered elsewhere. In the US, the Model Law has been adopted and is incorporated by Chapter 15. Under Chapter 15, if a Foreign Proceeding is pending in the Debtor's COMI, it can be recognised as a Foreign Main Proceeding under the US Bankruptcy Code. Chapter 15 specifically requires that courts bear in mind the international aspects of the statute, "and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." Bankruptcy Code Section 1508. For definitions of COMI, see e.g. *Re Stanford International Bank Ltd.*, [2010] EWCA Civ. 137, *Re Eurofood IFSC Ltd.*, [2006] EUECJ C-341/04 (*Eurofood*), which are also relevant to decisions under Chapter 15. See e.g. *In Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122 (Bankr. SDNY 2007) & 389 B.R. 325 (SDNY 2008). See also COMI Shift and Head Office Seat.

CEO: shorthand for "chief executive officer", the CEO is the highest-ranking executive officer of a company, in charge of managing the day-to-day affairs of the company, but subject to direction and oversight from the Board of Directors.

Cessation des Paiements: in France, Belgium and Luxembourg, a company is in a state of *Cessation des Paiements* when it is unable to pay its debts out of its available assets as they fall due. Unless a French company has already petitioned for the opening of Conciliation Proceedings, the officers of the company must petition for the opening of *Redressement Judiciaire* or *Liquidation Judiciaire* within 45 days of the company entering a state of *Cessation des Paiements*, failing which they may incur civil liability. The notion of *Cessation des Paiements* in Luxembourg should be distinguished from that of Insolvency. In Luxembourg, a Debtor can be solvent (i.e., if the value of its assets exceeds its liabilities) and yet be forced to cease payments if its assets are not sufficiently liquid (e.g., real property or a shareholding in a subsidiary that cannot be sold immediately). Conversely, a Debtor may be Insolvent and yet not be in a state of Cessation of Payments. The notion of Cessation of Payments in Luxembourg should not to be confused with the Suspension of Payments *(Sursis de Paiement)* procedure under the Luxembourg Financial Sector Act of 5 April 1993, as amended, which deals with the reorganisation and winding-up of certain types of distressed financial sector institutions.

Cessation of Payments: generally refers to when a company has ceased paying its debts as they become due but the precise meaning and effect of being in a state of Cessation of Payments varies from jurisdiction

to jurisdiction as it can be a trigger for Liquidation or recovery. See *Cessation des Paiements* for a description of the term in France, Luxembourg and Belgium. In the UAE, Cessation of Payments is the statutory trigger for a UAE trader to file for Insolvency within 30 days under the UAE Commercial Code, Federal Law No. 18 of 1993; the term is undefined under the law and has uncertain meaning in practice due to lack of reported judicial decisions in the UAE, which leads to common understandings that the term equates roughly to "Insolvency" and that traders must file for Insolvency if they are unable to pay a material demand for payment by a Creditor within 30 days; see Negligent Bankruptcy and Trader.

Change of Control: a material change in the ownership of a company or (in some uses of the term) the composition of its Board of Directors. Definitions and the consequences of a Change of Control vary between bond world and loan world and from transaction to transaction.

Channeling Injunction: an injunction that channels Claims or Interests to, or limits such Claims or Interests to a recovery from, a specific fund, trust or other entity. A Channeling Injunction may be found in a Plan in Chapter 11 or in an Order approving a 363 Sale. Bankruptcy Code Section 524(g) specifically allows Channeling Injunctions in Plans of Reorganisation in order to deal with asbestos liability.

Chapter 5 Cause of Action: see Avoidance Action.

Chapter 7: titled "Liquidation," it is the chapter of the Bankruptcy Code under which the Debtor's assets are liquidated by a Chapter 7 Trustee and the proceeds of Liquidation are distributed among the Debtor's Creditors in accordance with specified priorities. Bankruptcy Code Section 109(b) governs who may be a Debtor under Chapter 7, and certain persons are explicitly excluded. Under Bankruptcy Code Section 721, a Chapter 7 Trustee may request authority to operate the Debtor's business for a limited period of time.

Chapter 7 Trustee: a Chapter 7 Trustee is automatically appointed in every case under Chapter 7. Under 28 U.S.C. § 586(a)(1), a panel of private individuals that are eligible to serve as Chapter 7 Trustees is established by the United States Trustee. Under Bankruptcy Code Section 701, the United States Trustee appoints a Disinterested Person to serve as an interim Chapter 7 Trustee (it is not necessary that the interim Trustee be from the panel of trustees). Under Bankruptcy Code Section 702, certain Unsecured Creditors may vote for the appointment of a permanent Chapter 7 Trustee. The Unsecured Creditors eligible to vote often do not exercise such right in a Chapter 7 case, however. In that event, Bankruptcy Code Section 702(e) provides that the interim Trustee shall serve as the Chapter 7 Trustee for the case. Bankruptcy Code Section 704 lists the duties of a Chapter 7 Trustee.

Chapter 9: titled "Adjustment of Debts of a Municipality," it is the chapter of the Bankruptcy Code used by Municipalities (as defined in

Bankruptcy Code Section 101(40)) to adjust their debts under a Plan. Due to the public nature of Municipalities, the adjustment of debts of a Municipality is somewhat different than the adjustment of debts of a person. For instance, there is no provision under which a Municipality may liquidate. Additionally, the US Bankruptcy Court's powers are more limited when it is presiding over a case involving a Municipality.

Chapter 11: titled "Reorganisation," it is the chapter of the US Bankruptcy Code under which a person may reorganise its debts under a Plan of Reorganisation or liquidate under a Plan of Liquidation. Chapter 11 of the US Bankruptcy Code was created with the intention of making the reorganisation process as equitable as possible. The main goals of Chapter 11 are to: 1) rehabilitate financially viable businesses — preserving operations and saving jobs; 2) ensure equality of distribution of value among the Debtor's similarly-situated Creditors; 3) maximise the value of assets and distributions to Creditors; 4) provide Discharge from indebtedness and a "fresh start" to the Debtor; and 5) provide the Debtor with time and ability to restructure its balance sheet and business.

Chapter 11 Trustee: a Trustee appointed in a Chapter 11 case in the US pursuant to Bankruptcy Code Section 1104. A Chapter 11 Trustee is rarely appointed. The Debtor in Possession is the norm and is authorised to perform all of the duties of a Trustee in Chapter 11. The appointment of a Trustee in Chapter 11 generally only occurs when the US Bankruptcy Court concludes that Debtor's management is acting in a harmful, negligent or dishonest manner.

Chapter 12: titled "Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income," it is the chapter of the Bankruptcy Code that governs reorganisations of family farmers or fisherman. Additionally, however, corporate entities or partnerships may file for Chapter 12 relief so long as they are owned by one family that conducts either farming or fishing activities, and so long as they otherwise meet the requirements to be a Debtor in Chapter 12.

Chapter 12 Trustee: appointed in all Chapter 12 cases. Under Bankruptcy Code Section 1202, the United States Trustee can appoint a Trustee that has been impaneled under 28 U.S.C. § 586(b), or, if no such person exists, the United States Trustee may appoint a Disinterested Person as a Chapter 12 trustee. Unless otherwise ordered by the US Bankruptcy Court, the Chapter 12 Trustee's role, set forth in Bankruptcy Code Section 1202, is limited to performing certain administrative and advisory duties, and to distributing the Debtor's payments under a confirmed Plan.

Chapter 13: titled "Adjustment of Debts of an individual with Regular Income," it is the chapter of the Bankruptcy Code that allows individuals to reorganise their debts and make payments to certain of their Creditors pursuant to a repayment plan. Only individuals with regular income and a prescribed amount of unsecured and Secured Debts (which amounts adjust from time to time) can be Debtors under Chapter 13.

Chapter 13 Trustee: the United States Trustee appoints, under Bankruptcy Code Section 1302 and 28 U.S.C. § 586(b), a standing Chapter 13 Trustee that is responsible for a broad range of duties for all Chapter 13 cases filed within a certain geographical area. The United States Trustee may also appoint a Chapter 13 Trustee for certain individual cases. In Alabama and North Carolina, where the United States Trustee program is not in effect, the US Bankruptcy Court is given statutory authority to appoint a standing Chapter 13 Trustee.

Chapter 15: titled "Ancillary and Other Cross-Border Cases", it is the chapter of the Bankruptcy Code under which a Foreign Representative files a petition for Recognition of a foreign Insolvency case. Chapter 15 is modelled on the Model Law on Cross Border Insolvency. It is principally intended to provide a coherent procedural framework for co-operating with foreign courts in the management of the United States assets of a Debtor involved in insolvency proceedings overseas.

Chapter 22: there is, technically, no such thing; the term is an colloquial reference to two successive Chapter 11 filings by the same Debtor (11 x 2 = 22).

Chapter 33: there is, technically, no such thing; the term is an colloquial reference to three successive Chapter 11 filings by the same Debtor (11 x 3 = 33).

Charge: Security Interest given over an asset that gives the Secured Party the right to have the particular asset and its proceeds of sale applied to the discharge of the debt in question. A Charge does not transfer ownership; it is a Lien on the asset.

Chargee: another named for a Secured Party.

Chargor: a company or person (usually a Borrower or Guarantor) who grants a Charge or other Security Interest in favour of the applicable Secured Parties pursuant to a Security Agreement. Also sometimes known as a pledgor.

Cherry Picking: an annual seasonal activity occurring in certain agricultural areas around the world. In the restructuring context, the term refers to the ability of an Insolvency officer to choose which obligations of the Insolvent company it accepts and which it disclaims, (i.e., he or she "cherry picks" the good ones). In the US context, limited to assuming or rejecting Executory Contracts and Unexpired Leases.

Chief Executive Officer: the highest-ranking executive officer of a company, in charge of managing the day-to-day affairs of a company, subject to direction and oversight from the Board of Directors.

Chief Restructuring Officer: a senior executive officer that is hired, normally from the outside, to manage the restructuring of a company. It is often a senior professional from a Turnaround Firm.

Chinese Wall: an information barrier used within a firm or business to separate and isolate people who receive confidential information from disclosing such information to members of a different part of the firm or business. This is a way of avoiding conflict of interest problems. Also known as an Ethical Wall. By coincidence, there is actually a large wall in China.

CINET: Credit Information Network; a commercial institution that maintains a credit information database for the benefit of financial institutions in Kuwait, providing credit information through subscription-based services.

Circuit: the geographic area within the US over which a Circuit Court presides, which contains within it a number of District Courts.

Circuit Court: a federal court of appeal for a particular Circuit. There are 12 Circuits and thus 12 Circuit Courts within the United States. The Circuit Courts sit below the United States Supreme Court and above the District Courts within each Circuit. The Circuit Court hears appeals from the District Courts and the BAPs located within the Circuit.

Claim: as broadly defined in Bankruptcy Code Section 101(5), "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured."

Claim Agent: in the US, a service provider (not generally considered a Professional) hired by the Debtor with approval from the US Bankruptcy Court to handle the administrative duties involved with the filing and organizing of Proofs of Claim and Proofs of Interest. The Claim Agent may also perform duties related to preparing Schedules, noticing Parties in Interest of various happenings in the case and soliciting and tallying votes on a Plan.

Claim Estimation: an alternative means of determining the allowed amount of a Claim, where court proceedings to actually fix or liquidate the Claim may not be feasible. Bankruptcy Code Section 502(c) allows a US Bankruptcy Court to estimate for purposes of allowance "(1) any contingent or unliquidated claim, the fixing or Liquidation of which, as the case may be, would unduly delay the administration of the case; or (2) any right to payment arising from a right to an equitable remedy for breach of performance." There are no set procedures for an estimation. Depending on the circumstances, an estimation may take the form of an arbitration, or full-blown trial on the merits, or anything else deemed appropriate by the US Bankruptcy Court. The term may also be used to describe the process of establishing a ceiling on the amount of a Claim but not actually allowing the Claim.

Claim Objection: an objection filed in the US Bankruptcy Court to a Proof of Claim for the purpose of conforming the Claim asserted in the Proof of Claim to the liability, in amount or kind, believed to be owed by the Debtor. The objection may seek, among other things, to disallow the Claim in full, to reduce the Claim, to fix the Claim in a sum certain, or to reclassify the Claim.

Claim Register: the official list of Proofs of Claim that have been filed with the US Bankruptcy Court or, where permitted, the Claim Agent. Unless the Claim Agent has been authorised to maintain the Claim Register, it will be maintained by the Clerk of the US Bankruptcy Court.

Claims Process Order: an Order granted by a Canadian court that outlines the claims process to be used in CCAA proceedings. See also CCAA Claims Process.

Claims Trading: the buying and selling of Claims in Bankruptcy.

Class: in the US Bankruptcy context, the term refers to a type/category of Claims or Interests under a Plan. Claims or Interests are divided into Classes for purposes of voting on and receiving distributions under a Plan. Pursuant to Bankruptcy Code Section 1122, generally only "substantially similar" Claims or Interests may be put in the same Class. In the class action context, the term refers to a large group of Entities having common legal claims, and on whose behalf a named plaintiff or representative will bring a class action lawsuit. In the context of English law Schemes of Arrangement, the Creditors and members are divided into different Classes for the purpose of voting on the Scheme of Arrangement. The term has been and continues to be the subject of a significant amount of case law but generally refers to a category of persons whose rights are not so dissimilar to make it impossible for them to consult together with a view to their common interest. Rights rather than interests govern the determination of the Class, although the rights need not be identical. Determining the composition of a Class in a Scheme of Arrangement can be one of the biggest problems in its implementation.

Clawback: a fundamental feature of most international Insolvency regimes, permitting the applicable trustee or Insolvency practitioner of the Debtor to set aside certain transactions prejudicing the estate in the run up to Insolvency, such as Transactions at an Undervalue, Preferences/Preferential Transfers and Fraudulent Transfers (together "Suspect Transactions"). Needs to be analysed on a jurisdiction-by-jurisdiction basis. In the context of Clawback relating to Italian companies in a State of Insolvency, see *Revocatoria Fallimentare*. In US Bankruptcy, if a Creditor receives assets or payments from a Debtor on account of an Antecedent Debt during the 90-day period (or one year in the case of Insiders) prior to the date the Debtor files a Petition (see Preference Period), or any entity obtains a Fraudulent Transfer from the Debtor within the requisite time period prior to the Petition Date, a US Bankruptcy Court can require the return of those assets or payments that are determined to be Preferential Transfers or Fraudulent Transfers. This is known as the US

Bankruptcy Court exercising its "clawback powers." The Creditor may be able to assert a defence against a Preferential Transfer, such as by demonstrating that it gave "new value" to the Debtor in exchange for the assets or payments received or that the Debtor made the payment in the Ordinary Course of Business. Additionally, in connection with a Final Fee Application, the US Bankruptcy Court can Clawback fees and expenses that were previously awarded to Professionals on an interim basis.

Cleansing: in the context of distressed debt trading during a restructuring, the process of making price sensitive information (see MNPI) publicly available so that all parties can then trade on the basis of such information.

CMBS: see Asset-backed Security.

CM/ECF: the acronym for the Case Management/Electronic Case Filing (CM/ECF) system, which allows for filing and accessing US Bankruptcy Court documents over the Internet. See PACER.

Codebtor: although this term is not defined in the Bankruptcy Code, it generally means an entity that is liable with the Debtor on a Claim of a Creditor against the Debtor. The Codebtor can be liable with the Debtor with respect to either an Unsecured Claim or a Secured Claim. See Bankruptcy Code Sections 509, 1301.

Codebtor Stay: Bankruptcy Code Sections 1201 and 1301 impose stays on actions to collect certain categories of Debts from people that have obligated themselves on Debts incurred by, and for the benefit of, the Debtor. The purpose of this stay is to prevent the Debtor from feeling indirect pressure (e.g., if Creditors go after friends and family of the Debtor) to pay Creditors for Debts the collection of which would otherwise be stayed when the Debtor filed for Bankruptcy relief.

Collateral: assets of a Borrower or any other party that secure the Borrower's (or other party's) obligations under the applicable credit documents in a Secured Debt financing.

Collateral Act: Luxembourg Act of 5 August 2005 on financial collateral arrangements, as amended.

Collateral Agent: in a Secured Debt financing, the agent that is responsible for holding any possessory Collateral in its vault, and to whom, on behalf of all the Secured Parties, all Security Interests in Collateral will be granted. Also known as Security Agent.

Come-Back Clause: a clause usually included in an Initial Order that permits an interested party to return to the Canadian court within a specified time frame to seek to amend or vary the Initial Order or seek any other relief. This clause is particularly important where the initial CCAA application was made without notice to interested parties. A comparable provision is also typically included in Orders of a Canadian court that appoint a Receiver.

Comfort Order: an Order that a party may request from the US Bankruptcy Court granting authorisation to take an action that, technically, does not require court approval. For instance, a Creditor may seek a Comfort Order from the court affirming the Creditor's belief that the Automatic Stay no longer prevents such Creditor from taking some action. Many courts disfavour Comfort Orders and will decline to issue them.

COMI: acronym for Centre of Main Interests.

COMI Shift: the process used by restructuring professionals to migrate or move a company's COMI from a jurisdiction with less favourable Insolvency laws and formal processes to a jurisdiction with more favourable conditions for restructuring or (e.g., if acting for a sponsor or Borrower) vice versa. COMI Shifting to the UK has been common, in particular to implement a Scheme of Arrangement. Financing documentation will customarily contain a covenant preventing COMI Shifting. Countering the threat of COMI Shifting to France is one of the reasons why the Double Luxco Structure was devised.

Comity: the doctrine under which courts in the United States and Canada recognise foreign judgments. Comity can play an important role in Chapter 15 proceedings and proceedings under Part IV of the CCAA.

Commercial Mortgage Regulations: the Commercial Mortgage Regulations in the Kingdom of Saudi Arabia, promulgated under Royal Decree No. M/75 dated 21/11/1424H., governing security over movable property and enforcement thereof before the Board of Grievances; see Board of Grievances.

Commissaire: in Luxembourg, a *Commissaire* is an official (administrator) appointed when a company is in administration *(Gestion Contrôlée)*. The court appoints one or two *Commissaires* in order to oversee the management of the company and to prepare a reorganisation plan or a plan for the distribution of the company's assets.

Commissario Giudiziale: the public officer appointed in a *Concordato Preventivo* process who supervises the administration of the Debtor's assets and the management of its business. The procedure for dismissing and replacing the officer is the same as that applying to the *Curatore Fallimentare*; they have similar responsibilities including, among other things, monitoring management, preparing a report on the circumstances of the company's distress and providing advisory services relating to the *Omologazione* of the *Concordato Preventivo*. See also *Commissario Liquidatore* and *Commissario Straordinario*.

Commissario Liquidatore: the public officer appointed in a *Liquidazione Coatta Amministrativa* process who carries out all the winding-up transactions, acting on the instructions of the authority supervising the winding-up and under the control of the supervisory committee. The functions of the *Commissario Liquidatore* in an *Amministrazione Straordinaria*, are carried out by the *Commissario Straordinario*.

Commissario Straordinario: the public officer appointed by the Minister of Industry in an *Amministrazione Straordinaria*. The Minister of Industry can appoint up to three officers in extraordinary or complex cases. The management of the company and its assets can be assigned to the *Commissario Straordinario* in the judgment declaring the State of Insolvency or pursuant to the decree of the *Tribunale Fallimentare* (Italian bankruptcy court).

Companies' Creditors Arrangement Act: Canada's federal reorganisation legislation that allows financially troubled companies to restructure themselves through a formal plan of compromise or arrangement. The CCAA can be used to stay non-Creditors, Secured Creditors and Unsecured Creditors while restructuring the Debtor's Secured Debt and unsecured debt, and it can be used in conjunction with corporate statutes to restructure equity. The practical aspects of CCAA proceedings are, after its commencement, similar to Chapter 11 proceedings. CCAA proceedings are commenced by the issuance of an Initial Order by the Canadian court upon an initial application brought by the Debtor or, in rare cases, a Creditor. The initial CCAA application is brought in the Canadian court that is most appropriate according to the CCAA (i.e. typically the province of the head office or chief place of business of the Debtor). A Debtor will be a company to which the CCAA applies if: (i) it is a Canadian company, has assets in Canada or carries on business in Canada; (ii) it is Insolvent or has committed an act of bankruptcy (a defined term in the BIA) and (iii) it has outstanding indebtedness in excess of CA$5 million.

Companies House: the corporate registry for companies incorporated under the laws of England. Its register includes the incorporation, re-registration and striking-off of companies, the registration of documents that must be filed under company, Insolvency and related legislation, and the provision of company information to the public.

Companies Regs: the Regulations for Companies in the Kingdom of Saudi Arabia, promulgated under Royal Decree No. M/6 dated 22/3/1385H. (20 July 1965), as amended.

Company MAC: another name for a Business MAC.

Company Voluntary Arrangement: an Insolvency procedure under English Insolvency legislation. It involves a restructuring proposal that must be approved by more than 75 per cent by value of the company's Unsecured Creditors present and voting. Its use is limited as it can not bind Secured Parties without their consent.

Compulsory Court Liquidation: an Irish Liquidation procedure supervised by the High Court of Ireland for an Insolvent company. It is also known as "Official Liquidation". It is available for companies registered in Ireland and foreign-registered companies that have their COMI in Ireland. The process can be started by the company, its shareholders or directors or by any Creditor.

Conciliation Proceedings: French proceedings available to companies facing legal, economic or financial difficulties (whether actual or foreseeable) that have not been in a state of *Cessation des Paiements* for more than 45 days. Upon request of the company, the president of the commercial court appoints a *conciliateur* to facilitate negotiations between a company and its Creditors. Conciliation Proceedings last a maximum of five months and are confidential unless the parties decide to seek ratification of the restructuring from the commercial court whose decision will publicise the Conciliation Proceedings and the existence of an agreed restructuring.

Concordat Préventif de Faillite: a rarely used court-supervised reorganisation procedure provided for by Luxembourg law meaning "composition with Creditors", which enables an orderly negotiation with Creditors on petition of the Debtor as long as the Debtor has not ceased payments, and which requires the approval of Creditors representing at least three quarters of the claims.

Concordato Fallimentare: an Italian plan of reorganisation, available after commencement of *Fallimento* proceedings. The plan must be approved by a majority of Creditors by value and requires the support of the Creditors' Committee. If the Creditors are divided into different classes, approval is required from a majority of Creditors by value in a majority of classes. The agreement is binding on all Creditors whose claims arose before the *Fallimento* procedure was opened, including Creditors that did not apply for their claims to be included in the list of approved claims.

Concordato Preventivo: a restructuring tool in Italy, known as a pre-Insolvency composition designed to avoid a Debtor's *Fallimento*. Filing brings about an immediate stay on actions by all Creditors that typically lasts until the end of the procedure. The filing must be supported by a report from an *Esperto* and approved by a majority of Creditors by value (if the Creditors are divided into different classes, approval requires a majority of Creditors by value in a majority of classes) and by the *Tribunale Fallimentare* (Italian bankruptcy court) via the *Omologazione* procedure. Once the plan is approved, the relevant agreement is binding on all Creditors and therefore may be used to Cramdown non-consenting Creditors. The main difference between *Fallimento* and the *Concordato Preventivo* is that, unlike in the case of *Fallimento*, during the *Concordato Preventivo* proceedings the Debtor can continue to administer the assets and run its business. Disposals of any assets without the Italian bankruptcy court's approval are, however, unenforceable vis-à-vis those Creditors whose claims arose before the start of the *Concordato Preventivo*. For some more information on changes to the *Concordato Preventivo* procedure and to Italian Insolvency Law generally, see Latham & Watkins Client Alert No. 1151, "Decree Law No. 78 of 31 May 2010 as Converted by Law No. 122 of 30 July 2010: Additional Changes to Italian Bankruptcy Law" (24 February 2011), available at www.lw.com.

Concurso Culpable: Spanish term for gross negligence or willful misconduct in the creation or worsening of Insolvency by, for example, the company's directors, leading to potential personal liability. There is a presumption as to the existence of gross negligence or willful misconduct when the directors of the company fail to meet their obligation to file for the declaration of Insolvency within two months from the date they become aware (or should have become aware) of the Insolvency of the company (i.e., when the company is not able to regularly meet its due obligations). For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, "Spanish Insolvency Act Changes — Paving the Way for Restructurings" (29 May 2009), available at www.lw.com.

Concurso Mercantil con Plan de Reestructura Previo: see Mexican Pre-pack Proceedings.

Confidentiality Agreement or CA: an agreement in which one party agrees to provide non-public information to the other party and the other party agrees to treat such non-public information as confidential and to not disclose it to third parties except as may be permitted by the agreement.

Confirmation: approval of a Plan by the US Bankruptcy Court pursuant to a Confirmation Order.

Confirmation Hearing: the hearing at which the US Bankruptcy Court considers a Plan and decides to either confirm or disapprove the Plan.

Confirmation Order: the Order entered by the US Bankruptcy Court to evidence its approval and confirmation of the Plan.

Confirmed Plan: a Plan as to which a Confirmation Order has been entered by the US Bankruptcy Court. A Confirmed Plan is not necessarily effective and may have no force and effect until it becomes effective in accordance with the terms of the Plan and the Confirmation Order. See Effective Date.

Conflicts Check: under Bankruptcy Rule 2014, an Application to retain a Professional must be accompanied by a disclosure of the Professional's connections with Parties in Interest. This disclosure supports the requirement of Bankruptcy Code Section 327(a) that Professionals representing the Trustee or Debtor in Possession not hold or represent an interest adverse to the Estate and are Disinterested Persons and the requirement of Bankruptcy Code Section 1103(b) that Professionals representing an Official Committee not represent any other entity having an adverse interest in connection with the case. In this context, a Conflicts Check is a review by a Professional of its client database against a list of material Parties in Interest to determine if the Professional has connections with Parties in Interest that should be disclosed. A failure to conduct an adequate review and to make appropriate disclosures can result in disqualification and denial of payment.

Conflicts Counsel: counsel retained to handle matters with respect to which the client's other counsel has a conflict. For example, if a Debtor hires a particular law firm, and that law firm has a conflict on an issue that arises over the course of the Bankruptcy, the Debtor will retain Conflicts Counsel to deal with that discreet issue so that the Debtor's main counsel is not disqualified from otherwise acting on behalf of the Debtor.

Conservatoir Beslag: a means of pre-judgment "conservatory attachment" under the Dutch Code of Civil Proceedings taking the form, amongst other things, of an attachment of shares, moveable assets, receivables or real estate, which can secure payment by the Debtor in anticipation of an enforceable judgment against it.

Consumer Privacy Ombudsman: a Disinterested Person appointed by the United States Trustee under Bankruptcy Code Section 332 to ensure that private consumer information, referred to as "personally identifiable information" as defined in Bankruptcy Code Section 101(41A), is properly handled in the context of a sale, use or lease of property under Bankruptcy Code Section 363(b)(1)(B) that contains "personally identifiable information."

Contested Matter: a matter that arises in the main US Bankruptcy case, generally upon the filing of a Motion or Application, that is not an Adversary Proceeding. Bankruptcy Rule 7001 provides a listing of matters that are Adversary Proceedings. There is no similar listing of Contested Matters. Bankruptcy Rule 9014 governs Contested Matters. The vast majority of matters that are considered in the typical Bankruptcy case are Contested Matters.

Contingent Claim: a Claim that may be, but is not yet, owed by the Debtor. Although the Debtor's liability may be subject to the occurrence of a contingency as of the Petition Date, it is still a Claim for purposes of the Bankruptcy case, and is most likely a Pre-petition Claim even if the contingency occurs Post-petition.

Contractual Subordination: Subordination that results from contractual provisions (typically in an Intercreditor Agreement) that require certain classes of Creditors to hand over to a senior class of Creditors, under specified circumstances, anything they receive from the Borrower until the senior class is paid in full. Such provisions contractually require the holders of Junior Debt to "Turnover" to a specified class of senior lenders anything they receive until the senior lenders are paid in full and also include Payment Blockage Provisions and Standstill Periods. Note that the holders of Senior Debt cannot effect this type of Subordination without the agreement of the holders of the Junior Debt. Pre-petition Subordination agreements among Creditors that work to Subordinate Creditors' Claims are specifically upheld in Bankruptcy Code Section 510(a), at least to the extent the agreement would be upheld outside of Bankruptcy. See also Intercreditor Agreements. These agreements can Subordinate rights on a variety of fronts, including rights to vote, the priorities under which Creditors are to be paid, etc. It is possible,

however, that Bankruptcy Code Section 1129(b) provides Creditors that have agreed to be Subordinated with an escape hatch, allowing them to get out from under the Subordination in the context of treatment under a Plan.

Controlling Entity: under Russian Insolvency law, the individual or legal entity that controls or has influence over the management of a company during the two years prior to the Insolvency petition and that could become subject to liability for the company's actions. The Controlling Entity could be a shareholder, a beneficial owner or a member of a Liquidation committee and may become subject to secondary liability for payments owed by the company that were made under instruction from the Controlling Entity.

Convenio Anticipado: in Spain, an advanced composition agreement that may be filed at the beginning of the Insolvency proceedings when the Debtor files for Insolvency but must be filed before the expiry of the term for providing proof of claims. It must be agreed in advance by Creditors holding at least 10 per cent or 20 per cent of the total debts depending on the moment of filing. For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, "Spanish Insolvency Act Changes — Paving the Way for Restructurings" (29 May 2009), available at www.lw.com.

Convenio de Conciliación: a restructuring agreement entered into by and among a Mexican Debtor and its Recognised Creditors *(Acreedores Reconocidos)* holding title to more than 50 per cent of the sum of (i) the amount of all unsecured Recognised Claims, and (ii) all claims of those secured Recognised Creditors that enter into such *Convenio de Conciliación*. With judicial approval of the *Convenio de Conciliación* by a Mexican Insolvency Court (i) such *Convenio de Conciliación* will become binding on the Insolvent entity, all unsecured Recognised Creditors, all secured Recognised Creditors party to *Convenio de Conciliación* and all secured Recognised Creditors that are not a party to the *Convenio de Conciliación* if it contemplates payment of their claims in full as provided by the Mexican Insolvency Act; and (ii) the Mexican Insolvency proceeding *(Procedimiento de Concurso Mercantil)* will be terminated.

Conversion: although outside of Bankruptcy, conversion means theft, or a change from one religion to another, in US Bankruptcy, conversion usually refers to a situation in which a case that is proceeding under one chapter of the Bankruptcy Code is converted to one under another chapter of the Bankruptcy Code. In relevant part, conversion of a case under Chapter 11 is governed by Bankruptcy Code Section 1112, conversion of a case under Chapter 7 is governed by Bankruptcy Code Section 707, conversion of a case under Chapter 12 is governed by Bankruptcy Code Section 1208, and conversion of a case under Chapter 13 is governed by Bankruptcy Code Section 1307. A Chapter 9 case may not be converted to one under any other chapter. The effects of converting a case are covered by Bankruptcy Code Section 348. It is important to note that certain cases

may not be converted to different chapters. As noted, Chapter 9 cases may not be converted. Moreover, individual Debtors may not be forced into Chapter 13 or Chapter 11 due to the Thirteenth Amendment of the US Constitution, see e.g. *In re Clemente*, 409 B.R. 288 (Bankr. D.N.J. 2009), and, when a Debtor has acted in bad faith, the Debtor's ability to convert his or her case may also be limited. See e.g. *In re Marrama*, 127 S.Ct. 1105, 166 L.Ed. 2d 956 (2007).

Convert: see Conversion.

Coordinating Committee or CoCom: used in restructurings, in particular where the syndicate of banks and funds under the credit facility is large. The Coordinating Committee acts as the interface between the Borrower and the lenders, looking to negotiate the terms of a restructuring. Members typically include the largest debt holders in the syndicate. Their leader is known as the Coordinator. The Coordinating Committee can't bind the rest of the lenders. Also known as a Creditors' Committee or Steering Committee. For information on loan trading by members of the CoCom and the use of confidential information by the CoCom members, see Latham & Watkins Client Alert No. 1216, "New LMA Guidelines on Transparency and the Use of Information in Debt Trading" (18 July 2011), available at www.lw.com.

Coordinator: the lead institution on a Coordinating Committee.

Core Business: the business operations of a Debtor that provide the foundation for its reorganisation, as opposed to other business operations that are not integral to the reorganisation and are often sold or closed in conjunction with the reorganisation of the Core Business.

Core Proceeding: proceedings that implicate an issue that touches on the raison d'être of a US Bankruptcy, and that fall into the US Bankruptcy Court's "arising in" and "arising under" Bankruptcy Jurisdiction (but not the "related to" jurisdiction). Core Proceedings are listed in 28 U.S.C. § 157(b)(2). Notably, however, the list is not exclusive, and matters other than those listed in the statute may be considered to be core. A US Bankruptcy Court may enter Orders and judgments in Core Proceedings.

Corporate Benefit: a requirement under certain legal regimes in Europe that a company must derive an actual benefit, consideration or advantage from any transaction in order for it to be lawfully entered into without its officers risking personal liability or a prison sentence or making the transaction void. This is particularly the case for decisions involving the granting of Guarantees or Security Interests with respect to the liability of a third party. The extent to which a company can take into account the benefits derived by other members of its group when assessing the existence of Corporate Benefit differs between jurisdictions. The Corporate Benefit regime applicable to each relevant jurisdiction will in particular be reflected in any Guarantee limitation language.

Court Liquidation: an Irish Liquidation procedure supervised by the High Court of Ireland for an Insolvent company. It is also known as "Official"

or "Compulsory" Liquidation. It is available for companies registered in Ireland and foreign-registered companies that have their COMI in Ireland among others. The process can be started by the company, its shareholders or by any Creditor.

Cramdown: in the US, the confirmation of a Chapter 11 Plan by a US Bankruptcy Court over the rejection of one or more Classes of Impaired Claims or Interests, provided that the Plan satisfies other basic requirements, as set forth in Bankruptcy Code Section 1129(b). The confirmed Plan will bind all Creditors and Equity Security Holders, even those who vote against the Plan. Hence the descriptive phrase — the plan proponent "crams down" the Plan on dissenters. This is a key tool for Debtors and a major reason that some companies restructure in Bankruptcy, rather than out of court. Outside of the US the term means different things in different jurisdictions but broadly speaking, it is used to describe a process for forcing or imposing a restructuring proposal on dissenting or non-consenting Creditors or other stakeholders.

Cramup: in the US, used broadly to describe any treatment of a Class of senior or Secured Claims that is opposed by the holders of such Claims and is proposed in a Plan that is not dependent on the accepting votes of such holders but instead on the accepting votes of one or more Classes of junior or Unsecured Claims or even Interests. In the context of Reinstatement, where the Class of senior or Secured Claims is not Impaired, it means forcing upon the holders of such Claims a continuation of Pre-petition terms, generally because they have become below-market and are more favourable to the Debtor than terms otherwise then available. In the context of Impaired treatment of a Class of Secured Claims, it is sometimes used instead of the term Cramdown because the debt is up the Priority ladder instead of down, and has the same meaning as Cramdown.

Créancier Privilégié: the term for a Preferential Creditor in Luxembourg law. The Preferential Creditor enjoys a Super-priority over other Secured Creditors, in addition to a general Priority over the common body of Creditors *(masse des créanciers)*, such as the courts and Insolvency officials, employees and the tax and social security authorities. Preferential Creditors have either a "special" Preferential Claim over a specific asset of the Debtor or a "general" Preferential Claim over all of the Debtor's assets. In general, a Preferential Creditor whose Lien relates to a specific asset must be satisfied from the sales proceeds of this asset whereas a Preferential Creditor with a general Lien can be satisfied from the sales proceeds of any assets not subject to a special Preferential Claim/Lien and from any surplus of the sale of assets subject to a special Preferential Claim/Lien.

Créancier Titulaire d'une Sûreté: a general expression in Luxembourg for a Secured Creditor, of which there are three types: the Preferential Creditor *(Créancier Privilégié)*, the judgment lien creditor *(Créancier Titulaire d'une Sûreté Judiciaire)* and the contract lien creditor *(Créancier Titulaire d'une Sûreté Conventionelle)*.

Créancier Titulaire d'une Sûreté Conventionelle: the term for a Secured Creditor in Luxembourg that holds a Lien arising from an agreement (such as a pledge or mortgage) and which enjoys a general Priority over the common body of Creditors *(masse des créanciers)* but which may rank behind a Preferential Creditor *(Créancier Privilégié)*. In general, a court may declare the agreement void if it was concluded during the Hardening/Suspect Period *(Période Suspecte)*. Under the Luxembourg Collateral Act, a Secured Creditor in respect of Collateral that takes the form of financial instruments or claims is protected against core Insolvency provisions and has a *Droit de Rétention* in respect of the Collateral. In addition, under the Luxembourg Collateral Act, certain Preferential Claims may not be enforceable against this type of Secured Creditor.

Créancier Titulaire d'une Sûreté Judiciaire: the term in Luxembourg for a Secured Creditor holding a Lien granted by court order for conservatory purposes. A judgment lien is a conservatory measure similar to a Creditor's process in the form of conservatory attachment (*saisie conservatoire*) but is non-possessory in that the Debtor retains the right to physically possess and use the Collateral. Like a *Créancier Titulaire d'une Sûreté Conventionelle*, this type of Creditor normally has a general Priority over the common body of Creditors but may rank after a Preferential Creditor *(Créancier Privilégié)*.

Credit Bid: under Bankruptcy Code Section 363(k), in the context of a 363 Sale — but, as some recent cases have instructed, not in the context of a sale under a Chapter 11 Plan, see e.g. *In re Philadelphia Newspapers, LLC,* 599 F.3d 298 (3rd Cir. 2010) — the holder of a Secured Claim is able to bid to purchase the Debtor's assets with its Secured Claim. In other words, it is a bid by a Secured Creditor in a US Bankruptcy sale whereby the Secured Creditor offsets the allowed amount of its Secured Claim against the price at which it would purchase assets. For more information on the view of US courts on asset sales in US Bankruptcy, see Latham & Watkins Client Alert no.1215, "Seventh Circuit Disagrees With *Philadelphia Newspapers* and Finds That Credit Bidding Required for Asset Sales in Bankruptcy Plans" (18 July 2011), available at www.lw.com.

Credit Crunch: come on, where have you been?

Credit Default Swap: a contract, using ISDA form documentation, whereby one party agrees to pay the other party if certain catastrophic "credit events" (such as a failure to pay, bankruptcy or, in Europe only, a restructuring) occur under a debt undertaking of an obligor. Can sometimes cause a sticking point in a restructuring negotiation as a class of Creditors could fracture around those with and those without Credit Default Swaps. For further information on Credit Default Swaps and credit events in the context of restructuring, see Latham & Watkins Client Alert No. 1152, "The Impact of CDS on Restructurings" (24 February 2011), available at www.lw.com.

Credit Enhancement: the improvement of the credit quality of a company or its securities by employing resources, financial instruments or the credit of another entity to support such credit quality. Common methods of Credit Enhancement include Guarantees, Letters of Credit, surety bonds, reserve accounts, cash Collateral accounts and monoline bond insurance.

Crediti Prededucibili: pursuant to Italian Insolvency Law, super-senior credits are those which arise on the occasion of, or in relation to, the Insolvency procedures envisaged in the Italian Insolvency Law or that are named super-senior in special provisions of law in order to give them a specific Priority. These claims are given Priority with respect to the distribution of proceeds arising from the Liquidation of the assets. Super-senior credits are satisfied with the proceeds of the Liquidation of movable and immovable assets, excluding the portion of the proceeds obtained from the Liquidation of pledged and mortgaged assets intended for Secured Creditors. Super-senior credits arising during the *Fallimento* procedure that are liquid and collectable, and whose preference and amount are undisputed, may be met outside the distribution procedure if the assets are presumed to be sufficient to satisfy all the holders of such claims. If the assets are insufficient, they must be distributed in accordance with the criterion of ranking and proportionally and in the order provided by law. There has recently been a significant change to the relevant legal framework concerning super-senior credits: in particular, super-seniority is now granted to claims arising from new finance in the context of a *Concordato Preventivo* or an *Accordo di Ristrutturazione*, providing certain conditions have been met (e.g., that the new finance was made available in order to obtain the Italian Insolvency Court's *Omologazione* of an *Accordo di Ristrutturazione* or to allow the filing of a petition for admission to the *Concordato Preventivo* procedure). The fees paid to the *Esperto* or [the shareholder's loan (up to 80 per cent of their total amount)] are treated as super-senior.

Creditor: anyone or anything that is owed a debt by another. In Bankruptcy in the US, it is an entity that holds a Claim against the Debtor.

Creditors' Committee: a committee that is comprised of representatives of a group of Creditors, usually of the same type. In a Chapter 11 case, the committee can either be an Official Committee of Unsecured Creditors, which is put together by the United States Trustee pursuant to Bankruptcy Code Section 1102, or an unofficial or Ad-hoc Committee (see above), which is made up of Creditors voluntarily coming together to form a committee. The powers and duties of Official Committees are prescribed by Bankruptcy Code Section 1103. Additionally, Professionals hired by Official Committees are reimbursed by the Debtor's Estate. In a Chapter 7 case, Bankruptcy Code Section 705 provides that certain Creditors can, at the 341 Meeting, elect a committee of Creditors. Under English Administration, a Creditors' Committee of at least three and no more than five elected Creditors can assist the Administrator in performing his duties via regular meetings and for English Liquidation,

see Liquidation Committee. In Italy, the Creditors' Committee plays a significant role in the *Concordato Preventivo*. See *Curatore Fallimentare* regarding the Creditors' Committee appointed in Italian *Fallimento* proceedings (in *Liquidazione Coatta Amministrativa* and *Amministrazione Straordinaria*, the supervisory committee takes over the powers of the Creditors' Committee). For Creditors' Committee in Norway, see the Norwegian terms *Gjeldsnemnd* and *Kreditorutvalg/Bostyre*. In French *Sauvegarde* or *Redressement Judiciaire* proceedings for large companies or upon request of the company, a restructuring plan proposal must be submitted to three separate Creditors' Committees made up of: main trade Creditors, lenders holding bank debt and other Creditors (other than main trade Creditors or bondholders), and bondholders (see Bondholders' Committee). Each Creditors' Committee has six months from the opening of the relevant proceedings to adopt in identical terms (by a majority of its members representing two thirds of the Debtor's total debt) a restructuring plan. See also Coordinating Committee.

Creditors Voluntary Liquidation: a type of English Insolvent Liquidation proceeding approved by a company's Creditors. It is an alternative form of voluntary Liquidation where a Members Voluntary Liquidation cannot apply because the company is not solvent. This is also a type of Irish Liquidation proceeding, which is out of court and approved by a company's Creditors. It is initiated by the directors who call a members' meeting and a Creditors' meeting. The members then pass a resolution to wind up the company and appoint a liquidator. The Creditors, at their meeting, can vote to replace the liquidator with one of their choosing. Creditors' Voluntary Liquidation is the most commonly used insolvency procedure in Ireland because it is usually quicker and less expensive than a Court Liquidation.

Critical Vendors: a Creditor that supplies the Debtor with goods or services that are essential to the Debtor's business, and for which there is no ready or economic alternative. Although Bankruptcy Code principles prohibit the payment of Pre-petition Claims except pursuant to a Plan, US Bankruptcy Courts generally permit a Debtor in Chapter 11 (and permit a Trustee in Chapter 7 who must continue to operate a business pending Liquidation) to pay certain Pre-petition Claims held by Creditors who are "critical vendors." The Doctrine of Necessity is a usual basis for such permission. In Canada, a vendor designated by a Canadian Court under the CCAA as a "critical supplier" must continue to supply on existing terms or terms set out by the Canadian Court. Post-Filing amounts owed to critical suppliers under the CCAA may be secured by a court-ordered charge and such charge does not cover Pre-Filing amounts.

CRO: acronym for Chief Restructuring Officer.

Cross Acceleration: a Default that occurs when other indebtedness of the Borrower or in the Borrower's group in excess of an agreed threshold is Accelerated. Seen in bond world but not typically in loan world. Contrast to Cross Default.

Cross-Border Insolvency Regulations 2006: regulations implementing the Model Law in Great Britain (the CIBR(NR) implements the Model Law in Northern Ireland). Together, the regulations provide direct access for Foreign Representatives to the courts of the UK. The regulations also provide for Recognition of two types of insolvency proceedings: Foreign Main Proceedings and Foreign Non-Main Proceedings.

Cross-Border Insolvency Regulations (Northern Ireland) 2007: regulations implementing the Model Law in Northern Ireland.

Cross-collateralisation: outside of Bankruptcy in the US, and in the context of borrowing money, Cross-collateralisation generally occurs when the same assets are used to secure more than one loan. In US Bankruptcy, Cross-collateralisation typically occurs in the context of DIP Financing when, in exchange for the Post-petition loan, the Debtor elevates the DIP Lender's Pre-petition Claim to an Administrative Claim or Super-priority Administrative Claim, or secures the Pre-petition Claim with Post-petition Liens on assets not otherwise securing the Pre-petition Claim. Cross-collaterisation is disfavoured by US Bankruptcy Courts and subjected to heightened scrutiny.

Cross Default: a Default which occurs when other indebtedness of the Borrower or in the Borrower's group in excess of an agreed threshold is in default whether or not the relevant Creditors Accelerate. So basically the Creditors can benefit from the occurrence of an Event of Default with respect to more stringent obligations agreed in other credit documentation. Contrast to Cross Acceleration.

Cross Dressing: outside the scope of this glossary.

Crystallisation: the process under English law whereby a Floating Charge becomes a Fixed Charge over the assets to which it relates. Crystallisation can take place as a result of a notice (e.g., after an Event of Default) or, in some circumstances, may occur automatically on an Event of Default or other agreed event.

Curator/Curateur: an Insolvency trustee appointed by the court usually within one working day after the Debtor has been declared Insolvent under Dutch *Faillissement* proceedings (*Curator*) or Luxembourg Faillite proceedings (*Curateur*). The *Curator/Curateur* is usually a lawyer experienced in Insolvency law, who has the power and authority to dispose of the Insolvent Debtor's assets in order to liquidate the Debtor's estate for the benefit of the Debtor's Creditors.

Curatore Fallimentare: the public officer in Italy appointed by the *Tribunale Fallimentare* (Italian bankruptcy court) and charged with administering a Debtor's *Fallimento*. There is a specific category of professionals who may be designated to act as *Curatore Fallimentare*. The *Curatore Fallimentare* is responsible for the management of the Insolvent's assets and performs all the activities of the *Fallimento* procedure under the supervision of the *Giudice Delegato* (Italian bankruptcy judge) and of the Creditors' Committee which is appointed

by the judge. The Creditors' Committee provides a qualitative and quantitative evaluation of claims, assessing whether the claims can be repaid. See *Commissario Giudiziale, Commissario Liquidatore* and *Commissario Straordinario*.

Cure: the obligation of a Debtor to remedy a Default under an Executory Contract or Unexpired Lease, by payment or performance as provided in Bankruptcy Code Section 365(b), as a condition to Assumption.

CVA: an acronym for Company Voluntary Arrangement.

CVL: an acronym for Creditors Voluntary Liquidation.

D&O Policy: an insurance policy covering claims made by shareholders or Creditors against directors and officers of a corporation for alleged wrongful or improper conduct or acts. When the corporation is a Debtor in US Bankruptcy, a D&O Policy typically expires upon the Effective Date of a Plan, unless the Debtor has purchased a Tail Policy.

Date of the Initial Bankruptcy Event: in respect of a Debtor under the BIA, means the earliest of the date of filing or making: (i) an Assignment in Bankruptcy; (ii) a Proposal; (iii) an NOI; (iv) the first application for a Bankruptcy Order; or (v) CCAA proceedings.

Death Trap: a provision in a Chapter 11 Plan in which the Creditors or Equity Security Holders in a junior Class of Claims or Interests are required to vote in favour of such Plan as a pre-condition to receiving a small distribution that the Class would not otherwise receive under the Bankruptcy Code. If the Class votes against the Plan, the Class gets nothing under the Plan. Since the small distribution usually derives from the distribution entitlement of a senior Class of Creditors, the support of the senior Class is required.

Debenture: In the UK it is the name given to a Security Agreement whereby a company creates Fixed Charges and/or a Floating Charge over the whole or substantially the whole of its assets and undertakings.

Debt Capacity: used to describe the amount of debt that a Borrower can repay in a timely manner (from available means or resources) without jeopardising its financial viability. Also used to describe the total amount of debt that a Borrower can incur by virtue of being required to comply with Negative Covenants or other restrictions such as in its constitutional documents.

Debt for Equity: the process whereby a debt is extinguished in exchange for an equity Interest. Used to re-structure a company's balance sheet in a restructuring.

Debtor: anyone or anything that owes a debt to another. In US Bankruptcy, it is the person or Municipality concerning which a case under the Bankruptcy Code has been commenced. Bankruptcy Code Section 109 describes who may be a Debtor under each chapter of the Bankruptcy Code.

Debtor in Possession: a Debtor that has remained in possession of its Bankruptcy Estate (as opposed to having, for instance, a Chapter 11 Trustee appointed to run the Bankruptcy Estate). In Chapter 11, a Debtor in Possession has most, if not all, of the powers that a Trustee of the Debtor's Estate would have if the Trustee was in possession of the Estate. The term is also used in Chapter 12.

Declaration: a filing made in support of a particular request for relief in which an individual attests to or verifies the facts set forth in the filing, often as a substitute for live testimony. A declaration is authorised in federal courts by 28 U.S.C. § 1746 as an alternative to an affidavit. Unlike an affidavit that is sworn to and signed before a notary, a declaration is an unsworn statement, but still made under penalty of perjury.

Declared Default: an Event of Default that has resulted in Acceleration or the issuing of a notice placing the debt on demand. Often this is used as the trigger to allow enforcement against Collateral rather than the mere occurrence of the Event of Default itself.

Decree 57 / D57: Dubai Decree No. 57 for 2009, as amended by Dubai Decree No. 11 for 2010; a law issued by the Emirate of Dubai creating an insolvency regime modeled on international best practices, including a global stay / moratorium, "cram up / down" of dissenting classes, creation of a Creditors' Committee and procedures for the company to obtain rescue financing secured by liens with Priority over pre-existing liens, which is applicable exclusively to Dubai World and its subsidiaries. For more information on Decree No. 57 and why it was issued, see Latham & Watkins Client Alert No. 972, "New Dubai Decree Relating to any Future Restructuring of Dubai World and its Subsidiaries" (8 January 2010), available at www.lw.com.

Decree 57 Tribunal: A special tribunal comprised of judges of the DIFC Courts appointed to conduct proceedings under Dubai Decree No. 57 for 2009, as amended by Dubai Decree No. 11 for 2010; see Decree 57.

Deemed Trust: a trust established by legislation to be in effect even though there may not be any actual assets or monies in trust. For example, in Canada, the Canada Revenue Agency in a bankruptcy or insolvency proceeding has a deemed trust covering certain employee-related tax withholding liabilities (i.e. source deductions) that rank ahead of Secured Creditors.

Default: the beginning of trouble. The terms and conditions in bond offerings, Indentures and credit agreements generally have three stages of trouble: the Default, the Event of Default and Acceleration. At stage one, the Default, the issuer or Borrower has violated some provision of the terms and conditions of the issue, the Indenture or credit agreement. Left uncured for a specified period of time, together (in some cases) with notice from a disgruntled bondholder or lender (or the requisite majority thereof), a Default will mature into an Event of Default (and the story continues in that definition). Also known as a Potential Event of Default

and when adopting this term, Default can therefore be used to describe both Potential Events of Default and Events of Default just to confuse you further.

Default Interest: the extra interest accruing on due but unpaid amounts under a credit agreement. Default Interest accrues on all such overdue amounts at the regularly applicable rate plus (in Europe typically) 100-200 basis points. Contrast this to practice in the US where Default Interest can accrue on all outstanding amounts (whether or not overdue) (often at 200 basis points over) following the occurrence of any Event of Default (i.e., it is charged on the total loans rather than just amounts that have not been paid on the date they were due). Note that the ability of lenders to recover Default Interest may be subject to local Insolvency restrictions in different jurisdictions.

Defaulting Lender: name used to describe a lender that fails to fund, rescinds the credit agreement or related documentation, or becomes subject to Insolvency proceedings. The consequences of becoming a Defaulting Lender vary between credit agreements but can include loss of entitlement to any commitment fee, inability to vote on Amendments and waivers and/or being caught by a Yank-a-Bank.

Deficiency Claim: under Bankruptcy Code Section 506(a), an Undersecured Claim is bifurcated into two portions — a Secured Claim in the amount of the value of the Collateral that secures the Claim, and a Deficiency Claim, which is an Unsecured Claim for the remaining amount of the Claim that is not covered by the value of the Collateral.

Delay and Pray: a variation on the predominant means of restructuring in some countries, in which the maturities of debt instruments are extended through out-of-court agreements, without deleveraging of the company or formulation of a business plan and financial projections that would lead to repayment or refinancing of debts; see Amend and Extend and Amend and Pretend.

De Novo Review: an appellate court may review certain matters decided by the US Bankruptcy Court de novo, or anew. When a higher court reviews a US Bankruptcy Court's decision de novo, it does not give the US Bankruptcy Court's findings and conclusions any deference.

Derivative Claim: a claim that belongs to a Creditor or Equity Security Holder of the Debtor but is based upon an injury that is derived from the Debtor. In US Bankruptcy, such claims actually belong to the Debtor. One court explained: "Whether a particular state cause of action belongs to the estate depends on whether under applicable state law the debtor could have raised the claim as of the commencement of the case. As part of this inquiry, we look at the nature of the injury for which relief is sought. If a cause of action alleges only indirect harm to a Creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. Conversely, if the cause

of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate." *Schertz-Cibolo-Universal City v. Wright (In re Educators Group Health Trust)*, 25 F.3d 1281, 1284 (5th Cir. Tex. 1994). It is worth noting that Derivative Claims can be dealt with through a Chapter 11 Plan — indeed it is common for the Debtor to release such claims through a Plan, but the release can be, and normally is, the subject of extensive negotiations with other Parties in Interest.

Desequilibrio Patrimonial: in Spain, the reduction of net asset value to below half the value of a company's share capital as a result of accumulated losses. In such circumstances, the directors of the company must call for a shareholders' meeting to dissolve the company or file for Insolvency, unless the share capital of the company is adequately increased. For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, "Spanish Insolvency Act Changes — Paving the Way for Restructurings" (29 May 2009), available at www.lw.com.

Designation: disqualification of a Creditor or Equity Security Holder for purposes of voting on a Chapter 11 Plan pursuant to Bankruptcy Code Section 1126(e), where the vote of such party was not cast, solicited or procured in good faith. See e.g. *In re DBSD North America, Inc.*, 421 B.R. 133 (Bankr. S.D.N.Y. 2009).

Desktop Valuation: valuation of a business based solely on information supplied by the company, which has not involved any Market Testing.

DIFC: Dubai International Financial Centre; a self-administered free trade zone in Dubai with its own insolvency laws and regulations, which mirrors English insolvency law and is applicable to companies organised in the DIFC, and an independent court system that conducts proceedings in English.

DIFC Insolvency Law, DIFC Law No. 7 of 2004: the law governing insolvency proceedings in the Dubai International Financial Centre, which mirrors English insolvency law and is applicable to companies organised in the DIFC; see DIFC.

Dinero Fresco: means 'fresh money' and refers to the credits granted to a Debtor in the context of a refinancing agreement (*Acuerdo de Refinanciación*) which constitute new cash flow for the Debtor. Half of the *Dinero Fresco* shall be considered as a claim against the Debtor's estate (crédito contra la masa) ranking in the *Listado de Clasificación de Créditos* prior to any other debts in an Insolvency scenario.

DIP: see Debtor in Possession.

DIP Financing: shorthand for Debtor in Possession financing, which is financing arranged, pursuant to Bankruptcy Code Section 364, for a Debtor for the period during which it is in the Chapter 11 process. DIP Financing is also contemplated under the CCAA and is common in the

CCAA process. Notably, Claims for principal, interest and fees under a DIP Financing are typically allowed as Super-priority Claims. In addition, they are secured by Liens on any Unencumbered assets, by junior Liens on any assets subject to prior Liens, and in certain situations by Priming Liens on any assets subject to prior Liens. Many other jurisdictions have looked at implementing a similar concept, but it is not yet common in Europe. See Latham & Watkins Client Alert No. 890, 'DIP' Lending on Its Way into the United Kingdom; Other Significant Changes to UK Corporate Insolvency Laws Proposed for Consultation" (30 June 2009), available at www.lw.com.

DIP Lender: the lender or lenders who agree to provide DIP Financing to a Debtor.

Direct Claim: a claim that belongs solely to an individual Creditor or Equity Security Holder, and exists "independently of claims owned by the [Debtor]…" *Medlin v. Wells Fargo Bank, N.A. (In re I.G. Service, Ltd., et. al.)*, 2008 Bankr. LEXIS 818, at *12 (Bankr. W.D. Tex. Mar. 19, 2008) (Clark, B.J.); See also *Seven Seas Petroleum, Inc.*, 522 F.3d 575 (5th Cir. 2008). In other words, a Direct Claim does not become Property of the Estate and may not be asserted by (or settled by) the Debtor. See Derivative Claim.

Directions Hearing: a hearing pursuant to Dubai Decree No. 57 for 2009 at which the Decree 57 Tribunal considers approval of the Debtor's proposed notice and voting procedures for Creditors and equityholders to vote on a Voluntary Arrangement proposal; see Decree 57 and Decree 57 Tribunal.

Discharge: the release of a Debtor from personal liability on its debts, with the effects set forth in Bankruptcy Code Section 524. Certain exceptions to Discharge that apply to individual Debtors are listed in Bankruptcy Code Section 523. Each chapter of the Bankruptcy Code has its own Discharge provisions: Bankruptcy Code Section 727 for Chapter 7 cases, Bankruptcy Code Section 944 for Chapter 9 cases, Bankruptcy Code Section 1141 for Chapter 11 cases, Bankruptcy Code Section 1228 for Chapter 12 cases, and Bankruptcy Code Section 1328 for Chapter 13 Debtors.

Discharge Injunction: located in Bankruptcy Code Section 524, the injunction bars actions against the Debtor for debts that have been Discharged in the Debtor's case. The Discharge Injunction generally takes the place of the Automatic Stay at the conclusion of the Bankruptcy.

Disclaimer: the repudiation, rejection or resiliation of a contract. In Canada, the CCAA permits a Debtor to disclaim certain contracts and the CCAA includes a notice process, with access to the Canadian Court if the disclaimed counter-party objects to the disclaimer. Claims arising from the disclaimer are to be dealt with in the CCAA Plan. Special protection is provided under the CCAA to executory intellectual property or licence agreements (the disclaimer of such contracts will not affect the rights of

a counter-party provided such counter-party is prepared to comply with its objections) and the disclaimer provisions of the CCAA do not apply to Eligible Financial Contracts, collective bargaining agreements, financial agreements and real property leases.

Disclosure Statement: a written statement that contains "adequate information," as defined in Bankruptcy Code Section 1125(a), regarding a Chapter 11 Plan. Upon approval of the Disclosure Statement by the US Bankruptcy Court, it will be distributed to all Creditors and Equity Security Holders who are entitled to vote on the Chapter 11 Plan for the purpose of assisting them in making an informed judgment concerning the Plan. In a Small Business Case, a different process may be used pursuant to Bankruptcy Code Section 1125(f).

Disinterested Person: as defined in Bankruptcy Code Section 101(14), a person who is not a Creditor, an Equity Security Holder or an Insider, was not a director, officer or employee of the Debtor in the two years prior to the Petition Date, and does not have an interest materially adverse to the Estate or any Class of Creditors or Equity Security Holders. The term is used throughout the Bankruptcy Code but is most commonly at issue in the context of Professional retentions under Bankruptcy Code Section 327(a), which requires that Professionals not hold or represent interests adverse to the Estate and be Disinterested Persons.

Dismissal: a US Bankruptcy case may be dismissed for a number of reasons, as detailed in each chapter of the Bankruptcy Code: Section 707 for Chapter 7 cases, Section 930 for Chapter 9 cases, Section 1112 for Chapter 11 cases, Section 1208 for Chapter 12 cases and Section 1307 for Chapter 13 cases. The effect of dismissal is set forth in Bankruptcy Code Section 349. There are often fights about whether a case should be converted to one under a different chapter instead of dismissed. Notably, however, there are restrictions in converting cases to certain chapters.

Disputed Claim: a Claim to which an objection has been filed, or a Claim that is listed in the Debtor's schedules as a Disputed Claim. Under Bankruptcy Code Section 502(a), if a Proof of Claim or Proof of Interest is filed in a case, it is deemed allowed until an objection is filed against it.

Distressed BISO: new termination provisions for distressed trades that are incorporated into the revised LSTA Distressed Trade Confirmation which became effective on 9 September 2011. The Distressed BISO mechanism applies to certain distressed trades entered into on or after such date. It addresses problems of trade settlement delays by setting out options to compel trade settlement or allow termination of the trade. Distressed BISO allows the terminating party to effect a cover trade (buy-in or sell-out, as the case may be) with a third party, provided it has first delivered notice to the non-performing counterparty that it will avail itself of the Distressed BISO option.

Distressed Debt: debt of a company in financial distress. Some hedge funds or other entities specialise in Distressed Debt, and purchase such

debt either Pre-petition or Post-petition for purposes of participating in a Bankruptcy case.

Distressed Trade Confirm: see LSTA Distressed Trade Confirmation.

Distribution Record Date: the date specified in some Chapter 11 Plans for freezing the claims register and other applicable records and determining the holders of Claims or Interests entitled to receive distributions under the Plan. Generally, any transfers of Claims or Interests after the Distribution Record Date are disregarded. A Distribution Record Date is particularly helpful in a case with extensive Claims Trading, as it provides certainty as to distribution entitlements and obviates the need to continue to track transfers.

Distribution Scheme: the scheme under which Property of the Estate is distributed to parties in interest. Each chapter has its own distribution rules, and, indeed, certain sub-chapters of Chapter 7 may also contain special distribution provisions.

District Court: in US Bankruptcy, the federal district court in the federal district in which the US Bankruptcy Court sits. The US Bankruptcy Court is a unit of the District Court and exercises its jurisdiction by Reference from the District Court. Outside of Bankruptcy, the term "district court" could refer to any number of courts within the state court judicial system.

Docket: the official list of documents that have been filed in a US Bankruptcy case. A document that is not listed on the Docket is not considered "filed." Case Dockets are now available online through Public Access to Court Electronic Records (PACER), which requires a password for access. In larger Bankruptcy cases, the Docket may be accessed free of charge through different websites (including the Claim Agent).

Doctrine of Necessity: a doctrine that is used by the Debtor as a justification for seeking to pay certain Pre-petition Claims that would otherwise only be paid pursuant to a Plan. Generally, the Doctrine of Necessity arises during the Debtor's First Day Hearings, and more specifically in the context of seeking approval to pay Critical Vendors. The basic premise is that payment of certain Pre-petition Claims is necessary to the ability of the Debtor to reorganise.

Domicile: has legal significance, and generally requires (i) residence and (ii) the intent to remain in the place of residence. In US Bankruptcy, the Domicile of the Debtor is important in determining whether a person is eligible to be a Debtor (Bankruptcy Code Section 109), which exemptions the Debtor may be entitled to (Bankruptcy Code Section 722), and in which venue the Debtor may properly file a Petition (28 U.S.C. § 1408).

Double Dip: in the financial world, the term used to describe the circumstances when a recession quickly follows a prior recession.

Double Luxco Structure: a post-Credit Crunch method of structuring credit facilities in mid- to large-cap leveraged buyout acquisitions of French target groups in order to try to avoid the sponsor or the Borrower group

putting themselves (or threatening to put themselves) in *Sauvegarde*. Two Luxcos are put in place above the first French company, with the top Luxco granting a Security Interest over the shares in the second Luxco which owns the French bidco. How does this help? Well, under the EU Insolvency Regulation, the enforcement of this Security Interest is allowed notwithstanding the opening of *Sauvegarde* proceedings against the top Luxco (which might happen if its COMI is in or has been moved to France). Generates a host of Intercreditor Agreement issues with the sponsor and any Subordinated Creditors. Best to call Latham if your deal is going to involve a Double Luxco Structure.

Droit de Rétention: a Secured Creditor's right under Luxembourg French, Belgian and French Canadian (Quebec) law to retain physical possession of Collateral as against the Debtor or any Insolvency official until satisfaction in full of its claim. The right prevails over other Secured or Unsecured Creditors of the purchaser of the Collateral.

EBIT or EBITDA: the acronym for earnings before interest and taxes or earnings before interest, taxes, depreciation and amortisation. Because it eliminates the effects of financing and accounting decisions, EBITDA is often used to assess a company's ability to service debt. See also Adjusted EBITDA.

EBITDAR: a cousin of EBITDA used for property-heavy companies where some or all of rental expense is added back as well.

Ebranlement du Crédit: one of the two requirements that must be met to establish that a Debtor is Insolvent under Belgian and Luxembourg Insolvency law before commencing *Faillite* proceedings. The term means "loss of creditworthiness" and refers to the Debtor's inability (or impaired ability) to obtain credit. This condition will be deemed satisfied if any of the Debtor's Creditors, sources of financing or suppliers refuse to continue to extend credit.

EFC — Eligible Financial Contract: in Canada, an eligible financial contract means a derivative or financial agreement whose obligations are derived from or based on one or more underlying reference items (e.g. interest rates, indices, currencies, commodities, securities or other ownership interests or other macroeconomic data) and includes: (i) a contract for differences or a swap; (ii) a futures agreement; (iii) a cap, collar, floor or spread; (iv) an option and (v) a spot or forward.

Effective Date: the date on which the Debtor must begin performance under its Confirmed Plan. Sometimes, the Effective Date is the date on which the Plan is Confirmed, other times, the Effective Date is much later. The Effective Date is usually specified in the Plan and may be dependent on the satisfaction or waiver of certain case-specific conditions precedent (most notably, the availability of Exit Financing).

Effective Subordination: the situation that occurs when one tranche of debt is effectively, but not contractually, senior to another tranche of debt. A senior secured credit facility that sits alongside unsecured senior notes

without an Intercreditor Agreement that Subordinates the senior notes to the senior secured credit facility is an example of Effective Subordination. Even though the senior notes are not contractually Subordinated to the secured borrowings under the senior secured credit facility, because the credit facility has security and the senior notes do not, the senior notes are effectively Subordinated. See Subordination. Compare Contractual Subordination and Structural Subordination.

EIB: acronym for European Investment Bank, established by virtue of Article 308 of the Treaty on the Functioning of the European Union. It is the European Union's financing institution, and its shareholders are the 27 Member States of the European Union, which have jointly subscribed its capital.

Eigentumsvorbehalt: meaning Retention of Title, a common arrangement under German law between a supplier of goods and a purchaser of goods whereby the supplier retains ownership of the goods until full payment of the purchase price by the purchaser. The Luxembourg, Belgian and French law equivalent is the *Droit de Rétention*.

Enforcement Agent: if lenders were cautious enough when lending to Russian Borrowers, they might have appointed an Enforcement Agent. Could be used when a Russian Security Interest is involved. Usually the Enforcement Agent is a Russian bank, acting as an agent of the lender or trustee/Security Agent or both. The Enforcement Agent has the authority to declare an Event of Default and enforce the Security Interest.

Enforcement Procedure: procedure, which can be in-court or out-of-court, under Russian law for enforcing a Russian law pledge. If the procedure is in-court, application is made to the court, and the court determines whether the Default has occurred and a pledge can be enforced. The procedure may take a couple of months, if a Debtor objects to the enforcement. If a pledgor and a pledgee do not agree on the out-of-court Enforcement Procedure (which does not require application to court) in the agreement, an in-court Enforcement Procedure shall apply. If the parties agree an out-of-court Enforcement Procedure, a pledgor may realise pledged property within a certain period after the notice on enforcement of pledge has been served on a pledgor. (See also Realisation of Pledged Property).

Engagement Letter: a letter that represents the terms of the engagement of a Professional, signed by the Debtor or other engaging party. Where the engagement is subject to approval of the US Bankruptcy Court, the engagement letter is often attached to an Application requesting approval of the retention of such Professional.

Enterprise COMI: COMI of an Enterprise Group that files for Bankruptcy. Generally, COMI is determined on a Debtor-by-Debtor basis as opposed to the Enterprise Group. In other words, COMI is determined for each Debtor as a separate legal entity. In 2010, UNCITRAL published an addendum to the Legislative Guide to deal with Enterprise Groups in

insolvency. http://www.uncitral.org/pdf/english/texts/insolven/pre-leg-guide-part-three.pdf (last visited 8 February 2011.)

Enterprise Group: as defined by UNCITRAL, an Enterprise Group is two or more entities that are interconnected in some way so that they are related by either significant control or significant ownership.

Equitable Mootness: a judicial doctrine under which an appellate court avoids disturbing something that has already taken place. Most commonly, the Equitable Mootness doctrine is applied in the context of Appeals of Orders confirming Chapter 11 Plans. Unless the Confirmation Order is stayed, the Plan will be implemented, and by the time it is heard by an appellate court, it may be considered Equitably Moot. In such instances, the appellate court generally believes that, at the particular stage of implementation before it, unwinding the transaction (or, more than likely, transactions) will cause third parties significant harm, and although the court may be able to unwind, it is unwilling to do so.

Equitable Subordination: addressed by Bankruptcy Code Section 510(c), it is the power of a US Bankruptcy Court (which is a court of equity, after all) to Subordinate a Claim of a party who engaged in fraudulent or otherwise unsportsmanlike conduct, in order to provide a remedy for innocent Creditors or Equity Security Holders that suffered damage or loss as a result of that conduct. Equitable Subordination is a remedial, not penal, measure. A Claim is Subordinated only to the extent necessary to offset the harm caused by the culpable party. Claims by Insiders are subject to more rigorous scrutiny for Equitable Subordination than are Claims by non-Insiders. The term means different things in different places. In certain European jurisdictions, such as Germany and Italy, this term is used to describe the automatic Subordination of any debt claims against an Insolvent company that are held by the equity holders of such company unless an applicable exemption applies (e.g., see Restructuring Privilege in Germany). In Italy the shareholders can also be required to reimburse any repayments on such loans received in the year before the opening of the Insolvency proceedings. Whilst Equitable Subordination typically only applies to shareholders, in certain jurisdictions such as Germany it could apply to lenders if they exercise too high a degree of corporate control over the Borrower.

Equitable Test: another term for Cash Flow Test.

Equitisation: a restructuring mechanism involving the conversion of debt into equity. See Debt for Equity.

Equity Committee: a committee comprised of holders of the Debtor's Equity Securities. Like Creditors' Committees, an Equity Committee can either be an Official Committee, which is put together by the United States Trustee pursuant to Bankruptcy Code Section 1102, or an unofficial or Ad-hoc Committee, which is made up of Equity Security Holders voluntarily coming together to form a committee. Unofficial committees can request that the court recognise them as Official Committees. The powers

and duties of Official Committees are prescribed by Bankruptcy Code Section 1103. Additionally, Professionals hired by Official Committees are reimbursed by the Debtor's Estate. Professionals hired by unofficial committees are reimbursed by their constituents. In cases in which Equity Security Holders appear to be Out of the Money, appointment of an Equity Committee is likely to be strongly opposed by Creditors. In such instances, Creditors typically argue that expenses of an Equity Committee, which must be paid from the Estate, are an unnecessary drain on the Estate.

Equity Cure: an infusion of cash from shareholders in exchange for equity of the Borrower (or by way of Subordinated Shareholder Loan) in order to cure a financial covenant Default. This is a negotiated feature of credit facilities that sponsors often request. In the most common version of this provision (at least until the Credit Crunch), the proceeds of the Equity Cure are treated as EBITDA for purposes of determining financial covenant compliance. If a deal has financial covenants, lenders want to be able to use those covenants to police the Borrower's operating performance and call Defaults as appropriate. While infusions of junior capital are generally a positive event from a lender's perspective, by allowing shareholders to inject equity (and/or Subordinated Shareholder Loans) into the company after a Default and treating those amounts as if they were EBITDA to cure breaches of financial covenants, lenders lose the ability to call a Default and to work with the Borrower to negotiate appropriate remedies (including potential changes to the structure, pricing and Collateral provisions of the credit facilities). This masking of operational problems can be particularly harmful over consecutive periods. As a result, use of an Equity Cure (where it is permitted at all) is typically limited in amount and frequency based on negotiations. Note that more conservative versions of Equity Cure allow shareholders to inject equity (and/or Subordinated Shareholder Loans) to pay down debt but not to count the new equity as EBITDA. This more conservative version has been customary post Credit Crunch.

Equity Cushion: the extent to which an encumbered asset of the Debtor has a value that exceeds the amount of the Claim secured by the encumbrance. A sufficient Equity Cushion can be a form of Adequate Protection for the interest of the Secured Creditor in the asset.

Equity Security: as defined in Bankruptcy Code Section 101(16), a "(A) share in a corporation, whether or not transferable or denominated "stock", or similar security; (B) interest of a limited partner in a limited partnership; or (C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph."

Equity Security Holder: the owner of an Equity Security.

Erhvervs– og Selskabsstyrelsen: the Danish Commerce and Companies Agency — an agency under The Ministry of Economic and Business Affairs in Denmark, it serves as the official place of registration for Danish

businesses. When a company is adjudicated Insolvent in Denmark, the Agency is notified and the information is added to the records on that company. It also oversees legislation regulating businesses in Denmark (e.g., the Danish Companies Act and the Danish Financial Statements Act).

Esdebitazione: a discharge procedure in Italy for individual Debtors to obtain partial debt forgiveness in circumstances where the *Fallimento* procedure has closed and where some of the Creditors' claims have not been satisfied. Certain liabilities, such as those relating to alimony and subsistence obligations, cannot be discharged. The *Esdebitazione* procedure involves the *Tribunale Fallimentare* (Italian bankruptcy court) acting in consultation with the *Curatore Fallimentare* and the Creditors' Committee.

Esperto: the independent professional ("expert") in Italy who has to assess and validate an *Accordo di Ristrutturazione*, a *Concordato Preventivo* or a *Piano Attestato di Risanamento*. The *Esperto* is usually appointed by the company itself although, in some cases, the Italian bankruptcy court appoints the *Esperto*.

Establishment: under the Model Law, this is any place of operations where the Debtor carries out a non-transitory economic activity. It is used for the purpose of determining whether a foreign Insolvency is a Foreign Main Proceeding or a Foreign Non-main Proceeding. The meaning of Establishment under the Model Law is more or less mirrored in Bankruptcy Code Section 1502(2).

Estate: all property of the Debtor that is subject to the protection of the Bankruptcy Code, as described in Bankruptcy Code Section 541(a). When a Petition is filed, whether voluntary or involuntary, an Estate is created. However, when a petition for recognition is filed under Chapter 15, an Estate is not created.

Estate Board: a board of Creditor representatives, normally led by a lawyer with an employee representative if this is requested by the unions, which is created during Norwegian Konkurs proceedings to deal with the practical side of the proceedings. It is responsible for taking control of the assets, selling off the property and distributing the proceeds of sale.

Etapa de Conciliación: means a compulsory mediation stage designed to reorganise the Insolvent entity. This stage commences when a Mexican Insolvency Court issues an Insolvency Judgment. It concludes 185 calendar days after the last date of publication of the Insolvency Judgment in the Official Gazzette *(Diario Oficial de la Federación)*, provided that if a *Convenio de Conciliación* (restructuring agreement) with Creditors is not executed before that date, (i) the mediation stage may be extended by 90 calendar days at the request of the Mediador (mediator) or with the consent of those Recognised Creditors *(Acreedores Reconocidos)* holding title to at least 2/3 of all aggregate recognised claims, and (ii)

such term may be further extended for an additional 90 days at the request of the Insolvent entity and those Recognised Creditors holding title to 90 per cent of all aggregate recognised claims, for a maximum term of 365 calendar days. This stage may terminate (i) at the end of the abovementioned terms; or (ii) with the judicial approval of the *Convenio de Conciliación* (restructuring agreement) by the Mexican Insolvency Court or (iii) by resolution of the Mexican Insolvency Court if either the Insolvent entity or its Creditors are unwilling or unable to reach an agreement.

Etapa de Quiebra: The second stage (the Insolvency stage) of a Mexican Insolvency proceeding *(Procedimiento de Concurso Mercantil)*. Provides for the Insolvency and Liquidation of the Mexican Debtor. This stage may be avoided if a *Convenio de Conciliación* (restructuring agreement) is executed and approved by the Mexican Insolvency Court during the Reorganisation Stage.

Ethical Wall: a metaphorical wall or information block that is put in place within a firm or institution to prevent confidential information permitted to be known on one side of the wall from being known on the other side of a wall. For example, an investment bank providing financial advice to a Debtor and in possession of confidential, non-public information concerning the Debtor would be required to establish an Ethical Wall to prevent that information from getting into the hands of personnel with the institution who may engage in buying and selling securities of the Debtor.

EU Insolvency Regulation: Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings. The regulation sets out a regime for determination of Insolvency jurisdiction and recognition of the effects of an Insolvency proceeding and of Security Interests throughout the EU (other than Denmark). There is a significant element of overlap between the EU Insolvency Regulation and the Model Law, although the EU Insolvency Regulation governs only the coordination of Insolvency proceedings within the EU and does not deal with cross-border Insolvency matters extending beyond the EU.

Event of Default: if you are experiencing one of these, things are not going well. As discussed in the definition of Default, bond offerings, Indentures and credit agreements basically have three stages of trouble: the Default, the Event of Default and Acceleration. At stage two, the Event of Default, the Default has matured into an Event of Default because the issuer or Borrower has failed to cure the Default (and in some cases a disgruntled bondholder or lender (or the requisite majority thereof) has provided a required notice) within a specified period of time or within the period provided in the bonds, Indenture or credit agreement to fix the Default. So what happens next? See Acceleration.

Examination (or Examinership): a restructuring procedure in Ireland whereby an ailing company, its officers, shareholders or Creditors may apply for the protection of the High Court of Ireland to assist with the

rescue of the company and some or all of its business as a going concern. A pre-requisite for entry into Examination is the ability to show that the company is unable or unlikely to be able to pay its debts and that survival of the company is reasonably viable. If these requirements are satisfied, the Examiner's job is to prepare a Scheme of Arrangement to save the company. This scheme will divide the Creditors into different classes and the scheme is capable of confirmation where one class of Creditors whose rights are impaired votes in favour of it. The scheme must also be approved by the court. In order to gain the court's approval, the scheme must be fair and not unfairly prejudice any Creditors or other interested parties. Once approved, the Scheme of Arrangement will be binding on dissenting parties. Examination is therefore a useful tool in restructuring in Ireland. Unlike, say, an English Scheme of Arrangement, it provides an Automatic Stay against Creditor action against the company and allows a Cramdown of dissenting Creditors.

Examiner: essentially an investigator, appointed by the US Bankruptcy Court in certain Chapter 11 cases under Bankruptcy Code Section 1104(c). On request of a Party in Interest or the United States Trustee, the US Bankruptcy Court may — and in some instances, must — appoint an Examiner. Unlike a Chapter 11 Trustee, an Examiner does not replace the Debtor in Possession. Instead, an Examiner is generally appointed for purposes of investigating any aspect of the case that the US Bankruptcy Court feels would be appropriate, including Pre-petition or Post-petition actions taken by the Debtor, fraud, movement of assets, etc. (although Examiners have been known to take different (i.e., non-investigatory) roles in certain cases). Examiners' duties are prescribed in Bankruptcy Code Section 1106(c), and include writing and filing with the US Bankruptcy Court a report detailing his or her findings. See Examination for a discussion of the role of an Examiner in Irish Insolvency.

Exceptions to Discharge: Bankruptcy Code Section 523 lists a host of categories of Debts that are not Discharged when an individual Debtor receives its Discharge under Chapters 7, 11, 12, and 13. However, with limited exceptions, Bankruptcy Code Section 523(c)(1) provides that three of the listed categories of debt — those specified under Bankruptcy Code Section 523(a)(2), (4) or (6) — will be Discharged unless a Creditor objects to the Discharge of a Debt. A Creditor seeking to except one of these three categories of debt from the Debtor's Discharge must file a complaint within a certain period of time as set forth in Bankruptcy Rule 4007.

Exchange Offer: another name for an A/B Exchange Offer. In Europe, high yield notes are not typically subject to Exchange Offers. Also means an offering by an issuer of new securities issued in exchange for existing securities of that issuer.

Exclusivity: the exclusive right that continues during the Exclusive Period.

Exclusivity Period: pursuant to Bankruptcy Code Sections 1121(b) and (c), the period of time during a Chapter 11 case in which only the Debtor may file a proposed Plan of Reorganisation or Plan of Liquidation and seek to obtain acceptances of the Plan. The Exclusive Period for proposing a Plan is 120 days from the Petition Date, and if the Debtor files a Plan within that time frame, the Exclusive Period is extended by another 60 days to give the Debtor the opportunity to seek acceptances of its Plan. The Exclusive Period can be extended, and routinely is extended in large cases, under Bankruptcy Code Section 1121(d), but for not more 18 months after the Petition Date for proposal and 20 months after the Petition Date for acceptance. When the Exclusive Period terminates, any Party in Interest may file a Plan, which often results in a competing Plan process. Bankruptcy Code Section 1121(e) addresses exclusivity vis-à-vis "small business" Debtors.

Executory Contract: a contract that can be assumed or rejected in US Bankruptcy (with certain exceptions, including for Personal Services Contracts and Financial Accommodations). Although Executory Contracts are handled under Bankruptcy Code Section 365, the term is undefined in the Bankruptcy Code. Generally, the so-called Vern Countryman definition is used for Executory Contracts, which defines them as "contracts on which performance remains due to some extent on both sides." Litigation may ensue in a Bankruptcy case over whether a contract is executory.

Exemptions: laws that exist both inside and outside US Bankruptcy that make certain assets of individual Debtors (e.g., the Debtor's residence) unreachable by Creditors. Although the Bankruptcy Code has its own exemption scheme, many states have "opted out" of the Bankruptcy Code's exemption scheme and require their citizens to choose the state exemption scheme when filing for Bankruptcy. In states that did not "opt out" of the Bankruptcy Code's exemption scheme, Debtors are able to choose whether they want to claim exemptions under their state's rules or the Bankruptcy Code. However, situations have arisen in which a Debtor is forced to use the federal exemption scheme. Joint spouses may each claim exemptions, although the exemption scheme they choose must be the same. Exemptions can be objected to in Bankruptcy. Regardless of whether an exemption is properly claimed, if the deadline passes by which to file an objection to a claimed exemption (see Bankruptcy Rule 4003), with certain exceptions, the exemption is valid.

Exit Financing: financing that takes place when a Debtor is ready to confirm a Plan and exit Bankruptcy. It is through Exit Financing that the Debtor is able to fund its Plan of Reorganisation. In most, if not all, Plans of Reorganisation, Exit Financing is required to be available before a Debtor can reach the Effective Date for its Plan.

Ex Parte: a Latin term meaning "from (by or for) one party". An Ex Parte decision is a decision decided by a judge without requiring all of the interested parties to be present. Under the insolvency laws of certain

jurisdictions such as the UK, the US and Canada, Ex Parte means a legal insolvency proceeding brought by a person without notice to other parties to the controversy. In US Bankruptcy, some procedural matters in some courts are appropriately handled on an Ex Parte basis. Substantive matters, however, require notice and would normally be considered by a US Bankruptcy Court on an Ex Parte basis in emergencies only. In such a situation, if a US Bankruptcy Court enters an Order Ex Parte, it will normally do so on an interim basis and will allow Parties in Interest to thereafter appear and make their case before granting final relief.

Extend and Pretend: like Amend and Pretend but one of the Amendments will include an extension to the maturity of the credit facilities.

Extended Administration Plan: see *Plan Vneshnego Upravleniya*.

Extended Exclusive Period: a period of 180 days following expiration of the Initial Exclusive Period (of 120 days) under Dubai Decree No. 57 for 2009 in which the Debtor has the exclusive right to propose a Voluntary Arrangement; the Extended Exclusive Period applies if the Debtor has made a Voluntary Arrangement proposal within the Initial Exclusive Period and may be extended by order of the Decree 57 Tribunal; see Decree 57, Decree 57 Tribunal and Initial Exclusive Period.

Extended Retention of Title: for use of this term in Germany, see *Verlängerter Eigentumsvorbehalt.*

External Administration: a term used in Russia. See *Vneshneye Upravleniye.*

External Administrator: a term used in Russia. See *Vneshniy Upravlyaushiy*.

External Administrator or Arbitration Administrator: appointed by the Arbitrazh Court to conduct External Administration (See also External Administration *(Vneshneye Upravleniye)*.

FA: see Financial Advisor.

Faillissement: a legal process in the Netherlands and in Belgium aimed at the Liquidation of the company's estate and the realisation of its assets for allocation among the Creditors. For a description of the term as it is used in Belgium, see Faillite (French for *Faillissement* which is the Dutch term). In the Netherlands, the Insolvent Debtor, any Creditor or the public prosecutor may file a petition for *Faillissement* with the relevant court. The requirements for *Faillissement* to be commenced are that the Debtor has ceased to pay its debts as they fall due and that the Debtor has at least two Creditors. As is the case with *Surseance Van Betaling* (Suspension of Payments) proceedings, Secured Creditors may enforce their rights on secured assets unless the supervisory judge *(Rechter-Commissaris)* or the court has granted a Moratorium *(Afkoelingsperiode)*. The court appoints an Insolvency trustee *(Curator)* (acting under the supervision of a supervisory judge *(Rechter-Commissaris))* to manage the Debtor's

estate and realise the Debtor's assets. Upon the commencement of *Faillissement* the Debtor no longer has the power to dispose of its assets.

Faillissementswet: the Dutch Bankruptcy Act entered into on 1 September 1896 and since amended a number of times. It covers the following types of Insolvency proceedings among others: *Faillissement* and *Surseance Van Betaling* (Suspension of Payments).

Faillite: (*Faillissement* in Dutch) a legal process in Belgium and in Luxembourg, which has as its aim the Liquidation of the company's estate and the realisation of its assets for allocation among the Creditors. See *Faillissement* for a description of this legal process in the Netherlands. Under Belgian Insolvency law, the Debtor, any Creditor, the temporary administrator of the Debtor or the public prosecutor can apply to the competent commercial court to request the *Faillite* if the Debtor has persistently stopped paying its debts as they fall due and no longer has credit available to it (and is unable to obtain further credit) so that it will continue not to meet its obligations to Creditors. A company is declared Insolvent by a judgment of the court which sets the date for the Cessation of Payments *(Cessation de Paiements/Staking van Betaling)* (which may be set at maximum six months prior to the date of the *Faillite*) and provides for the appointment of one or more trustees who will manage the Debtor's assets and a supervisory judge *(Juge Commissaire/Rechter-commissaris)* who will supervise the trustee's management. As soon as the process is initiated, all measures of execution are suspended for Unsecured and Secured Parties. Under Luxembourg Insolvency law, *Faillite* is a judicial procedure that can be initiated by the Debtor's directors, its Creditors, by own motion of the court or by the public prosecutor's office. In order to initiate *Faillite* proceedings, the Debtor must be in a state of Cessation of Payments *(Cessation des Paiements)* and be unable to obtain credit *(Ebranlement du Crédit)*. The rights of general Secured and Unsecured Creditors without "delivery" of the Collateral are suspended during the *Faillite* proceedings. However, holders of pledges or mortgages have a general Priority over the common body of Creditors *(masse des créanciers)*. Further, Secured Creditors holding qualifying Collateral under the Luxembourg Collateral Act will be entitled to enforce their rights without court approval.

Fallen Angel: can refer to (i) the issuer of a bond that was once investment grade but has since been reduced to Junk Bond status or (ii) a stock that has fallen substantially from its all time highs.

Fallimento: the Italian bankruptcy procedure, which is court-supervised and governed by the Italian Insolvency Law. The aim of the procedure is to declare bankrupt *(fallito)* a Debtor that is in a State of Insolvency, realise its assets and distribute the proceeds to its Creditors according to the principle of *Par Condicio Creditorum*. The companies that can be subject to *Fallimento* and declared bankrupt are entities (other than public bodies) that conduct a business activity and are Insolvent, that is, unable to pay their debts as they become due.

Faqih: an Islamic finance term for an Islamic jurist specialising in the issuance of *Fiqh*.

Fatwa: an Islamic finance term for a legal verdict or pronouncement based on *Fiqh*, given by a *Shari'ah* scholar or a *Shari'ah* board or a *Mufti*. Each Islamic finance transaction will have one or more *Fatwas* issued on closing approving of the Islamic structure of the transaction.

Feasibility Test: a confirmation requirement under Bankruptcy Code Section 1129(a)(11), which requires that the proposed Plan of Reorganisation or Plan of Liquidation is feasible and is not likely to result in a subsequent Liquidation or additional reorganisation, unless such Liquidation or additional reorganisation is proposed in the Plan. Most Bankruptcy Judges will decline to confirm a Plan if they believe that a Chapter 22 filing if likely to occur thereafter.

Fecha de Retrotracción: meaning "effective date", this term is used by the Mexican Insolvency Act for purposes of determining the existence of Fraudulent Conveyances. As a general rule, this date is 270 calendar days prior to the date of the Insolvency Judgment.

Fee Application: the Application that must be filed by a Professional with the US Bankruptcy Court in order for the Professional to become entitled to an award of compensation for fees and reimbursement of expenses. A Fee Application may be an Interim Fee Application if filed during the Bankruptcy case for a portion of the Bankruptcy case or may be a Final Fee Application if filed after the conclusion of the Bankruptcy case (or period of service) for the entire Bankruptcy case (or period of service). Fees and expenses awarded on an interim basis pursuant to an Interim Fee Application can be clawed back by the US Bankruptcy Court until they are granted on a final basis pursuant to a Final Fee Application.

Fiduciary Duty: varies from jurisdiction to jurisdiction but in essence it is the obligation by one party to act in the best interests of another party, with the obligation usually arising from a legal or ethical relationship of confidence and trust. The term is frequently used in connection with the duties owed by a corporation to its Creditors and stockholders when the corporation is in financial distress. It is generally held that a corporation owes Fiduciary Duties to its stockholders when solvent, but that those duties expand to include its Creditors when Insolvent or in the Zone of Insolvency.

Fiduciary Out: a provision of an agreement with a Debtor that excuses the Debtor from complying with another provision of the agreement if compliance would violate the Debtor's Fiduciary Duty. Such provisions may be found in purchase and sale agreements, where the Debtor obligates itself — subject to the Fiduciary Out — not to entertain offers from other parties, and in Plan Support Agreements where the Debtor obligates itself — subject to the Fiduciary Out — to pursue the restructuring proposal outlined in the agreement.

Filing Date: in Canada, the date on which a Debtor commences proceedings under the CCAA.

Final Decree: an Order entered by the US Bankruptcy Court formally closing the Bankruptcy case. The entry of a Final Decree in a Chapter 11 case comes with the end of material activity in the case and essentially signals the closing of the file. It has more administrative than substantive significance. Normally, if a Plan has been confirmed and become effective, the former Debtor has emerged from Chapter 11 upon the Effective Date and is no longer subject to the Bankruptcy Code, even though the case remains open and a Final Decree has not yet been entered.

Final Fee Application: the last Application filed by a Professional, either at the end of the Bankruptcy case or at the conclusion of its services, to obtain final allowance and an award of compensation for services rendered and reimbursement of expenses incurred for the entire case or period of service. Pending final allowance pursuant to a Final Fee Application, any payments made to a Professional are subject to disgorgement. Disgorgement, should it be ordered, is invariably highly undesirable from the viewpoint of the Professional in question.

Final Order: in US Bankruptcy, the term is used in several different contexts. For example, where a Motion for relief is initially granted on a temporary basis pursuant to an Interim Order, the term may refer to the Order that is later granted on a final basis; where an Order is subject to a stay under the Bankruptcy Rules or by Order of the US Bankruptcy Court, the term may refer to the Order after the stay has been waived or has expired; or where an Order is subject to Appeal, the term may refer to the Order after the opportunity for Appeal has expired or been exhausted. In the context of Appeals, the term refers to an Order that can be appealed of right, as opposed to an interlocutory Order that (with certain exceptions) can be appealed only by leave of the appeals court.

Financial Accommodation: as described in Bankruptcy Code Section 365(c)(2), a contract to make a loan or extend other debt financing or financial accommodations to or for the benefit of a Debtor, or to issue a security of a Debtor. Financial Accommodations are a type of Executory Contract that is not subject to Assumption or Assignment under Bankruptcy Code Section 365.

Financial Advisor: an advisor retained by a party to or committee formed for the purposes of a restructuring. In the US, a Professional retained by the Debtor with approval from the US Bankruptcy Court to advise it on financial matters for the purposes of its restructuring. The Financial Advisor often also serves as the Debtor's Investment Banker. A Committee may also retain a Financial Advisor with approval from the US Bankruptcy Court to assist it with the Debtor's case. Because of the form their compensation takes, usually fixed monthly amounts with large end of case restructuring fees, Financial Advisors often seek initial approval, and thus protection, of their compensation structure under Bankruptcy Code Section 328(a).

Financial Rehabilitation: a proceeding under Russia law (known as *Finansovoye Ozdorovleniye* in Russian) that may be initiated by the Arbitrazh Court, which is primarily aimed at restoring the company's solvency and satisfying Creditors' claims in accordance with a debt repayment schedule. If the Financial Rehabilitation is successful, the company will exit the Insolvency proceedings; if not, the Arbitrazh Court will order a *Konkursnoye Proizvodstvo* (Liquidation) or an External Administration *(Vneshneye Upravleniye)*. This stage may last up to two years, but may not necessarily be ordered in all cases.

Financial Rehabilitation Administrator: see *Administrativniy Upravlyaushiy*.

Financing Statement: in Canada, a form prescribed under the applicable PPSA setting out essential information regarding a PPSA security registration, including the name of the Debtor and the applicable Collateral. A Secured Party in Canada must file the Financing Statement in the applicable provincial registry to Perfect a Security Interest by registration.

Finansiell Restrukturering: literally "financial restructuring" — a Norwegian Out of Court Restructuring involving the financial Creditors (Secured and Unsecured) and shareholders only. The most common form of restructuring for sizeable companies or complex structures in Norway.

First-day Hearing: the very first hearing that takes place in US Bankruptcy Court after the US Bankruptcy case is filed. Normally, First-day Hearings are held within a day or two after the filing occurs, for the purpose of considering First-day Motions.

First-day Motion: a Motion filed by the Debtor requesting immediate relief from the US Bankruptcy Court to ensure that the Debtor's on-going operations are not hampered by the Bankruptcy. Typical First-day Motions seek authorisation to pay certain Pre-petition Claims (e.g., those of employees or Critical Vendors) that could otherwise only be paid pursuant to a Plan.

First Lien: shorthand for "first priority Lien," this Lien has Priority over other Liens, subject to a negotiated list of exceptions for other Liens that may be permitted in a credit agreement.

First Meeting of Creditors: for use of this term in the US, see 341 Meeting. In Canada, a First Meeting of Creditors may be called by the Trustee in Bankruptcy to consider the affairs of the Bankrupt or a Debtor under a Proposal.

Fixed Charges: the name given to a Security Interest under English law that attaches to the asset in question and gives the beneficiary of the Security Interest a degree of control over that asset. Contrast to Floating Charge. Similar to a pledge in France, Belgium, Luxembourg and the Netherlands. Aside from this, Fixed Charge is also a more comprehensive way to define interest expense for covenant purposes

in certain transactions. Fixed Charges would be generally defined to mean the sum of consolidated interest expense plus certain dividends on preference shares. A portion of consolidated lease expense is also sometimes included. Note that some form credit agreements include scheduled principal payments and capital expenditure in the definition of Fixed Charges.

Flip Clause: a clause which 'flips' the order in which proceeds are distributed under the Waterfall in a credit document. Many CDO transactions include a Flip Clause so that a swap counterparty that is in default will not benefit from termination payments due to its own default until the noteholders are repaid in full. In a recent case stemming from the Lehman Brothers collapse, the US Bankruptcy Court and the UK Supreme Court considered the enforceability of a Flip Clause in the same transaction and came to opposite conclusions. For more information on Flip Flaps in the context of the derivatives market, see Latham & Watkins Client Alert No. 1147, "'Flip' Flap II: Uncertainty in Derivatives Markets Caused by the Lehman Bankruptcy Court's Decision Will Continue" (17 February 2011), available at www.lw.com.

Floating Charge: a Charge taken under English law over all the assets or a class of assets owned by a company from time to time. It "floats" over the assets and allows the Chargor to continue to deal with the assets in the ordinary course of business until Crystallisation. A Floating Charge ranks behind a Fixed Charge in the order of repayment in Insolvency.

FOGASA: acronym for the Spanish term *Fondo de Garantía Salarial*.

Fondo de Garantía Salarial: a wage warranty fund managed by the Spanish Ministry of Labour and dedicated to guaranteeing the salaries and indemnifications of workers, which are due as a result of the Insolvency of the employer.

Forbearance: a deal that the Borrower cuts with its lenders or other Creditors where the lenders or other Creditors agree to refrain from accelerating the debt for a limited period of time while the Borrower endeavours to get its act together. In a typical situation, lenders might agree not to exercise remedies while giving the Borrower time, beyond any available period provided in the bonds, Indenture or credit agreement to fix the Default, to improve performance, find a new financing source or otherwise agree upon an appropriate Amendment to the credit facility to reflect the new (and usually unpleasant) circumstances. The lenders will want to make sure that other Creditors in the capital structure (such as bondholders) have similarly agreed not to exercise remedies during the same time period. The lenders will typically seek to tighten various terms, such as demanding additional Collateral, increased pricing and stricter financial reporting, in exchange for their Forbearance.

Forbearance Agreement: the agreement documenting a Forbearance. Also known as a Standstill Agreement.

Foreign Main Proceeding: under the Model Law, this is a foreign Insolvency proceeding that is pending in the country where the Debtor has its Centre of Main Interests. In the US, this is reflected in Bankruptcy Code Section 1502(4). Generally, certain rights are automatically conferred on a Debtor whose foreign Insolvency is determined to be a Foreign Main Proceeding versus a Foreign Non-main Proceeding. Bankruptcy Code Sections 1520, 1529. Akin to Main Proceeding under the EU Insolvency Regulation.

Foreign Non-main Proceeding: under the Model Law, it is a foreign Insolvency proceeding, other than a Foreign Main Proceeding, pending in a country where the Debtor has an Establishment. In the US, this is reflected in Bankruptcy Code Section 1502(5). If a petition is recognised as a Foreign Non-main Proceeding, automatic benefits are not conferred but a Foreign Representative may ask for relief from the US Bankruptcy Court. Akin to Secondary Proceeding under the EU Insolvency Regulation.

Foreign Proceeding: under the Model Law, this is a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, relating to insolvency or adjustment of debt, in which the assets and affairs of the Debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or Liquidation. This meaning is mirrored in Bankruptcy Code Section 101(23).

Foreign Representative: under the Model Law, a person or a body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or Liquidation of a Debtor's assets or affairs, or to act as a representative of the foreign proceeding. In the US, this definition is mirrored in Bankruptcy Code Section 101(24). A Foreign Representative is usually the entity that files a petition for Recognition of the Debtor's foreign Insolvency case under Chapter 15.

Företagsrekonstruktion: the Swedish legal process for company reorganisation pursuant to the *Lag om Företagsrekonstruktion* (1996:764) — an act which provides for the reorganisation of the business of an ailing company, if that company is registered in Sweden. The reorganisation procedure can only be used if the company is unable to pay its debts when due or is unable to do so in the near future. There must be reasonable grounds to believe that the reorganisation can achieve its purpose. A company reorganisation may be initiated by the directors of the company or by any Creditor following application to court. If the court sanctions the application, it appoints a *Fretagsrekonstruktör*. An *Offentligt Ackord* usually takes place at the same time as the reorganisation.

Företagsrekonstruktör: the person appointed by the court as an administrator to handle the Swedish reorganisation proceedings of a company. The appointed person must establish a reorganisation plan and negotiate with the Creditors. The term is also referred to as *Rekonstruktör*.

Forum Shopping: when venue for a case would be proper in more than one venue, the practice of selecting venue based on factors indicating that the case would be more favourably considered in a particular venue. In a US Bankruptcy case, venue could be proper for a single Debtor in several venues, including domicile, residence, principal place of business or place of principal assets, as provided in 28 U.S.C. 1408(1). When the Debtor has Affiliates that will be filing for Bankruptcy at the same time, the venue options increase due to the Affiliate Rule

Fraudulent Conveyance: see Fraudulent Transfer.

Fraudulent Trading: a criminal offence under English law which applies where any business of a company has been carried on with the intent to defraud Creditors of the company or for any other fraudulent purpose. It applies to anyone who has been involved in carrying on the business in such a manner. Actual dishonesty needs to be proved.

Fraudulent Transfer: subject to jurisdictional differences, generally the term used to describe a transfer made by a party (i) that was made with actual intent to hinder, delay or defraud that party's Creditors or (ii) in which the party making the transfer received less than reasonably equivalent value in exchange and was or became Insolvent. A Fraudulent Transfer can be subject to Clawback from the transferee under certain Fraudulent Transfer laws. Also known as Fraudulent Conveyance. See Transactions Defrauding Creditors and Fraudulent Trading for specific rules relating to Fraudulent Transfers under English law and *Actio Pauliana* in France, Belgium, Luxembourg and the Netherlands. See also *Podozritelnye Sdelki* (Suspicious Transactions) for applicable Russian law. In the US, Clawback action can be taken under state Fraudulent Transfer or Fraudulent Conveyance laws, and if the party is in Bankruptcy, under the Bankruptcy Code, provided the statute of limitations (which is two years for actions under the Bankruptcy Code and typically four to six years under state laws) has not run. In Bankruptcy, a Fraudulent Transfer action is one of the Chapter 5 Causes of Action. Chapter 15 specifically precludes a Foreign Representative from taking advantage of Chapter 5's Fraudulent Transfer provisions. However, at least one Circuit Court has held that a Foreign Representative may still invoke the foreign law's Fraudulent Transfer provisions to avoid Fraudulent Transfer (*Tacon v. Petroquest-Res. Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319 (5th Cir. 2010)). For information on the position of US Bankruptcy Courts in relation to Fraudulent Transfers, see Latham & Watkins Client Alert No. 1166, "District Court Reverses Bankruptcy Court's Decision in TOUSA" (15 March 2011), available at www.lw.com.

Free and Clear: without Liens or other encumbrances. Under Bankruptcy Code Section 363(f), in certain circumstances, the Debtor's assets may be sold free and clear of Liens or other interests held by third parties. Generally, the Liens or other interests are transferred to the proceeds of the sale and attached in the same manner and Priority as they did to the assets.

Free Fall Bankruptcy: a Chapter 11 case that is commenced without a restructuring strategy in place either pursuant to a Pre-Packaged Plan or a Pre-Arranged Plan. Because there is no strategy, the ultimate course and end result of the case are unknown.

Frivillig Akkord: a private Voluntary Arrangement between the Debtor and all Creditors within Danish reorganisation proceedings. It is out-of-court. Creditors who decline the arrangement are not bound by it.

Frivillig Gjeldsforhandling: see *Gjeldsforhandling* — in-court Voluntary Settlement proceedings under Norwegian law. All Creditors who are covered by the proposal must approve it.

Frjálsir Nauðasamningar: a Voluntary Composition procedure under the Icelandic Bankruptcy Act of 1991, requiring the express consent of all Creditors who will not receive full payment.

Fulcrum Creditors: the Creditors in the part in the capital structure where "value breaks". These are the Creditors whose claims are neither completely In the Money nor completely Out of the Money, (i.e., in a distribution of assets they would only get partially repaid).

Fulcrum Security: the security where the value of a company runs out. See Loan to Own.

Funded Sub-participation: a Sub-participation where the sub-participant places with the lender granting the Sub-participation a deposit which is repayable as and when payments are received from the Borrower. Contrast to Risk Sub-participation.

Gap Creditors: because, notwithstanding the filing of an Involuntary Petition, under Bankruptcy Code Section 303(f) a Debtor may continue to operate and use, acquire or dispose of its property as if an Involuntary Petition had never been filed, it is possible for an entity to become a Creditor of the Debtor during the Gap Period. If the Involuntary Petition is later granted, Creditors whose Claims arose during the Gap Period are called Gap Creditors. Additionally, Bankruptcy Code Section 502(f) deals with the allowance of Gap Creditors' Claims and Bankruptcy Code Section 507(a)(3) provides them with Priority payment rights.

Gap Period: the period of time between the date an Involuntary Petition is filed against a Debtor and the date on which the Involuntary Petition is granted by the US Bankruptcy Court. Importantly, certain (but not all) sections of the Bankruptcy Code, namely Bankruptcy Code Sections 362 and 541, apply during the Gap Period. Therefore, Creditors and Debtors need to be particularly cognizant of their actions during this period of time to avoid finding themselves subject to liability if the Involuntary Petition is later granted.

Gedelegeerd Rechter: the Dutch term in Belgium for *Juge-Délégué*.

Gerechtelijke Reorganisatie: Dutch for the *Réorganisation Judiciaire* procedure in Belgium.

Gestion Contrôlée: the rehabilitation procedure under Luxembourg Insolvency law meaning "controlled management". Its aim is to give companies in financial difficulty a breathing space to restructure their business or realise their assets and satisfy their Creditors. The procedure is commenced by court order further to a petition filed by the company (represented by its directors). The company must be able to demonstrate not only that its creditworthiness is impaired and that it can no longer fulfil its payment obligations but also that the procedure will either allow it to reorganise and continue its business or ensure the orderly realisation of its assets in the best interest of its Creditors. If the court finds the petition admissible, the company is still permitted to manage its business but a special judge (*Juge-Délégué*) is appointed to draft a report on the company's financial situation. The rights of general Secured and Unsecured Creditors are suspended from the date of this appointment, although Secured Creditors holding qualifying Collateral under the Luxembourg Collateral Act are entitled to enforce their rights without court approval. If the court grants the application, it will appoint one or more administrators (*Commissaires*) to oversee the management of the company. All important decisions must be approved by the administrators, who will either draw up a reorganisation plan or a plan providing for distribution of the company's assets. The court will ratify the plan if more than half in number of the Creditors representing more than half in value of the Debtor's liabilities have approved the plan. Absent Creditors are assumed to have approved the plan. Once the plan is approved, the stay on enforcement ends and management regains control.

Gift Plan: a Plan in which senior Creditors voluntarily offer a portion of their recovery to junior Creditors or Equity Security Holders, as a means of obtaining support for and discouraging objections to the Plan. Because this type of Plan can have the effect of defeating the Absolute Priority Rule, some Circuit Courts on the facts before them have declined to approve Gift Plans. E.g., *In re DBSD North Am., Inc.*, 634 F.3d 79 (2d Cir. 2011). For information on the position of US courts in relation to Gift Plans, see Latham & Watkins Client Alert No. 1154, "Beware of Creditors Bearing Gifts: the Second Circuit's Recent Decision *In re: DBSD North America, Inc.* Casts Significant Doubt on "Gift" Plans" (28 February 2011), available at www.lw.com.

Giudice Delegato: the sole Italian judge who supervises the *Fallimento* procedure. The *Guidice Delegato's* instructions are given in the form of a duly motivated order. Appeal against the orders of the *Giudice Delegato* may be lodged with the *Tribunale Fallimentare* (Italian bankruptcy court). The *Giudice Delegato* also supervises the *Concordato Fallimentare*, the *Concordato Preventivo*, the *Liquidazione Coatta Amministrativa* and the *Amministrazione Straordinaria*.

Gjaldþrotaskipti: the legal process under Icelandic Insolvency law for realising the Debtor's assets for allocation to its Creditors. It is a judicial procedure that can be initiated by the Debtor or any Creditor

by filing a petition for *Gjaldþrotaskipti* at the court. The requirement to commence this process in Iceland is the inability of the Debtor to satisfy its debts as they fall due provided that it is not deemed likely that his payment difficulties will be over within a short period of time. Under the Icelandic Bankruptcy Act of 1991, a Moratorium is imposed during the *Gjaldþrotaskipti* proceedings prohibiting Creditors from exercising Default remedies.

Gjeldsforhandling or Offentlig Gjeldsforhandling: debt settlement proceedings under Norwegian law usually referring to the court supervised process. These proceedings may only be initiated by the Debtor, who must be able to demonstrate to the court that it is illiquid. Being Insolvent is not a requirement, but does not preclude the Debtor from opening debt settlement proceedings. The court will grant the debt settlement petition if it considers it likely that a debt settlement is achievable. When the petition is granted, Secured Creditors will not be able to enforce their Security Interests unless they obtain the Creditors' Committee's consent and Unsecured Creditors cannot file for attachments. The court appoints a leader of the Creditors' Committee (a lawyer), and then the committee members upon suggestions from the leader. A debt settlement proceeding lacks the flexibility of some court supervised systems (most notably US Chapter 11) and is rarely if ever used for larger/complex restructurings. In the past, such larger and more complex matters have been undertaken either as US Chapter 11 proceedings, assuming that there is an adequate jurisdictional basis, or, in the alternative, as Out-of-Court Restructurings (typically purely financial restructurings). While the Debtor remains in possession, the trustee and the Creditors' Committee are de facto in charge of a number of issues. Once opened, there are only two ways out: a successful proceeding (with the requisite number of Creditors adopting the plan) or *Konkurs*. Successful proceedings are concluded either as a *Frivillig Gjeldsordning* (a Voluntary Settlement), with the approval of all voting Creditors, or as a *Tvungen Gjeldsordning* (a compulsory settlement), (sometimes called *Offentlig Akkord* or *Offentlig Gjeldsforhandling*) — a settlement where a certain majority accepts and binds the minority — the required majority depends on the size of the settlement. An automatic stay is invoked for the sale (enforced or otherwise) of secured assets, with certain exceptions for financial assets, unless exceptions are made by the Creditors' Committee.

Gjeldsnemnd: a court appointed Creditors' Committee set up to assist the Debtor with its proposal for court-supervised debt settlement proceedings under Norwegian law (*Gjeldsforhandling*). The Creditors' Committee is chaired by the *Gjeldsnemndsleder*. While technically there to supervise the Debtor in possession, the Creditors' Committee (and in particular the chairman) will usually be very instrumental in the process. The Creditors' Committee can petition for *Konkurs*, if it considers further proceedings unlikely to result in a settlement, or that the Debtor does not comply with the requirements of the Creditors' Committee.

Gjeldsnemnsleder: court appointed trustee (lawyer) in Norway chairing the Creditors' Committee (*Gjeldsnemnd*).

Going-Concern Prognosis: in Germany, a Going-Concern Prognosis is typically relevant to remedy a situation of financial Over-Indebtedness (this will only apply until 31 December 2013). A Going-Concern Prognosis is also a precondition for obtaining a Restructuring Opinion. It means a company is capable of continuing business not only in the short-term but at least until end of its next business year (which may be different from the calendar year) with reference to its ability to meet its obligations when they fall due.

Going-Concern Value: the value of a company, as an operating business, to the market or prospective buyer (as opposed to the value of its assets or its liquidating value). The method of valuation is crucial in restructurings to determine who is Out of the Money — see Latham & Watkins Client Alert No. 916, "The *IMO Car Wash* Decision" (21 August 2009), available at www.lw.com.

Good Faith Lender: in the context of DIP Financing, a lender who is entitled to the protections of Bankruptcy Code Section 364(e). Specifically, the Bankruptcy Code provides that "[t]he reversal or modification on appeal of an authorisation under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debtor so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith…" unless the Order granting the incurrence of debt or lien was stayed pending Appeal.

Good Faith Purchaser: in the context of a 363 Sale, a purchaser who is entitled to the protections afforded by Bankruptcy Code Section 363(m). Specifically, if a US Bankruptcy Court makes a finding that the purchaser of a Debtor's assets in a 363 Sale is a Good Faith Purchaser, then "the reversal or modification on appeal of an authorisation … of a sale or lease of property does not affect the validity of a sale or lease…" unless the Order granting the sale is stayed pending the Appeal. Thus, it is critical for a buyer to be designated as a Good Faith Purchaser under Bankruptcy Code Section 363(m). There is no specific definition of "good faith" but it generally means that there is no challenge — like fraud, collusion or taking unfair advantage — to the integrity of the conduct of the purchaser in the transaction.

Gornisht: (pronounced "Gore-nish") not the piece of parsley on the blue-plate special at the diner, but rather what that piece of parsley is worth, nothing — as in "your claim is worth Gornisht."

Governmental Unit: as defined in Bankruptcy Code Section 101(27), the United States; a state, commonwealth, district, territory or Municipality; a foreign state; a department, agency or instrumentality of the United States (but not a United States trustee while serving as a Trustee), of a state, commonwealth, district, territory or Municipality, and of a foreign state; or other foreign or domestic government. A Governmental Unit is not a person under the Bankruptcy Code, but is an entity.

Graduación de Créditos: meaning "Priority of payments", in Mexico the proceeds obtained from Liquidation of the assets of the Insolvent entity will be applied by the Receiver to pay the relevant Creditors in the following order of Priority (assuming that the Insolvent entity is a business entity and not an individual): (1) first, payment of labour claims for salaries and severance for the two calendar years preceding Insolvency Judgment; (2) second, payments to Secured Creditors, but only to the extent of the value of their respective collateral; (3) third, payment of liabilities and obligations of the estate (masa) of the Insolvent entity; (4) fourth, payment of litigation costs and expenses, and fees and expenses of the *Visitador* (Inspector), the Mediador (mediator) and any appointed Receivers; (5) fifth, payment of labour claims (other than those described in paragraph (1) above) and tax claims; (6) sixth, payments to other Creditors that qualify as "privileged" under Mexican commercial laws, but only to the extent of the value of the respective privilege; and (7) seventh, payments to Unsecured Creditors.

Greiðslustöðvun: a Suspension of Payments reorganisation procedure under article 10 of the Icelandic Bankruptcy Act no. 21 of 1991 as amended. Only the Debtor can initiate a Suspension of Payments by filing for it at court. If the court grants the Suspension of Payments, there is a general Moratorium preventing Creditors from exercising Default remedies. The Debtor is not permitted to allocate or disburse its assets without prior approval from the court approved assistant who is normally a lawyer. The Debtor may decide to propose a *Nauðasamningar* (compulsory composition) during Suspension of Payments proceedings.

Guarantee: a promise by a person that is not the direct obligor of a debt to be responsible for that debt. In Luxembourg, France and Belgium an independent demand Gurantee must be distinguished from a suretyship (cautionnement) that is an accessory (accessoire) to the principal secured obligations.

Guarantor: a person, often a subsidiary or parent of the Debtor, who issues a Guarantee with respect to a debt of the Debtor.

Half a Turn: see Turn. This is half of it.

Hanafi Fekh: a school of Islamic jurisprudence used by Palestinian courts to govern debt-related and attachment proceedings.

Hardening Period: the period of time during which a new Security Interest or other transaction with the company is vulnerable to being set aside in Insolvency. The relevant Hardening Period differs between jurisdictions and can also depend on whether or not the beneficiary of the transaction is connected to the Insolvent company. Also known as the Suspect Period or Doubtful Period. See also *Verdachte Period* or *Période Suspecte* in the context of Belgian and Luxembourg law and *Riftunartímabil* in the context of Icelandic law.

Hawalah: a term seen in Islamic finance meaning the transfer of liability (e.g., a novation).

Head Office: the criteria used to determine, under Italian Insolvency Law and in relation to the relevant company, the jurisdiction of the *Tribunale Fallimentare* (Italian bankruptcy court).

High Yield Bond: a bond rated below investment grade by the rating agencies, but note that in emerging markets where issuers may be rated below investment grade, their bonds are often not strictly speaking High Yield Bonds in that the covenant package and the structuring will be simpler.

Holdco Debt: debt at the Holdco level. Holdco Debt is an interesting creature. It is generally not Guaranteed by the operating company below it. So from the Holdco Creditors' perspective, Holdco Debt is debt. But from the lower operating company perspective, the Holdco Debt is essentially equity because payments on the Holdco Debt can only be paid with dividends or other payments up from the operating company. The ability to incur new debt at a Holdco level depends on whether the operating company's bond offerings, Indentures and credit agreements restrict Holdco Debt.

Holdco Guarantor: any parent entity of a Borrower or issuer that acts as a Guarantor of the Borrower's or issuer's debt.

Holding Company or Holdco: a company that sits on top of (or "holds" the equity of) the Subsidiary that is below it. This concept sometimes connotes a company that does nothing else (i.e., has no operations). "Bidcos" are often Holding Companies and financing documentation will often contain a negative covenant preventing bidco and other Holding Companies from doing anything other than entering into the transaction documents and otherwise providing customary holding company services. See also Holdco Debt and Holdco Guarantor.

Hondle: to bargain or haggle, "He will hondle about everything". "He is a real hondler."

IBLOR: acronym for Italian Bank lender of Record. A structure used in financings for Italian Borrowers to try to allow syndication to non-Italian banks without imposition of withholding tax by the Italian tax authorities. In summary, the Borrower enters into a bi-lateral facility with an Italian tax resident bank who then gets credit support from the third party lenders it wishes to 'sell' the debt to, thereby spreading the risk and creating the commercial effect of Syndication. Likely to be looked at closely by the Italian tax man. The risk of the structure being re-characterised, such that the tax authorities look through to the third party lenders, lies with the Borrower.

IBM: *Inshallah bukra mumkin*; "God willing tomorrow maybe", an Arabic expression also used to describe the speed at which financial restructurings occur (or do not occur) in the Middle East.

IFECOM (Federal Institute of Business Reorganisation Specialists: in Mexico, means the "Instituto Federal de Especialistas en Concursos Mercantiles".

Impaired: in the US, treatment of a Class of Claims or Interests under a Plan of Reorganisation or Plan of Liquidation that essentially gives the holders of the Claims or Interests something less than what they bargained for. Under Bankruptcy Code Section 1124, a Class of Claims or Interests is Impaired unless the treatment proposed by the Plan satisfies one of the two tests described in that section.

Incidente Concursal: special procedure set out by Spanish Insolvency legislation whereby all questions and claims arising out of an Insolvency proceeding are resolved by the Insolvency court. For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, Spanish Insolvency Act Changes — Paving the Way for Restructurings (29 May 2009), available at www.lw.com.

Indenture: the governing document for a series of bonds. The Indenture is a contract between the Debtor and a Trustee (who acts as a sort of bondholder representative) pursuant to which bonds are issued. As more broadly defined in Bankruptcy Code Section 101(28), it means a mortgage, deed of trust or indenture, under which there is a security that constitutes a Claim against the Debtor, which may be a Secured Claim, or an Equity Security of the Debtor. Although the term has a different meaning under English law, when used in reference to High Yield Bonds, Indentures are generally governed by New York law. Individual investors hold notes in book entry form through the clearing systems (i.e., the notes are held in large computerised ledger systems which enable securities to be traded without the need for paper cash to be handed over for paper certificates) rather than actually signing this document.

Indenture Trustee: the trustee under an Indenture. The Indenture Trustee is a recognised Party in Interest and is accorded certain rights and obligations under the Bankruptcy Code and Bankruptcy Rules.

Independent Director: directors who do not have a material relationship with the listed company (i.e., they are outsiders, and certainly not employees). Sarbanes-Oxley and the rules adopted by individual regulators including the UK Corporate Governance Code have a complex set of requirements as to who qualifies as independent. In general, you know one when you see one. Some stock exchange rules or regulators require that the full board be comprised of a majority of Independent Directors.

Indubitable Equivalent: a term used in two different contexts in but not defined by the Bankruptcy Code. For purposes of Bankruptcy Code Section 361, it is a means of Adequate Protection in which the Debtor gives a Secured Creditor a form of relief that allows for the Secured Creditor to realise the "Indubitable Equivalent" of its interest in property. For purposes of Bankruptcy Code Section 1129 (b)(2)(A), it refers to a form of treatment of a Secured Claim under a Plan that allows for the Secured Creditor to realise the "Indubitable Equivalent" of its Secured Claim. Recent cases have discussed the meaning in the plan treatment

context. See *In re Phila. Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010), and *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009).

Information Circular: in Canada, this is a document that generally includes information regarding a Debtor's CCAA Plan and its effects on Creditors, the Debtor's financial condition and an estimate of the Liquidation value of the Debtor's assets. An Information Circular is similar to a Disclosure Statement and is typically approved by the Canadian court in a Meeting Order.

Inherent Jurisdiction: the powers of a court that is derived from the very nature of the court as a superior court of law and that the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of due process of law and to do justice between the parties. In Canada, the common law doctrine of Inherent Jurisdiction has been applied extensively in proceedings under the CCAA and, to a lesser extent, the BIA. In CCAA proceedings, Canadian courts have appeared willing to provide relief that on its face exceeds the express provisions of the CCAA on the basis of the limited provisions in the CCAA itself, and the fact that Canadian courts must rely on their Inherent Jurisdiction to fill gaps in the CCAA so as to give effect to the objects of the CCAA and enhance its utility as a restructuring tool. The BIA is a more complete code than the CCAA for the treatment of Creditors' claims in a bankruptcy and, as such, the role of Inherent Jurisdiction has less frequently been used to supplement the BIA. However, Canadian courts have called upon Inherent Jurisdiction to supplement the BIA where it is clear that it has the authority to issue Orders that are discretionary, where it is necessary to give effect to the provisions of the BIA or to fill gaps in the BIA.

Initial Exclusive Period: a period of 120 days following filing of Voluntary Arrangement Notification under Dubai Decree No. 57 for 2009 in which the Debtor has the exclusive right to propose a Voluntary Arrangement; see Decree 57 and Extended Exclusive Period.

Initial Order: an initial order granted by a Canadian court under the CCAA at the initial CCAA application. Generally, the Initial Order contains the following: (i) a declaration that the Debtor is a corporation to which the CCAA applies; (ii) an order that the Debtor may, subject to further order of the Canadian Court, file a CCAA Plan and hold meetings of classes of Creditors to vote on the CCAA Plan; (iii) approval of any requisite DIP Financing; (iv) a stay of all actions, suits and other proceedings against the Debtor; and (v) the appointment of the Monitor.

Insider: generally, a person whose relationship with the Debtor may be subject to heightened scrutiny or whose rights may be limited in certain contexts under the Bankruptcy Code (e.g., directors, officers and persons in control). For example, an Insider is subject to a one-year preference review period, rather than just 90 days, under Bankruptcy Code Section 547. In addition, the ability of a Debtor to provide severance and retention

protections to Insiders is limited under Bankruptcy Code Section 503(c). The term is specifically defined in Bankruptcy Code Section 101(31), with different meanings where the Debtor is an individual, corporation or partnership. In addition to the statutory definition, courts have also applied a non-statutory definition of Insider. E.g. *In re Foothills Texas, Inc., et. al.*, 408 B.R. 573 (Bankr. D.Del. 2009).

Insolvency: a common expression used in Europe for describing bankruptcy (which in certain jurisdictions is more usually applied to the insolvency only of natural persons, although the terms are colloquially often used inter-changeably). The word describes both certain formal procedures, as well as the financial condition of being "insolvent", which is the inability to pay one's debts as they become due. This inability can be manifested by the company either failing to satisfy the Balance Sheet Test (generally liabilities exceeding assets) or the Cash Flow Test (generally, liabilities not being paid when due), tests that can be expressed in different ways according to the jurisdiction (see, e.g., Over-Indebtedness, which is a formulation of what can be seen as Balance Sheet Insolvency). In some jurisdictions, such as England, both the first two of these measures of Insolvency are in use and will determine eligibility to enter Insolvency proceedings. There is a significant amount of judicial authority on both Cash Flow Insolvency and Balance Sheet Insolvency, meaning that Insolvency is not necessarily easily proven, particularly by a Creditor. As a result, and as a general precaution, European finance documents commonly include much wider situations of potential financial distress, including for example, the commencement of any security enforcement, which would be Events of Default. In the US, Bankruptcy Code Section 101(32) defines the term insolvent and, subject to the specific statutory language, essentially incorporates the Balance Sheet Test for all Entities other than Municipalities, with differences for partnerships, and the equitable test for Municipalities. A Debtor need not be Insolvent to be eligible to be a Debtor in US Bankruptcy. See *Stato di Insolvenza / Stato di Crisi* (State of Insolvency/State of Distress) in Italy and Cessation of Payments. For Insolvency in Mexico, see *Supuestos de Concurso Mercantil*.

Insolvency Plan: see the German term *Insolvenzplan*.

Insolvent: see Insolvency.

Insolvent: a Debtor who is not solvent. There are two basic tests for insolvency: (i) the balance sheet test — generally, liabilities exceeding assets and (ii) the equitable test – generally, liabilities not being paid when due. Bankruptcy Code Section 101(32) defines the term insolvent and, subject to the specific statutory language, essentially incorporates the balance sheet test for all Entities other than Municipalities, with differences for partnerships, and the equitable test for Municipalities. A Debtor need not be Insolvent to be eligible to be a Debtor in Bankruptcy.

Insolvent Person: in Canada, a Debtor who is not Bankrupt and whose liabilities exceed their assets and/or ability to pay. The BIA contains a

statutory definition that differs from this general definition and defines an Insolvent Person to mean a Debtor who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to Creditors provable as claims under the BIA amount to CA$1,000, and (i) who is for any reason unable to meet his obligations as they generally become due, (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due or (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

Insolvenzplan: meaning "insolvency plan", the German plan of reorganisation that requires approval of a majority of Creditors in number and by value, in a majority of the classes of Creditors and sanction of the court. Increasingly popular in German restructurings including Herlitz, Ihr Platz, Senator Entertainment and Sinn Leffers.

Inspector: a term used in Mexico; see *Visitador*. In Canada, a person appointed by the Creditors of a Bankrupt at the First Meeting of Creditors or subsequent meeting of Creditors (usually as part of a committee) to examine and give direction to the Trustee in Bankruptcy's administration of the estate of the Bankrupt. The inspectors stand in a fiduciary relationship to the general body of Creditors and must perform their duties impartially and in the interests of the Bankrupt's Creditors. The Trustee in Bankruptcy must obtain the consent of the majority of Inspectors before undertaking certain actions.

Instructing Group: another name given to Majority Lenders.

Insufficiency of Assets: a term that is commonly used in various jurisdictions to refer to when the value of the company's obligations exceeds the value of the company's assets (i.e., the Balance Sheet Test). This term is used in Russia for example. When a company reaches this point under Russian law, it must apply for Liquidation. In practice, however, Russian companies typically ignore this requirement.

Intercreditor Agreement: an agreement that sets forth the rules of engagement between two or more groups of Creditors with respect to shared Collateral or other intercreditor relationship matters. Think of this as a prenuptial agreement between two classes of Creditors. Apart from addressing the obvious point that the First Lien lenders get paid out first from Collateral proceeds and the junior classes get paid out second, Intercreditor Agreements also lay out a number of important provisions regarding the right of each lender group to take action with respect to the Collateral and the Borrower generally. As is the case with Subordination Agreements, Intercreditor Agreements are generally upheld in a Bankruptcy pursuant to Bankruptcy Code Section 510(a), and may be rendered moot under Bankruptcy Code Section 1129(b) in the context of a Plan confirmation. For more information on the enforcement of Intercreditor Agreements and on how the UK courts interpret release clauses in Intercreditor Agreements, see Latham & Watkins Client Alert

Nos. 1172, "Enforcement of Intercreditor Agreements — When Should Their Terms Give Way to the "Bankruptcy Imperative"?" (7 April 2011), and 1093, "*European Directories* — Court of Appeal Decision Intercreditor Release Clauses" (25 October 2010), both available at www.lw.com.

Interest: the right of an Equity Security Holder in an Equity Security of the Debtor. The term is used throughout Chapter 11 but is not specifically defined in the Bankruptcy Code. An Interest is not a Claim and is generally entitled to the lowest Priority of rights in the Debtor.

Interested Persons: in the context of Russian Insolvency law, this term (*zainteresovannye litsa* in Russian) is broadly defined and generally means any member of the Debtor's group, any individual who is a member of the Debtor's Board of Directors or management, or its chief accountant.

Interim Administrator: a term used in Russia. See *Vremenniy Upravlyaushiy*.

Interim Compensation: Bankruptcy Code Section 331 allows a Professional retained under Bankruptcy Code Section 327 or 1103 to be paid on an interim basis, but not more than once every 120 days after an Order for Relief is entered in the case. A request for such interim payment is usually made by the Professional under an Interim Fee Application. Most US Bankruptcy Courts, particularly in large Chapter 11 reorganisation cases, will authorise monthly procedures for interim payment of fees and reimbursement of expenses, sometimes with a holdback of a percentage (20 per cent of fees is typical) pending approval of the Interim Fee Application or the Final Fee Application. See also Knudsen Order. All interim payments are subject to final approval at the end of the case, pursuant to a Final Fee Application filed by the Professional.

Interim Fee Application: an Application filed by a Professional periodically during a case, usually every 120 days, to obtain interim allowance of compensation for services rendered and reimbursement of expenses incurred. In cases in which the US Bankruptcy Court has authorised Interim Compensation on a monthly basis, the Interim Fee Application provides an interim check on fee and expense payments. Any allowance granted pursuant to an Interim Fee Application is just interim and is subject to review in connection with the Final Fee Application, with any payments made being subject to disgorgement pending final allowance pursuant to a Final Fee.

Interim Order: an Order entered by the US Bankruptcy Court that is effective for a short period of time. Usually, Interim Orders are entered when the Debtor has an emergency that cannot be considered on a final basis, and the US Bankruptcy Court will enter an Interim Order granting immediate relief on a temporary basis and setting a later hearing to consider the Debtor's request on a final basis. In some US Bankruptcy Courts, First-day Motions will be granted pursuant to Interim Orders pending a hearing on notice to Parties in Interest.

Interlocutory: refers to judgments, Orders and decrees entered by the US Bankruptcy Court that are not final for purposes of Appeal. In order to Appeal an Interlocutory judgment, Order or decree, an entity must get permission to do so, unless such judgment, Order or decree was issued under Bankruptcy Code Section 1121(d) to extend or reduce the Exclusive Period. See 28 U.S.C. §158(a) and Bankruptcy Rule 8001(b).

In the Money: the term describes Creditors who are not Out of the Money.

Involuntary Petition: an involuntary Bankruptcy case is commenced when three or more eligible Creditors file a Petition for Bankruptcy relief against the prospective Debtor. An Involuntary Petition may only be filed under Chapter 7 or Chapter 11, and under Bankruptcy Code Section 303, certain persons may not be involuntarily placed into Bankruptcy. The filing of an Involuntary Petition does not by itself constitute an Order for Relief. The prospective Debtor has an opportunity to contest the Petition. If contested, after trial the US Bankruptcy Court may enter an Order for Relief if it finds that the Debtor is generally not paying its undisputed Debts as they become due. Only Creditors who hold a certain type and amount of Claims are eligible to file an Involuntary Petition, and if the Involuntary Petition is later dismissed, those Creditors may be subject to sanctions.

Ipso Facto: meaning "by the fact itself." In Bankruptcy, Ipso Facto clauses come into play because many contracts contain a clause under which, if a Debtor files for Bankruptcy, the contract is terminated or in default. With some exceptions, see Bankruptcy Code Sections 555-556, Ipso Facto clauses are not enforceable pursuant to Bankruptcy Code Sections 541(c) and 365(e). Under Bankruptcy Code Section 365(c)(1), however, Ipso Facto clauses may effectively be enforceable in certain types of contracts, namely intellectual property contracts. The Anti-deprivation Principle is the equivalent of the Ipso Facto clause in England.

Italian Insolvency Law: the Italian Royal Decree No. 267 of 16 March 1942 *Disciplina del fallimento, del concordato preventivo e della liquidazione coatta amministrativa* as amended and supplemented from time to time.

Jay Alix Protocol: see Alix Protocol.

Joint Administration: under Bankruptcy Rule 1015, the US Bankruptcy Court may order that the cases of two or more related Debtors be jointly administered. This is a procedural, administrative remedy that is very different from Substantive Consolidation. It allows the related cases to be handled as one case, instead of as multiple cases, simplifying filings, noticing and Docket control.

Joint and Several Liability: where two or more parties assume liability and each is treated as having assumed the obligation both collectively and individually for itself. A third party may proceed against any one or more of the co-obligors for the full performance of the obligation, irrespective of which of them caused the breach. Guarantors will have Joint and Several Liability. See also Several Liability.

Joint Case: a Joint Case is commenced pursuant to Bankruptcy Code Section 302 when two spouses file one Voluntary Petition for Bankruptcy relief. Although a Joint Case may be substantively consolidated, a Joint Case is not the same as a jointly administered case or a substantially consolidated case. The term applies only in the context of spouses.

Judicial Composition: the procedure by which a UAE trader may be reorganised following a declaration of Insolvency at the initiative of the court and Creditors under the UAE Commercial Code, Federal Law No. 18 of 1993; see Protective Composition and Trader.

Juge-Commissaire: in Belgium, the French name for a *Rechter-commissaris* (which is the Flemish/Dutch word).

Juge-Délégué: in Luxembourg, a special judge appointed for the specific task of preparing a report on the business of a company applying for *Gestion Contrôlée* (administration). The court relies on this report when making its decision on whether to grant the Debtor's petition. It is also the French name in Belgium (*Gedelegeerd Rechter* in Dutch) for the supervisory judge appointed by the court pursuant to the Belgian *Réorganisation Judiciaire/Gerechtelijke Reorganisatie* procedure to supervise the Debtor and its management of its assets during the *Sursis de Paiement/Opschorting van Betaling* (Suspension of Payments) period. The *Juge-Délégué* may assist with the preparation of the restructuring plan and will report on its progress.

Junior Debt: a general reference to a Slug of debt that is "lower" in the overall structure of the company's debt and equity than other debt. For example, if a company has both senior Subordinated notes and senior notes, the senior Subordinated notes are "junior", even though the word "senior" appears in the name because those holders have agreed to be Subordinated in right of payment to the senior notes. Compare Senior Debt.

Junk Bond: another name for a High Yield Bond or non-investment grade bond. "Junk Bond King" Michael Milken pioneered the use of Junk Bonds for corporate financing and M&A deals, but his novel approach to the interpretation of relevant legal regulations earned him a stint in Federal prison and a life-time ban from being involved in the securities industry.

Jury Trial: exactly what it sounds like — a trial that is determined by a jury, instead of a judge. Although very rare, 28 U.S.C. §§ 157(e) and 1411 generally allow Jury Trials in Bankruptcy cases. Any Jury Trial in a Bankruptcy case, however, takes careful planning and strategy. Three times the Supreme Court has spoken on the issue: *Katchen v. Landy*, 382 U.S. 323 (1966), *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and *Langenkamp v. Culp*, 498 U.S. 42 (1990). The analysis over whether an entity has or has not waived its right to a Jury Trial is complicated and fact-driven. In general, however, one overriding principle that can be gleaned is that Creditors that file Proofs of Claim have waived their right

to a Jury Trial, at least with respect to matters surrounding the validity of the Claim. Courts are split on whether a Debtor, by filing for Bankruptcy, waived its right to a Jury Trial in every matter that arises.

Juzgado Concursal (Mexican Insolvency Court): means the federal court with jurisdiction over the Insolvent entity.

KEIP: the acronym for a Key Employee Incentive Program. See MIP. As with a MIP, this type of program augments an employee's usual salary package with additional compensation that is tied to performance targets, thus incentivizing the employee to achieve the performance target. KEIPs have been more frequently used since BAPCPA, since they are not subject to the same restrictions on Insiders that apply to KERPs and severance programs under Bankruptcy Code Section 503(c). Implementation of a KEIP is subject to prior approval of the US Bankruptcy Court. Generally, the big issue when seeking such approval is whether the performance targets are realistic or whether the targets have been set so low that the KEIP is really a disguised KERP.

KERP: the acronym for a Key Employee Retention Plan. These types of plans are "Pay to Stay" payment packages, and are not tied to the participating employees' abilities to meet certain performance targets (as in KEIPs). Bankruptcy Code Section 503(c) regulates the ability of Debtors to institute KERPs for Insiders. KERPs do remain in existence, however, for purposes of retaining the Debtor's middle management and other non-Insiders.

Kinut' (verb) (literally — to throw someone): a Russian slang term used to refer to unfriendly restructuring by a Debtor. The term is usually used in relation to Creditors. "Kinut' Creditors" means to develop and realise a plan aimed at avoiding the payment of debt to Creditors and gaining a profit from a Debtor's Default.

Kitchen-sinking: in reference to financial forecasts, an exacerbation of the downside by throwing in "everything plus the kitchen sink".

Knudsen Order: an Order authorizing monthly payment of Professionals, so called because the case of *In re Knudsen Corp.*, 84 B.R. 668, 671-72 (B.A.P. 9th Cir. 1988), provided early precedent for the practice of seeking a court-approved procedure for making interim monthly payments to Professionals, notwithstanding the 120-day interim payment rule under Bankruptcy Code Section 331. The term is most frequently used in the 9th Circuit Court.

Konkurs: Denmark, Norway and Sweden share Insolvency terminology, including this word for any process that has as its aim Liquidation of the company's estate and realisation of its assets for allocation among its Creditors. In Denmark and Sweden, the company is Insolvent if unable (and not only temporarily so) to pay its debts as they fall due. The requirement to commence *Konkurs* in Norway is the demonstrated continuing non-temporary inability of the Debtor to satisfy its debts as they fall due and that the Debtor has liabilities that exceed its assets.

Konkurs in Norway generally implies immediately ceasing operations, and the estate of the Insolvent Debtor seizes all assets with a view to a fairly quick sale, with the proceeds being distributed to the Creditors, based on Priority. The Board of Directors is set aside, and all powers rest with the trustee/the Creditors' Committee. An automatic stay is invoked for the sale (enforced or otherwise) of secured assets, with certain exclusions for financial assets, unless exceptions are made by the Creditors' Committee. Exceptions will usually be made.

Konkursförvaltare: the administrator (official receiver) during Swedish Konkurs proceedings who administers the Debtor's assets and distributes proceeds to the Creditors. The Konkursförvaltare is also entitled to continue the business when Creditors are not in agreement.

Konkurslagen (1987:672): Swedish Bankruptcy Act. See *Konkurs*.

Konkursniy Upravlyaushiy: (Russian for Insolvency administrator) is an Arbitration Administrator appointed by the Arbitrazh Court to conduct the *Konkursnoye Proizvodstvo* (Liquidation). The *Konkursniy Upravlyaushiy* has the authority to sell off the Debtor's assets, pay off the Debtor's debts, dismiss management and employees, and to enter into the *Mirovoye Soglasheniye* (Voluntary Arrangement) in the name of the Debtor.

Konkursnoye Proizvodstvo: Liquidation under Russian Insolvency law. A company will enter into Liquidation as a result of an Arbitrazh Court order obtained by the Creditors. A company may generally enter into Liquidation if the Arbitrazh Court determines that the company shows "Signs of Insolvency" and there are no grounds to (i) initiate any recovery proceedings (i.e., Financial Rehabilitation (*Finansovoye Ozdorovleniye)* or External Administration); (ii) approve a *Mirovoye Soglasheniye* (Voluntary Arrangement); or (iii) terminate Insolvency proceedings or dismiss a petition for Insolvency. Liquidation lasts for up to six months, although it may be extended by a further six months.

Konkursradet: a Norwegian advisory council on the *Konkurs* procedure, consisting of representatives from the courts, the administrative authority, accountants, lawyers and the public prosecutor. The council submits recommendations for reform to the Norwegian Insolvency regime and publishes recommendations and opinions; the Ministry for Justice is secretariat for the council.

Kreditorutvalg/Bostyre: a Creditors' Committee appointed by the court during Norwegian Konkurs proceedings. The committee acts in cooperation with the trustee (and it is called "Bostyre", including the trustee), although it can independently object to recommendations of the trustee. It is also involved in decisions regarding the Insolvent estate and its management.

Kronofogdemyndigheten: this is the Swedish Enforcement Authority. Its functions include the supervision of bankruptcies and of the administrators (official receivers); giving support with debt regulation and debt rehabilitation; and registration/ support in collecting debts.

KSA or The Kingdom: The Kingdom of Saudi Arabia.

Lag om Företagsrekonstruktion: see *Företagsrekonstruktion*.

Lender in Possession: slang for a secured lender who controls all of the assets of the Debtor by virtue of its Perfected security interest and who often asserts great influence over all decisions of the Debtor.

Lender Liability: an umbrella term loosely describing a wide range of potential liabilities incidental to lending, from straightforward contract claims through to Insolvency doctrines such as Equitable Subordination. A specific concern arises in Germany, where a lender that makes available fresh money to a German Borrower facing imminent Insolvency in an amount that is not sufficient to ensure the turnaround, runs liability risks against other Creditors of the Borrower. One of the uses of Restructuring Opinions is to mitigate these risks. In Italy, a lender that grants a credit to a Borrower facing the imminent State of Insolvency can be liable for the offence of *Abusiva Concessione del Credito* (granting credit unlawfully) or for the offence of participating in *Bancarotta Semplice* (simple bankruptcy). We suggest that you make sure that you understand the legal regime of Lender Liability by speaking to your favourite Latham expert.

Ley Concursal: see Spanish Insolvency Act.

Ley de Concursos Mercantiles: means the 11-year-old Mexican Insolvency Act.

Lien: depends on the context. Often used interchangeably with Security Interest; however, Lien is a broader term and includes non-consensual encumbrances on property such as tax Liens or Liens in favour of warehousemen or carriers as well as consensual Security Interests.

Liens Covenant: a covenant that restricts the incurrence of Liens and serves to protect the seniority position of debt by preventing more Secured Debt from either getting ahead (this is what unsecured senior notes are worried about) or becoming *Pari Passu* (this is what the lenders under a secured credit agreement are worried about). Senior Subordinated lenders will want protection that prevents Security Interests over any other Subordinated Debt. See also Negative Pledge.

Lien Subordination: the Subordination of tranches of Secured Debt. They may be *Pari Passu* in terms of payments, and secured by the exact same Collateral, but one tranche is Subordinated because its beneficiaries agree that in the case of the receipt of any proceeds of sales of that Collateral (but not otherwise), the lenders under the other tranche will be paid prior to any payouts on their debt. In the US this is the manner in which First Lien and Second Lien credit facilities are structured, although European practice is different. See generally Subordination.

Likvidation: the Swedish term for liquidating or winding up a company. The assets are taken care of by the *Likvidator* who will try to realise the assets, pay Creditors' claims, costs and distribute the remaining

proceeds to shareholders. A fundamental requisite for *Likvidation* is that all Creditors receive full payment. A company may go into *Likvidation* voluntarily or it may be forced to go into *Likvidation* by a court order obtained by Creditors. See Liquidation.

Limited Jurisdiction: a Foreign Representative that files a petition for recognition under Chapter 15 of the Bankruptcy Code does not subject him or herself (or itself) to the jurisdiction of any US court for any other purpose. Bankruptcy Code Section 1510. Similarly, Bankruptcy Code Section 306 provides much the same thing, although in the context of a Foreign Representative seeking relief under Bankruptcy Code Sections 303 and 305.

Liquidated Claim: a Claim as to which the amount is established, although liability may still be in dispute.

Liquidation: the legal process which varies from jurisdiction to jurisdiction of winding up a company's business and realising its assets for allocation among the Creditors. This is usually done by a liquidator who is usually able to charge fees and recover expenses in Priority to other Creditors from the realised assets. Liquidation may either be compulsory (by means of a petition lodged with the court by parties entitled by law to make such a petition) and/or, depending on the jurisdiction, voluntary (where usually the members of the company resolve to voluntarily wind-up the company). The term "bankruptcy" is often used outside the US simply to refer to Liquidation or other formal insolvency processes. Also see Winding Up in the context of England and Wales; *Faillissement* in the context of Belgian and Dutch law; *Faillite* in the context of Luxembourg and Belgian law; *Fallimento* in the context of Italian law; *Konkurs* in the context of Swedish, Norwegian and Danish law; *Konkursnoye Proizvodstvo* under Russian law; *Gjaldþrotaskipti* in the context of Icelandic law and *Liquidation Juidiciaire* in the context of French and Luxembourg law.

Liquidation Analysis: the written analysis performed by the Debtor to demonstrate that the Plan satisfies the Best Interest of Creditors test, as a condition to Confirmation of the Plan. The Liquidation Analysis is usually contained within the Disclosure Statement.

Liquidation Committee: in many jurisdictions that have Liquidation as a formal Insolvency procedure, a Liquidation Committee, which is a committee of Creditors in a Liquidation, can be appointed. Under English law, for example, the purpose of a Liquidation Committee is to help the Liquidator in the discharge of his functions during a Liquidation.

Liquidation Judiciaire: French and Luxembourg Liquidation proceedings of a company in a state of *Cessation des Paiements* where the company's reorganisation is not possible. The aim of these proceedings is to end the company's operations and to realise its assets as a business or individually.

Liquidazione Coatta Amministrativa: an Italian compulsory winding-up procedure for liquidating entities in which public interest is involved such

as banks, insurance companies, cooperative companies, trust and audit companies, securities brokerage companies and investment companies. The procedure may be initiated by the Debtor, one or more Creditors or by the public authority with the task of monitoring the Debtor's activity. As a general principle, the enterprises subject to the *Fallimento* can not be compulsory wound-up, except in certain particular circumstances. The procedure is characterised by the involvement of the Italian Bankruptcy Court and the relevant public authority.

Liquidity Crisis: a shortage of liquid funds necessary to pay the immediate costs and expenses of a company's continuing operations. A Liquidity Crisis often precipitates the commencement of a Chapter 11 case.

Listado Clasificación de Creditos: the Spanish Insolvency Act distinguishes between claims against the Debtor's estate (*créditos contra la masa*) and insolvency claims (*créditos concursales*). Claims against the Debtor's estate are to be paid upon becoming due and in Liquidation prior to the payment of any insolvency claims. Claims against the Debtor's estate cover legal costs, the receiver's fees, or claims resulting from obligations entered into by the receivers, or the Debtor under the authorisation of the receivers, during the Insolvency proceeding.

Loan to Own: refers to a business strategy of lenders who make new loans or purchase existing debt with an eye towards owning the Fulcrum Security such that the lender is in a prime position to have its debt converted to Equity or ownership of an asset in a troubled situation.

Local Rules: the rules adopted by a district for US Bankruptcy Courts within the district. For example the United States Bankruptcy Court for the District of Delaware has a set of Local Rules, which differ from the Local Rules in effect in the United States Bankruptcy Court for the Southern District of New York. The Local Rules supplement and sometimes modify the Bankruptcy Rules for purposes of local practice and procedure.

Lockup: the term has a different meaning in different contexts. In the context of a stock offering, for example, a lockup "locks-up" the shares of officers, directors and other insiders as well as the issuer so that no new shares will hit the market during a certain period following the closing of the offering. In this context, the purpose of the Lockup is to help stabilise the stock price following the offering by controlling supply. In the Bankruptcy context, a lockup obligates certain consenting Creditors or Equity Security Holders to support a particular restructuring proposal for a prospective Debtor.

Lock-up Agreement: in the context of a stock offering, the letters signed by officers, directors and other insiders setting forth the terms of their Lockups. In the Bankruptcy context, the Pre-petition agreement between a prospective Debtor and certain Creditors or Equity Security Holders to support a particular restructuring proposal. In this context, such an agreement may also be called a Plan Support Agreement or a

Restructuring Support Agreement, and they are almost always utilised in connection with a Pre-arranged Bankruptcy or Pre-negotiated Bankruptcy.

Look-See: a Canadian term for a business review of a company that is generally done by the Financial Advisor of a Secured Creditor.

LSTA Distressed Trade Confirmation: LSTA Distressed Trade Confirmation: the Loan Syndications and Trading Association Inc.'s standard form confirmation for distressed debt trades which sets out the deadlines and basic obligations of each of the parties to the trade. A revised form of LSTA Distressed Trade Confirmation was made effective on 9 September 2011 and the most significant revisions to this are the Distressed BISO provisions.

Lumping: in US Bankruptcy, the practice in which more than one task performed by a Professional is included in a time entry with only one time increment rather than separate time increments assigned for each task. Lumping is discouraged in Bankruptcy timekeeping as it prevents the US Bankruptcy Court from determining whether the charge for the offending time entry was reasonable. A Fee Application may be subject to challenge, and fees may be disapproved, for lumping.

Luxco: a company incorporated in Luxembourg, often used in European Leveraged Buyouts for tax efficiency reasons, including Luxembourg's extensive network of Double Tax Treaties and favourable Withholding tax rules (attributes shared by a number of other jurisdictions in Europe), and now increasingly for Security Interest efficiency reasons under Double Luxco Structures.

MAC: acronym for Material Adverse Change.

Main Proceedings: under the EU Insolvency Regulation, this is an Insolvency proceeding opened in the EU country where the Debtor has its Centre of Main Interests. Akin to Foreign Main Proceeding under the Model Law.

Majority Lenders: usually the lenders holding more than 66.6 per cent (not 50 per cent as the name would suggest and as is common in the US and also in European bridge facilities) of the aggregate principal amount of outstanding loans and unfunded commitments under a credit agreement. Usually required for approval of Amendments and waivers under a credit agreement, although certain Amendments require a 100 per cent vote. Also known as the Instructing Group. See Super Majority Voting.

Make-Whole: shorthand for a "make-whole call" feature, which allows the issuer of a series of bonds to redeem those bonds without the consent of the bondholders at a "make-whole price" that is the sum of the present values of each remaining payment on the bonds (until maturity or until the date on which the bonds otherwise become redeemable at a fixed price, if applicable). These present values are calculated using

a discount rate equal to the rate on the comparable US Treasury note (i.e., the US Treasury note having a remaining life to maturity that most nearly approximates that of the bonds) plus a spread (usually 50 basis points). The sum of the present values of the remaining payments on a High Yield Bond can often substantially exceed the principal amount of the High Yield Bond. A "make-whole price" of 120 per cent of principal amount is not unheard of in the context of a make-whole redemption of a High Yield Bond. This feature is generally available to issuers during the period during which the bonds cannot be otherwise optionally redeemed or in a Change of Control context. Also increasingly seen in mezzanine financings which contain provisions specifying that the loans or bonds cannot be optionally redeemed or voluntarily prepaid other than by means of a Make-Whole.

Manager: under the laws of Qatar, a judicially-appointed manager of an Insolvent estate following a declaration of Insolvency pursuant to the Qatar Commercial Code; one of the Manager's roles is to represent the Committee of all persons having valid claims on the Debtor prior to the declaration of Insolvency.

Mandataire ad hoc proceedings: flexible and confidential proceedings in France available to companies that are not in a state of *Cessation des Paiements*. Upon request of the company, the president of the commercial court appoints a *mandataire ad hoc* to facilitate negotiations between a company and its Creditors.

Mandatory Subordination: Bankruptcy Code Section 510(b) provides that Claims based upon the rescission of a purchase or sale of a security of the Debtor or an Affiliate, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution on account of that Claim, are to be Subordinated to all Claims or Interests that are senior or equal to the Claim or Interest represented by the security, or, if such security is common stock, to the same Priority as the common stock.

Market MAC: this is a reference to a condition precedent that there shall not have been any disruption or adverse change to the financial, banking or capital markets generally, or the syndicated loan and high yield markets, specifically. Compare Business MAC.

Market Testing: a technique for valuing a business based on bids obtained from the market following a formal or informal solicitation of offers from prospective purchasers.

Mark-to-Market: an accounting requirement to write assets down (and in some cases up) to update the value of a financial instrument to its current market price. This is required by GAAP for certain assets in certain industries.

Marshalling: an equitable doctrine that may be applied by the US Bankruptcy Court where a Debtor has two Secured Creditors and two or more pieces of Collateral, but only one of the Secured Creditors has Liens in all of the Collateral while the other Secured Creditor has Liens in only

one piece of Collateral. If applied, the Secured Creditor with Liens in all of the Collateral may be limited in its rights to proceed against the one piece of Collateral of the other Secured Creditor until it has exhausted its rights first in all of its other Collateral.

Marzano Law: Italian law no. 39/2004, named after the Ministry of Productive Activities. See *Amministrazione Straordinaria*.

Material Adverse Change: just like it sounds, this phrase refers to a "material adverse change" in something—generally either the business (see Business MAC) or the market (see Market MAC). This term is used in three general contexts: either (i) as a condition precedent (for instance, a seller would not have to close on an acquisition if there had been a Material Adverse Change to the business) or (ii) as a qualifier to a representation and warranty (for instance, the environmental representation is limited to instances where violations of the representation could (or would) lead to a Material Adverse Change) and covenants or (iii) as an Event of Default (although not in US credit agreements). When used as a qualifier to a representation and warranty/covenants and as an Event of Default, however, most agreements use the term Material Adverse Effect. See MAE Qualifier.

Material Adverse Effect: just like it sounds, this refers to a "material adverse effect" on something and is just another way of expressing the concepts embedded in the phrase Material Adverse Change.

Material Non-public Information: another expression for "insider information" in the context of insider trading laws, which prohibit the trading of certain types of securities on the basis of such information.

Mediador: person ("mediator" in English) appointed by the Federal Institute of Business Reorganisation Specialists to facilitate negotiations between the Mexican Debtor and its Creditors.

Meeting Order: an Order granted by a Canadian court under the CCAA that accepts a CCAA Plan for filing with the Canadian court and outlines how the formal meetings of the Creditor classes will be held to vote on the CCAA Plan. The Meeting Order also generally approves the voting materials relating to the CCAA Plan (e.g. notice of meeting, forms of proxy and Information Circular) and the manner in which these materials are to be delivered to affected Creditors.

Members Voluntary Liquidation: a type of English Liquidation proceeding approved by the members of a company. Applicable only where the company is solvent.

Mexican Pre-pack Proceeding: a procedure that implies a combination of out-of-court efforts plus a final court stage, sealed through a *Convenio de Conciliación* (restructuring agreement) between the Mexican Debtor and its Creditors and approved by a Mexican Insolvency court; provided, however, that the plan is executed between the Mexican Debtor and those Creditors representing at least 40 per cent of the total debts of such

Insolvent entity. The main advantage of this type of proceeding is that there will be no need for a visit by the *Visitador* (Inspector).

Minnelijk Akkoord: the Dutch term in Belgium for *Accord Amiable*.

Minsky Moment: almost a catchphrase for the start of the financial crisis of 2007-2010. Refers to Hymen Minsky, the US economist.

MIP: the acronym for Management Incentive Plan. See also KEIP. Broadly speaking, this type of incentive plan falls outside of restrictions contained in Bankruptcy Code Section 503(c) because it is tied to incentivizing the performance of the Debtor's management, as opposed to paying the Debtor's management a retention bonus. In other words, it has been found to be different than a KERP, which is subject to the restrictions of Bankruptcy Code Section 503(c). See e.g. *In re Dana Corp.*, 351 B.R. 96 (Bankr. S.D.N.Y. 2006) compared to *In re Dana Corp.*, 358 B.R. 567 (Bankr. S.D.N.Y. 2006).

Mirovoye Soglasheniye: a Voluntary Arrangement under Russian Insolvency law that can be entered into at any stage of the Insolvency proceedings. To be legally binding a *Mirovoye Soglasheniye* must be approved by the Arbitrazh Court and the court may approve it only if the Unsecured Claims of the first and second Priority Creditors are satisfied. Once the *Mirovoye Soglasheniye* is approved by the Arbitrazh Court, the Insolvency proceedings terminate and the Debtor is obliged to start repayment of the Creditors' claims in accordance with the repayment schedule set out in the *Mirovoye Soglasheniye*.

MNPI: acronym for Material Non-public Information.

Model Law: see UNCITRAL Model Law on Cross Border Insolvency.

Modified Universalism: the English common law principle that there should be a unitary Insolvency proceeding in the court of the Debtor's Domicile that receives worldwide recognition and that applies universally to all the Debtor's assets. The principle requires Recognition and cooperation between courts and office-holders (such as administrators) in different jurisdictions during cross-border insolvencies.

Monitor: a Canadian insolvency practitioner (usually one of the major Canadian accounting firms) appointed by the Canadian court under the CCAA to monitor the business and affairs of the Debtor under CCAA protection. The CCAA requires the Canadian court to appoint a Monitor on an initial CCAA application, whose principal role is to act as the Canadian court's eyes and ears in ensuring that the restructuring is proceeding appropriately, and whose role includes the dissemination of information to stakeholders. The Monitor is not normally an adversary of any party, although the Monitor's input (through court reports and recommendations from time to time made therein) can significantly influence the Canadian court's decision on matters ranging from DIP Financing, to sales process, to CCAA Plan approval matters. The Monitor's duties and responsibilities are generally specified in the Initial Order and

baseline duties are also codified in the CCAA. The CCAA provides that the Debtor's auditors or "accountants" cannot be appointed as a Monitor and that a Monitor must be a licensed Trustee in Bankruptcy.

Monte Carlo Simulation: a way of valuing businesses by running a large number of simulations using random quantities for uncertain variables and then taking the distribution of results to infer which values are most likely. Relied upon rather unsuccessfully in the IMO Car Wash restructuring by the mezzanine lenders. For a more comprehensive summary of the IMO Car Wash case, see Latham & Watkins Client Alert No. 916, "The *IMO Car Wash* Decision" (21 August 2009), available at www.lw.com.

Monthly Operating Reports or MORs: see Operating Reports.

Moratorium: the legal equivalent of a "time-out", (i.e., a period when a Borrower is authorised by a government authority or law to suspend repayment of debts owed to its Creditors). Also used in restructurings to refer to the period in which Creditors are not allowed to take enforcement action. In an Italian restructuring, sometimes Italian Debtors and relevant Creditors agree upon a Moratorium during the negotiation phase of an *Accordo di Ristrutturazione* or a *Piano Attestato di Risanamento*.

Motion: a pleading filed in a court seeking some form of relief. In US Bankruptcy, a Motion may be filed by any Party in Interest requesting relief from the US Bankruptcy Court under Bankruptcy Rule 9013. Motions are used to commence Contested Matters under Bankruptcy Rule 9014.

Mudaraba: an Islamic finance term referring to an Islamic finance structure akin to a silent partnership or investment trust management, with the *Rub ul-maal* (the investors — like lending banks in a conventional financing) providing the capital of the *Mudaraba*. See also *Mudarib*.

Mudarib: an Islamic finance term meaning the person who provides entrepreneurship and management of a *Mudaraba*. See also *Rub ul-maal*.

Mufti: an Islamic finance term meaning one who passes *Fatwas*. Also used as slang for ordinary clothes (i.e., not uniform), principally by those educated at English private schools.

Municipality: a political subdivision or public agency or instrumentality of a State. Only a Municipality may be a Debtor under Chapter 9 of the Bankruptcy Code.

Murabaha: an Islamic finance term referring to an Islamic finance structure where goods desired by a purchaser (like a Borrower in a conventional asset financing) are sold at cost plus an agreed and stated profit by the Islamic finance institutions (like the lenders in a conventional asset financing).

Musawamah: an Islamic finance term meaning a sale arrangement where the price of the sale is negotiated between the parties (without any reference to the original price paid by the seller).

Musharaka: an Islamic finance term meaning a partnership or joint venture.

MVL: acronym for Members Voluntary Liquidation.

Nablyudeniye: the first mandatory Supervision stage of the Russian Insolvency procedure designed to facilitate the rescue of an Insolvent company or to achieve a better return to Creditors than if the company immediately went into *Konkursnoye Proizvodstvo* (Liquidation). This stage lasts up to 7 months; see also the Interim Administrator (*Vremenniy Upravlyaushiy*).

Nagnut' (verb) (literally — to bend someone over): a Russian slang term that refers to forcing a party to agree to unfavourable terms, because of the threat that the party will be left with nothing. In restructurings the term is usually used to refer to negotiations with Creditors, but some decisive Creditors may also apply this to a Borrower.

Nauðasamningar: a compulsory composition reorganisation procedure under the Icelandic Bankruptcy Act of 1991. Only the Debtor can initiate compulsory composition proceedings. The Debtor must submit a proposal for a compulsory composition and this must be approved by a qualified majority of Creditors affected by the composition in the same proportion as the payout proportion and in any case by at least 60 per cent of the Creditors (70 per cent with regards to financial undertakings). The court must affirm the composition.

NDA: acronym for non-disclosure agreement. See also Confidentiality Agreement.

Negative Covenant: the opposite of an Affirmative Covenant. This represents an undertaking by an issuer or a Borrower not to take certain specified acts. If Affirmative Covenants should be thought of as "Thou Shalt" covenants, then, likewise, these may be thought of as "Thou Shalt Not" covenants. A common Negative Covenant is a promise by a Borrower not to put liens on, or otherwise encumber, specified assets, but there are many others.

Negative Notice: a notice to Parties in Interest in a US Bankruptcy case that a particular Motion or Application may be granted by the US Bankruptcy Court without a hearing in the absence of any timely objections to the relief sought, or that a particular Interim Order will become a Final Order without further action in the absence of any timely filed objections to the relief granted. The Local Rules of some US Bankruptcy Courts include negative notice procedures with respect to certain types of Motions or Applications. In addition, US Bankruptcy Courts may enter a case administration Order in a particular case that allows for negative notice procedures to be implemented in that case.

Negative Pledge: in bond world, a variant on the Liens Covenant that allows the issuer to place Liens on its assets that would not otherwise be allowed by the baskets so long as the issuer gives the same (or equal) rights in the Collateral to the bondholders, therefore putting the "on/off" switch for the Lien in the hands of the other investors. This covenant is typical in investment grade bond deals and is usually the only covenant in a eurobond. In loan world, this is the more usual name for the Liens Covenant.

Negligent Bankruptcy: a criminal offence under the UAE Penal Code, Federal Law 3 of 1987, which occurs if a trade fails to file a declaration of Insolvency within 30 days of Cessation of Payments; see Cessation of Payments and Trader.

Neplatezhesposobnost: when the Debtor in Russia stops paying its debts due to Insufficiency of Funds. When a company reaches *Neplatezhesposobnost*, it must apply for Liquidation; see Insufficiency of Assets to find out whether they actually do this.

Netting: the concept of calculating net value across several transactions to come up with the overall risk associated with such transactions. The International Swap Dealer's Association allows parties to net their exposure under all hedging transactions entered into under such ISDA Master Agreement.

NIO: the Negotiable Instruments Office (*Maktab Al-Fasl Fie Munaza'at Al Aourak Al Tijariah*) in the Kingdom of Saudi Arabia; one member panels of legal officers established under the authority of the Ministry of Commerce and Industry, pursuant to the Negotiable Instrument Regulation promulgated under Royal Decree No. M/37 dated 11/10/1383 H., as amended, with jurisdiction to hear disputes arising in respect of negotiable instruments (i.e., mainly cheques and promissory notes).

NOI: notice of intention to file a Proposal under the Canadian BIA. An NOI is a simple one page statement signed by the Debtor and filed with the Official Receiver, which must include the consent of a Trustee in Bankruptcy who has agreed to act as Proposal Trustee under the Proposal and a list of all Creditors with claims exceeding CA$250. After filing the NOI, the Debtor has 30 days to file a Proposal with the Official Receiver. This 30 day period may be extended, on application to the Canadian court, for up to a maximum of five additional months, provided that such extensions are solely for the purpose of enabling the Debtor to file its Proposal and that they may only be granted for periods of up to 45 days at a time. After the Proposal has been filed with the Official Receiver, the Proposal Trustee is required to hold a meeting of Creditors within 21 days.

NOLs: the acronym for net operating loss(es). In general, a company acquires NOLs when its allowable tax deductions are greater than its taxable income, resulting in negative taxable income, and allowing a company to possibly recover past tax payments or reduce future tax

payments. NOLs generally occur when a company's expenses are greater than its revenues for a given period of time. In a Bankruptcy case, the preservation of a Debtor's NOLs or other valuable tax attributes may be the focus of a Motion seeking to limit the trading in certain Claims or Equity Security.

Non-core Proceeding: proceedings in a US Bankruptcy case that are not Core Proceedings. Without the consent of the parties, a US Bankruptcy Court may hear but may not enter Orders or judgments in a Non-core Proceeding. Instead, the US Bankruptcy Court must issue proposed findings of fact and conclusions of law that are then reviewed by the District Court.

Non-Dischargable: a debt that is excepted from Discharge or for which the Debtor otherwise does not receive a Discharge.

Non-filing Parent: a parent company of the Debtor that did not file a Petition for relief under any chapter of the Bankruptcy Code. A Non-filing Parent is not a Debtor.

Non-filing Subsidiary: a subsidiary of the Debtor that did not file a Petition for relief under any chapter of the Bankruptcy Code. A Non-filing Subsidiary is not a Debtor.

Non-recourse Financing: a type of financing in which the lender has agreed that it has no ability to make claims against the Borrower in excess of the value of the Collateral if such Collateral is insufficient to repay the Debt.

No-shop Provision: an agreement by one or both parties to a merger or sale transaction only to deal with the other party and not to solicit other bids or provide information to other possible bidders. In US Bankruptcy, No-shop Provisions likely go by the wayside since it is the Debtor's responsibility to get as much as it can for the assets it is going to sell. Similarly, a US Bankruptcy Court is unlikely to approve a sale of an asset without some kind of evidence that the Debtor made an effort to get the highest price on the market. Thus, instead of No-shop Provisions, Window Shop Clauses are imposed.

"Nothing to see here": the most common response of executives of distressed companies in the Middle East (and indeed the world over) to questions regarding the financial condition of their companies; also known as "the zone of insolvency". See Zone of Insolvency for US and UK implications of such term.

Notice: a process by which Parties in Interest are notified of key deadlines in a US Bankruptcy case or that the Debtor or another Party in Interest is seeking relief from the US Bankruptcy Court. Notice may be actual, as by mail, or constructive, as in the case of Notice by Publication.

Notice by Publication: the process of giving Notice by publishing a notice in a newspaper or other publication, as an alternative to actual Notice. This frequently occurs when the Debtor does not know if it has

certain Creditors, and if it does, where those Creditors can be found. It is also frequently used in very large, complex cases to ensure that every possible Creditor receives Notice. Notice by Publication provides constructive notice, as distinct from the actual notice that results from notice by mail. Notice by Publication is usually not effective with respect to known Creditors with identifiable addresses.

Novation: the name given to the process by which obligations as well as rights are transferred by one party to another or (in some civil law jurisdictions) the name given to the process by which an existing obligation is morphed into a different obligation. Contrast (in the former case) with Assignment. Novations can cause the loss of Security Interests granted in certain European countries (if you do not phrase your Novation carefully enough), hence the use of Assignment and Assumptions in these instances.

Numerosity: under Chapter 11, a Plan is accepted by a Class of Claims if that Plan is accepted by (i) more than one-half of the Creditors in the Class who actually voted and (ii) holders of at least two-thirds in amount of the Claims held by Creditors in the Class who actually voted. The requirement described in part (i) of the previous sentence is known as the Numerosity requirement.

Nunc Pro Tunc: a Latin term meaning "now for then". It is used in US Bankruptcy cases when Professionals seek to be retained by Order of the US Bankruptcy Court from the inception of their services rather than from the date of the filing of their Retention Application (or later approval of their retention). In many cases, Professionals are required to begin work on behalf of their client, either the Debtor or a Committee, prior to obtaining an Order from the US Bankruptcy Court, and they would be disinclined to do so without the ability to obtain Nunc Pro Tunc relief. Some US Bankruptcy Courts will permit Nunc Pro Tunc relief only if the Retention Application is filed within a certain period of time after the commencement of services — often 30 days.

Objection to Discharge: Bankruptcy Code Section 727 provides that the US Bankruptcy Court shall grant a Chapter 7 Debtor a Discharge of all debts (except as provided in Bankruptcy Code Section 523) unless there is a complaint filed against the Debtor objecting to such Discharge. A number of grounds exist under which an Objection to Discharge may be filed pursuant to Bankruptcy Code Section 727. Notably, a complaint objecting to a Debtor's Discharge must be filed within a certain period of time pursuant to Bankruptcy Rule 4004.

Obligor: the collective name for Borrowers and Guarantors.

Observation Period ("Période d'observation"): period after the opening of the French *Sauvegarde Financière Accélérée*, *Sauvegarde* or *Redressement Judiciaire* proceedings available to adopt a reorganisation plan. It is for a maximum of 18 months in *Sauvegarde* or *Redressement Judiciaire* proceedings although adoption by the Creditors' Committees

must occur within the first six months of the *Période d'observation*. If a plan has not been approved by the Creditors' Committees by that time, Creditors will be consulted individually or collectively and no longer be regrouped into Creditors' Committees so that the two-thirds majority rule will no longer apply to the members of the Creditors' Committees. The Observation Period is limited to 2 months in *Sauvegarde Financière Accélérée* proceedings and the plan must be adopted through the Creditors' Committee of credit institutions (including the lenders holding bank debt and other Creditors (other than main trade Creditors or bondholders) having extended credit to the Debtor) and through the Bondholders' Committee.

Obtaining Credit Unlawfully: a term used in Italy; see *Ricorso Abusivo al Credito*.

OCP: see Ordinary Course Professional.

Offentlig Akkord: a Norwegian term; see *Gjeldsforhandling*.

Offentlig Gjeldsforhandling: a Norwegian term; see *Gjeldsforhandling*.

Offentligt Ackord: a type of Swedish financial settlement between a Debtor and its Creditors, in the form of a judicial composition, during a *Företagsrekonstruktion*. The aim of the *Offentligt Ackord* is to settle the debt problems of a company, and it is only available to companies that fulfil the requirements for reorganisation proceedings or within a Konkurs proceeding. It only applies to Unsecured Creditors and debts incurred before the start of the reorganisation. The requirements for court approval are that at least 60 per cent of the Unsecured Creditors by both number and value must be in favour of the composition if the proposal includes a dividend of 50 per cent or more of their debts. If the Unsecured Creditors are to receive 50 per cent or less under the proposal, then at least 75 per cent in number and value must approve the composition. See *Ackord*.

Official Committee: in Chapter 11 cases, a committee that is appointed by the United States Trustee under Bankruptcy Code Section 1102.

Official Liquidation: see Court Liquidation.

Official Receiver: Canadian federal government officials responsible for administering the BIA. The duties of the Official Receiver include: (i) receiving certain filings in bankruptcy and Insolvency proceedings; (ii) reporting bankruptcy offences; (iii) performing examinations of a Bankrupt; and (iv) and chairing certain meetings of Creditors.

OID: acronym for Original Issue Discount.

Omnibus Hearing: a hearing at which a number of matters in a particular case are heard. In large, complex US Bankruptcy cases, the US Bankruptcy Court may reserve certain dates specifically for matters related to that Debtor. Motions or Applications filed within requisite time periods in advance of such dates are set for hearing on such dates.

Hearings taking place on those reserved dates are referred to as Omnibus Hearings.

Omologazione: the procedure in Italy whereby the Italian bankruptcy court, having verified that the *Concordato Preventivo* procedure has been duly complied with and that the result of the Creditors' vote is correct, ratifies the private agreement by means of a duly motivated final order. In the *Accordo di Ristrutturazione*, the *Omologazione* grants the relevant enterprise immunity from *Revocatoria Fallimentare* which means that the payments and transactions carried out under the *Accordo di Ristrutturazione* cannot be subject to Clawback. See *Bancarotta Fraudolente* (fraudulent bankruptcy) and *Bancarotta Semplice* (simple bankruptcy).

Operating Reports: also called Monthly Operating Reports or MORs. Periodic (usually monthly) reports that are filed by the Debtor with the US Bankruptcy Court to apprise Parties in Interest of the Debtor's Post-petition operational financial information, and also to provide the disbursement information upon which Quarterly Fees are calculated. They generally follow a form and are due by a date prescribed by the United States Trustee in the applicable region, and thus may vary from region to region.

OPM: see Other People's Money.

Oppression Remedy: a remedy under Canadian corporate legislation that parties may seek in respect of certain oppressive acts of a company or its directors (e.g. an unjust Preference or the payment of dividends while a company is in the Zone of Insolvency). A Canadian court may grant an oppression remedy if it is satisfied that the company or its directors have committed any act or conducted any business in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of any security holder, Creditor, director or officer. The Canadian court may make any Order it deems appropriate, including an Order: (i) restraining the complained-of conduct; (ii) appointing a Receiver or receiver and manager; or (iii) liquidating or dissolving the company.

Opschorting van Betaling: the Dutch term in Belgium for *Sursis de Paiement*.

Order: a judicial command, direction or decision. Orders are entered in response to the Motions or Applications that request them, and sometimes may be entered by a court *sua sponte*.

Order for Relief: the filing of a Voluntary Petition commences a US Bankruptcy case, and the commencement of the case "constitutes" — meaning it is a deemed Order and not an actual written Order — an Order for Relief. In a case commenced by the filing of an Involuntary Petition, if the Involuntary Petition is not timely contested or if the US Bankruptcy Court so determines after trial, the US Bankruptcy Court will actually order relief. Under the Bankruptcy Code and Bankruptcy Rules,

many things happen upon, flow from or are tied to the timing of the Order for Relief.

Ordinary Course of Business: somewhat of a term of art in a US Bankruptcy case. If a certain type of transaction is of the type that the Debtor would enter into in the normal and expected conduct of its operations, it may not be affected by the Bankruptcy. For example, a use, sale or lease of assets in the Ordinary Course of Business does not require prior approval of the US Bankruptcy Court under Bankruptcy Code Section 363(c); obtaining unsecured credit in the Ordinary Course of Business on an Administrative Claim basis does not require prior approval of the US Bankruptcy Court under Bankruptcy Code Section 364(a); and certain Pre-petition transfers may not be avoidable as a Preferential Transfer if made in the Ordinary Course of Business and on account of a debt incurred in the Ordinary Course of Business under Bankruptcy Code Section 547(c)(2). To determine whether or not a transaction is in the Ordinary Course of Business, some US Bankruptcy Courts apply a reasonable expectations test, which considers what Parties in Interest would reasonably expect a Debtor to do in its usual business activities, and other US Bankruptcy Courts apply a vertical-horizontal test, which looks vertically at the Debtor's Pre-petition and Post-petition activities and horizontally at the Debtor's industry.

Ordinary Course Professional: a professional retained by a Debtor to handle matters arising in the Ordinary Course of Business that are unrelated to the US Bankruptcy. Most US Bankruptcy Courts will allow a Debtor, upon Motion, to retain and compensate an Ordinary Course Professional without following formal retention application and payment procedures, so long as fees do not exceed a certain monthly amount and in some cases a certain aggregate case amount (which amounts vary by District and by the size and nature of the case).

Original Issue Discount: refers to the discount from par value at the time a bond or other debt instrument is issued. The most extreme example of an OID is a zero-coupon bond. OID is considered a form of unstated interest so tax issues are implicated.

Other People's Money: a movie based on a play by the same name. It introduced to the world "Larry the Liquidator", played in the movie by Danny DeVito. The term OPM is generally used to refer to any instance in which an investor is seeking to leverage the money of others.

Out-of-Court Restructuring: a process whereby the Debtor and its Creditors seek to come to an agreement to restructure the Debtor's debt without the need for a Bankruptcy or any other resort to a court to resolve disputes.

Out of the Money: a term used in restructurings to describe any Creditors or Equity Security Holders where the Going-Concern Value of the Borrower group is less than the total amount due to Creditors senior in Priority to them.

Outside the Ordinary Course of Business: the opposite of in the Ordinary Course of Business. A transaction that is outside the normal and expected conduct of a Debtors' operations will likely be affected in some manner by the Bankruptcy. For example, a use, sale or lease of assets not in the Ordinary Course of Business requires approval of the US Bankruptcy Court under Bankruptcy Code Section 363(b); obtaining credit outside the Ordinary Course of Business requires approval of the US Bankruptcy Court under Bankruptcy Code Section 364(b)-(c); and a Pre-petition transfer made on account of a debt may be avoidable as a Preferential Transfer if not made in the Ordinary Course of Business (and not subject to another defence) under Bankruptcy Code Section 547(b).

Over-Collateralisation: this is a contractual requirement, which may be imposed on the grantor of a Collateral, that the value of the assets provided as Collateral is higher than the amount secured by such Collateral, in order to protect the beneficiary against the potential decrease in value of such assets. In some jurisdictions, this may be limited by statutory provisions restricting the granting of Collateral disproportionate to the obligation being secured—apparently you can have too much of a good thing. Also used more generally to describe the situation where the value of the Collateral held by a lender is greater than the amount of its loan (i.e., the lender is said to be "Over-Collateralised").

Over-Indebtedness: one of the conditions describing Insolvency in Germany and triggering the 21 Day Rule. A Debtor is legally over-indebted if it (i) has deficient assets and (ii) lacks a Going-Concern Prognosis (the latter criterion will no longer apply from 2014). The other condition describing Insolvency is illiquidity. For more information, see Latham & Watkins Client Alert No. 926, "German Legislation to Limit Application of Over-Indebtedness Test to be Extended Beyond 2010: More Chances for Out-of-Court Restructurings" (31 August 2009), available at www.lw.com.

Oversecured Claim: a Secured Claim, the amount of which is less than the value of the Collateral securing such Claim. Under Bankruptcy Code Section 506(b), the holder of an Oversecured Claim may receive payments for interest on its Secured Claim, as well as for reasonable fees, costs or charges provided for by agreement or applicable law, up to the value of the Collateral.

PACER: the acronym for Public Access to Court Electronic Records. PACER is accessible online at www.pacer.gov. It is an electronic public access service that allows authorised users to obtain, at a per-item charge, case and docket information from Circuit Courts, District Courts and US Bankruptcy Courts. To become an authorised user, an account must be established with PACER.

Parallel Debt: certain jurisdictions do not recognise a trust concept, such that granting a Security Interest to a Security Trustee for the benefit of Secured Parties is not possible (or its validity is doubtful) and the Collateral must be held directly by those owed the debt that is being secured. To

get around this and avoid having all Secured Parties as signatories to the Security Agreements (with the obvious consequential practical problems on syndication and other transfers of the debt), parties create a Parallel Debt provision pursuant to which a Security Agent obtains a parallel claim and Security Interest against the Borrower, issuer or other Obligor. The parallel claim represents a primary obligation equalling the total amount of debt the Obligors owe to the Secured Parties. The provision will provide that the Parallel Debt is due and payable at the same time, in the same amounts, and will be discharged at the same time and to the same extent as the underlying debt.

Pari Passu: equal right of payment. Literally, "of equal step", indicating that two or more Creditors, or two or more Equity Security Holders, are entitled to the same rights, privileges or distributions, depending on the context.

Partial Roll Up: a Roll Up of only part of a Pre-petition Debt.

Part IV of the CCAA: the provisions of the CCAA that address cross-border insolvencies. Part IV of the CCAA largely adopts the UNCITRAL Model Law on Cross-Border Insolvency and is very similar to the provisions of Chapter 15 of the Bankruptcy Code. Part IV of the CCAA largely revolves around the concepts of whether a proceeding is a "foreign main proceeding" or "foreign non-main proceeding". As is the case in the Chapter 15 context, a "foreign main proceeding" is a foreign proceeding in a jurisdiction where the Debtor has "the centre of its main interests" or "COMI" and a "foreign non-main proceeding" means a foreign proceeding other than a "foreign main proceeding". Under the CCAA, a "foreign representative" may apply to the Canadian court for recognition and, if the Canadian court determines that the foreign proceeding is a "foreign main proceeding" (i.e. that the Debtor's COMI is in the foreign jurisdiction), the CCAA requires the Canadian court to issue an Order granting a stay of proceedings and prohibiting the Debtor from selling or otherwise disposing of its assets outside the ordinary course of business. The Canadian court has broad discretion under the CCAA to make an Order consistent with any Order that may be made under the CCAA. In the event that the foreign proceeding is a "foreign non-main proceeding", the stay of proceedings is not automatic; however, the Canadian court has discretion to grant a stay of proceedings and other relief that it deems appropriate.

Party in Interest: a term of art in the Bankruptcy Code that is broadly defined in Bankruptcy Code Section 1109(b) to include the Debtor, the Trustee, a Creditors' Committee, an Equity Committee, a Creditor, an Equity Security Holder or any Indenture Trustee. A Party in Interest has a right to raise and appear and be heard on any issue in a case.

Patient Care Ombudsman: a Disinterested Person appointed by the United States Trustee at the direction of the US Bankruptcy Court to monitor the quality of patient care and to represent the interests of the patients of a Debtor's health care business. Under Bankruptcy Code

Section 333, a Patient Care Ombudsman "shall" be appointed no later than 30 days after the Petition Date, unless the US Bankruptcy Court finds that a Patient Care Ombudsman is not necessary to protect the patients due to the specific facts of the case. The duties of a Patient Care Ombudsman are listed in Bankruptcy Code Section 333(b).

Payment Blockage Provision: a standard feature in an Intercreditor for a Mezzanine Financing and a high yield deal (and other types of Subordinated Debt). It provides that the Borrower/issuer of the Subordinated Debt is forbidden from making payments on the Subordinated Debt in certain circumstances (e.g., when any or certain agreed Defaults have occurred with respect to the Senior Debt). Note that this is not the same as a Standstill Period. If the Subordinated Debt does not get paid when it is supposed to be paid because of a Payment Blockage Provision, the Subordinated Creditors can pursue all available remedies unless they are also subject to a Standstill Period. Subordinated Creditors should expect to be subject to both.

Perfect or Perfection: what a holder of a Security Interest must do to protect its interests. In certain jurisdictions, failure to Perfect a Security Interest renders it void against other Creditors so Perfection is really rather important. Typically Perfection requires further acts other than simple execution of the Security Agreement, and such acts will vary between jurisdictions and depend on the nature of the asset(s) subject to the Security Interest but may include registration at relevant registries, the giving of notice to third parties and/or taking possession of the Collateral. Counsel to the lenders will typically take responsibility for ensuring Perfection. In the US, Perfection of a mortgage or other Security Interest in real property requires the recording of the instrument in the real property records of the county or other governmental repository of real estate records for the location in question. For personal property subject to Article 9, there are five basic methods of Perfection: filing of a financing statement, control, possession (either directly or through a third party), temporary perfection and automatic perfection. The easiest and most common method of Perfection in the US is the filing of a financing statement, which is sufficient to Perfect a Security Interest in most (but not all) personal property.

Période Suspecte: the French term for Suspect Period. In Luxembourg, the *Période Suspecte* is from the date on which the Debtor is deemed to have entered a state of Cessation of Payments (*Cessation de Paiements*) until the adjudication in bankruptcy. In practice, this period is usually retroactively set to start to run no earlier than six months (and 10 days, depending on the transaction in question) prior to such adjudication. Except where Security Interests over qualifying Collateral are created under the Luxembourg Collateral Act, transactions made during the Suspect Period are particularly vulnerable to attack as the court can declare them void, even if no fraud was committed. The term *Période Suspecte* is also used to describe the Suspect Period under Belgian

Insolvency law, a description of which can be found under *Verdacte Periode* (the Dutch translation of *Periode Suspecte*).

Personal Services Contract: a type of Executory Contract that, in the absence of consent by the non-Debtor counterparty, is not subject to Assumption or Assignment under Bankruptcy Code Section 365(c) because it is personal in nature and applicable law excuses the non-Debtor party from accepting performance from anyone other than the Debtor.

Petition: the document used to commence a US Bankruptcy, in the form of Official Form 1 for a voluntary filing or Official Form 5 for an involuntary filing. The term is also used to describe the act of voluntarily or involuntarily filing a Petition or seeking relief under the Bankruptcy Code. Notably, a voluntary filing of a Petition constitutes an Order for Relief under whichever chapter of the Bankruptcy Code such petition was filed; an involuntary filing, however, does not constitute an Order for Relief.

Petition Date: the date on which a US Bankruptcy case is commenced, so named because a Petition is filed with the US Bankruptcy Court to commence a Bankruptcy case. Some practitioners use the term "Commencement Date" instead of Petition Date.

Piano Attestato di Risanamento: aka a financial/industrial plan prepared by the company. In Italy, a rapid, confidential and almost exclusively Out-of-Court Restructuring aimed at the company's reorganisation and debt restructuring. The plan must be assessed and validated by the Esperto and can include all sorts of debt restructuring options. Requires the approval of all participating Creditors. The use of this procedure therefore is not to Cramdown minorities, but to obtain particular relief against potential later Clawback actions. See *Revocatoria Fallimentare*, *Bancarotta Fraudolenta* (fraudulent bankruptcy) and *Bancarotta Semplice* (simple bankruptcy). For more information on the *Piano Attestato di Risanamento* and to Italian Insolvency Law generally, see Latham & Watkins Client Alert No. 1151, "Decree Law No. 78 of 31 May 2010 as Converted by Law No. 122 of 30 July 2010: Additional Changes to Italian Bankruptcy Law" (24 February 2011), available at www.lw.com.

Plan: a document, generally considered to be enforceable as a contract, proposed in a US Bankruptcy case under Chapter 9, Chapter 11, Chapter 12 or Chapter 13.

Plan A: see Plan B.

Plan B: the colloquial name given to a restructuring plan that can be implemented coercively against some constituency of stakeholders if they do not agree to a consensual deal (that being Plan A). It is often said that "you need Plan B in order to get Plan A". A Plan B typically will involve enforcement of Collateral or some other non-agreed disposal of assets, (e.g., via English Administration proceedings).

Plan C: the back-up plan to your back-up Plan B which is thought of when it is realised that Plan B doesn't work. Time to get worried.

Plan Implementation Date: the date on which a CCAA Plan is implemented and the Debtor must begin performance thereunder. Sometimes, the Plan Implementation Date is the same date as the Sanction Order, while in other instances, the Plan Implementation Date is much later. The Plan Implementation Date is usually triggered by the satisfaction or waiver of the conditions precedent in the CCAA Plan and the filing of a Monitor's certificate with the Canadian court confirming same.

Plan of Liquidation: a Plan filed under Chapter 11 of the Bankruptcy Code for purposes of liquidating the Debtor's assets and distributing any Liquidation proceeds among Creditors and Equity Security Holders based on the treatment provisions of the Plan.

Plan of Reorganisation: a Plan filed under Chapter 11 of the Bankruptcy Code, providing for the reorganisation and continuation of the Debtor and for the treatment of Claims and Interests.

Plan Support Agreement: a Pre-petition agreement between a prospective Debtor and certain Creditors or Equity Security Holders to support a particular restructuring proposal that is intended to be embodied in a Plan. Such an agreement may also be called a Lockup Agreement or a Restructuring Support Agreement, and they are almost always utilised in connection with a Pre-arranged Bankruptcy or a Pre-negotiated Bankruptcy.

Plan Vneshnego Upravleniya: meaning "External Administration Plan" in English, a plan produced by the External Administrator for restoring the Debtor's solvency. Such a plan is ordered during the course of a Russian External Administration and must be approved by a majority of the Creditors voting at the Creditors' meeting. The Extended Administration Plan must establish a period for restoring the Debtor's solvency and must contain a feasibility study for achieving this goal.

Podozritelnye Sdelki: meaning "suspicious transactions" in Russian. These are Suspect Transactions entered into by a Debtor prior to the commencement of Insolvency proceedings. This term covers both Transactions at an Undervalue and Transactions Aimed at Defrauding Creditors (respectively translated into Russian as: "*sdelka sovershennaya dolzhnikom pri neravnotsennom vstrechnom ispolnenii*" and "*sdelka sovershennaya v tselyah prichineniya vreda imuschestvennym pravam kreditorov*").

Point of No Return: under recent English case law, the Court of Appeal held that the Balance Sheet Test was primarily a test for whether a company had "reached the point of no return". The Court of Appeal held that a company reaches the Point of No Return when it faces "an incurable deficiency in its assets".

Police Power: under Bankruptcy Code Section 362(b)(4), "a governmental unit's or organisation's police and regulatory power, including the

enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organisation's police or regulatory power...". It is an explicit exception to the Automatic Stay.

Ponzi Scheme: named after Charles Ponzi who gained notoriety in the 1920s, the term is used to describe investment schemes where returns are only generated by further investors parting with their cash into the scheme, and therefore the scheme is bound to fail. The founders tend to live extravagant lifestyles in the meantime and then go to jail. Bernie Madoff is the latest, but doubtless not the last, notorious perpetrator of a Ponzi Scheme.

POR: shorthand reference to a Plan of Reorganisation.

Post Arrangement Hearing: a hearing pursuant to Dubai Decree No. 57 for 2009 at which the Decree 57 Tribunal considers approval of a Voluntary Arrangement proposal; see Decree 57 and Decree 57 Tribunal.

Post-Filing: in Canada, after the Filing Date, used either as an adjective (a Post-Filing Claim, meaning a Claim that arose after the Filing Date) or as a noun (the contract was entered into Post-Filing, meaning the contract was entered into after the Filing Date).

Post-petition: after the filing of the Petition, used either as an adjective (a Post-petition Claim, meaning a Claim that arose after the filing of the Petition) or as a noun (the contract was entered into Post-petition, meaning the contract was entered into after the filing of the Petition). Some practitioners drop the hyphen and use Postpetition.

Potential Event of Default: see Default.

PPSA — Personal Property Security Act: in most common law Canadian provinces other than Quebec (which is a civil law jurisdiction), security against personal property is governed by the particular province's PPSA. The PPSA is legislation modeled after Article 9 of the UCC and governs the taking, Perfection, Priority and enforcement of security in the particular Canadian province. Although amendments to Quebec's Civil Code have brought it closer to the concepts of the PPSA with respect to personal property security, Quebec's commercial laws are significantly distinct from those of the rest of Canada.

Pre-arranged Bankruptcy: a Chapter 11 case that is filed by the Debtor after negotiating the terms of the restructuring with its major stakeholders. It is often the case that the Debtor will have entered into a Plan Support Agreement with such stakeholders prior to filing. A Plan based on the negotiated restructuring terms is usually filed on or shortly after the Petition Date, along with a Disclosure Statement. Notably, however, unlike a Pre-pack Bankruptcy, in a Pre-arranged Bankruptcy, the Debtor has not yet solicited the Plan. A Pre-arranged Bankruptcy should be shorter than a Free Fall Bankruptcy, but longer than a Pre-pack Bankruptcy.

Preference: a type of Suspect Transaction usually, but not always, made during the Preference Period, often made to a Creditor while the transferor was Insolvent which (in England) puts the Creditor in a better position than it otherwise would have been in an Administration or a Liquidation or, in the US, in Chapter 7 or Chapter 11 proceedings. Preferences may be subject to Clawback, subject to any defences that are available in the applicable jurisdiction. The Preference rules are intended to discourage Creditors from making a mad grab for assets when they learn that the Debtor is becoming Insolvent and to prevent Debtors from favouring some Creditors over others as Insolvency nears. Preferences are also known as Preferential Transfers. A Preference has some similar characteristics to Fraudulent Transfer but they are separate legal concepts as Clawback of assets under a Preference will not usually require proof of an intention to defraud Creditors or of constructive fraud in US. See Clawback. See also Preferential Transfers for a description of Preferences in Bankruptcy in the US and *Actio Pauliana* for a description of Preferences in the Netherlands.

Preference Period: a period of time during which, if a Creditor (or, in the case of Bankruptcy, an Insider) received a payment from a Debtor, such payment is considered a type of transfer that can be subject to a Clawback. In Bankruptcy in the US, the Preference Period is usually 90 days, or one year for Insiders, prior to the Petition Date. The Preference Period is also known as the Hardening Period or Suspect Period. See Clawback, Preference and Preferential Transfer.

Preferential Claims: a category of debts recognised in most jurisdictions outside of the US as having a preferential claim to the Debtor's estate claims, typically enshrined in the Insolvency legislation. The types of claims eligible for preferential treatment and their ranking as against other claims (particularly the expenses of the procedure and Secured Claims) varies significantly between jurisdictions, and often reflect local cultural priorities (e.g., the treatment of employee claims). In relation to the Italian Insolvency Law, see *Crediti Prededucibili* (Super-senior Credits).

Preferential Creditor: a Creditor holding a Preferential Claim (in some jurisdictions called a Preferred Creditor). See also *Créancier Privilégié*.

Preferential Transfer: pursuant to Bankruptcy Code Section 549, a Preferential Transfer is a transfer made during the Preference Period (i) to a Creditor; (ii) on account of an Antecedent Debt owed by the transferor before the transfer is made; (iii) while the transferor is Insolvent and (iv) that enables the Creditor to receive more than it would have received in a Chapter 7 Liquidation case under the Bankruptcy Code. Preferential Transfers are subject to Clawback, but Creditors may avail themselves of certain defenses to a Clawback action such as the Ordinary Course of Business defense and the "new value" defense. See Preference, Antecedent Debt, Clawback and Avoidance Actions.

Preferred Creditor: see Preferential Creditor. In Canada, a Creditor under the BIA that ranks ahead of an ordinary Creditor (e.g. an employee for certain wages and a landlord for specified rental arrears).

Pre-Filing: in Canada, before the Filing Date, used either as an adjective (a Pre-Filing Claim, meaning a Claim that arose before the Filing Date) or as a noun (the contract was entered into Pre-Filing, meaning the contract was entered into before the Filing Date).

Preliminary Insolvency Proceedings: the English name for *Vorläufiges Insolvenzverfahren* (which after all is far harder to pronounce), the phase between the filing for Insolvency with a German Insolvency court and the formal opening of Insolvency proceedings. Used by the court to analyse the company's situation mainly to see if there are at least enough assets to satisfy the costs of the proceedings. Usually terminates within three months, with commencement of formal Insolvency proceedings.

Prenda Catalana: a Spanish law pledge having as its main distinguishing feature the ability of the Secured Party and the pledgor to reach an agreement for the direct sale of the pledged asset without a public Auction.

Pre-negotiated Bankruptcy: see Pre-arranged Bankruptcy.

Pre-pack: generally, the term used to describe any Insolvency or Bankruptcy proceeding or arrangement in which the restructuring plan has been fully agreed and the necessary approvals already obtained before filing for Insolvency or Bankruptcy. In England, it is more specifically used in relation to Administration proceedings, in which a sale of the company's assets has been pre-agreed by the prospective Administrator, and will be implemented immediately upon his appointment.

Pre-packaged or Pre-pack Bankruptcy: a Chapter 11 case that is filed by the Debtor after negotiating a Pre-pack Plan with key groups of stakeholders and soliciting acceptance of the Plan from such stakeholders. The Pre-pack Plan and corresponding Disclosure Statement are usually filed with the US Bankruptcy Court on the Petition Date, along with a Motion requesting a combined hearing to consider approval of the Disclosure Statement, approval of the Pre-petition solicitation procedures, and confirmation of the Pre-pack Plan. The combined hearing will normally follow several weeks later. The purpose of a Pre-pack Bankruptcy is to shorten the duration of the Bankruptcy proceedings and reduce costs.

Pre-packaged or Pre-pack Plan: the Plan in a Pre-pack Bankruptcy, which is negotiated and voted on prior to the commencement of the Pre-pack Bankruptcy.

Pre-petition: before the filing of the Petition, used either as an adjective (a Pre-petition Claim, meaning a Claim that arose before the filing of the Petition) or as a noun (the contract was entered into Pre-petition, meaning the contract was entered into before the filing of the Petition). Some practitioners drop the hyphen and use Prepetition.

Prescribed Part: under English law, a percentage of the net proceeds realised from the pool of assets covered by a Qualified Floating Charge, which is ring-fenced and made available to unsecured Creditors in a Liquidation or Administration currently capped at £600,000, the Prescribed Part is calculated as 50 per cent of the first £10,000 of net floating charge realisations and 20 per cent of the balance.

Prima Facie: an evidentiary presumption that facts are true unless disproven. In US Bankruptcy, a Proof of Claim is considered Prima Facie valid until and unless it is objected to.

Prime: to take Priority over or, less frequently, an equal position with. Used in the context of DIP Financing to describe the imposition of a new Post-petition Lien on top of and with Priority over, or at least equal to, Pre-petition Liens that would have otherwise been First Liens without competition. Priming is done under Bankruptcy Code Section 364(d) and requires that DIP Financing be unavailable on any other basis and that the holders of any Pre-petition Liens that are to be Primed receive Adequate Protection of their interest in the property that is to be subject to the Priming Lien. Unless the Prime occurs consensually, it can be expected to result in heavy litigation before the US Bankruptcy Court.

Priming DIP Financing: a DIP Financing that requires the Priming of all other Liens (usually with certain exceptions).

Priming Lien: a Lien that Primes other Liens.

Priming Loan: a loan that is secured by a Priming Lien.

Priority: a term used globally to mean, as among two or more Creditors, the ranking of their Security Interests or their rights to receive payments. Generally, unless otherwise agreed, the first Secured Party to Perfect will be entitled to Priority.

Priority Claim: in the US, a Claim that is entitled to Priority treatment under Bankruptcy Code Section 507.

Privilège de Conciliation: Priority of payment granted to providers of new money to companies in the context of French Conciliation Proceedings subsequently ratified by the commercial court.

Privilegio Speciale: an Italian Security Interest created over a company's inventory to secure medium/long term financing facilities granted by banks to companies. Perfection is subject to registration of the deed creating the *Privilegio Speciale*, on a special register held at the place of the seat of the company or of the person having granted the *Privilegio Speciale*, if different from the Debtor. It ranks senior against Unsecured Creditors and junior against judicial expenses and other Preferential Claims.

Priznaki Bankrotstva: in Russia, non-payment of bills is not sufficient to force a company into Insolvency. A company is deemed to show *Priznaki Bankrotstva* (Signs of Bankruptcy) when it is unable to satisfy

its Creditor's claims for at least three months from their due date. In order for a Creditor to apply to the court for an Insolvency of a company, such claims must be at least RUB100,000 (around US$3,410) and this application will only be the first step in a complex process of initiating bankruptcy.

Procedimiento de Concurso Mercantil: a Mexican Insolvency proceeding to keep the Mexican Debtor operating and to avoid generalised Defaults in payments with two successive stages: (i) *Etapa de Conciliación* (mediation stage); and (ii) *Etapa de Quiebra* (bankruptcy stage).

Procedure of Exequatur: Lebanese legal principle by which final judgments of foreign courts may be enforced in Lebanon, which acts in an Insolvency setting to facilitate cross-border restructurings through enforcement of rulings in foreign Insolvency proceedings.

Professionals: lawyers, financial advisors, investment bankers, restructuring consultants, accountants, etc. that are working either for the Debtor, the Trustee, a Committee or some other entity that is related to the US Bankruptcy case. If a Professional will be compensated from Property of the Estate, the US Bankruptcy Court must approve the retention pursuant to either Bankruptcy Code Section 327 or 1103.

Proof of Claim: the official evidence of a Claim in US Bankruptcy, generally conforming to Official Form 10. Creditors generally must file timely Proofs of Claim against the Bankruptcy Estate in order to vote and receive distributions. Certain categories of Creditors, however, need not file Proofs of Claim, including Creditors whose aims are listed in the Schedules of Liabilities in the correct amount and are not designated as contingent, unliquidated or disputed.

Proof of Debt: a statutory form completed by a Creditor in an English compulsory Liquidation to state how much is claimed. The form is supplied by the Liquidator.

Proof of Interest: the official evidence of an Interest or Equity Security in Bankruptcy. A list of Equity Security Holders filed pursuant to Bankruptcy Rule 1007(a)(3) constitutes Prima Facie evidence of the validity and amount of the Interests, making it unnecessary for Equity Security Holders to file a Proof of Interest.

Property of the Estate: in the US, Bankruptcy Code Section 541 creates a Bankruptcy Estate, which consists of all of the property that will be administered by the US Bankruptcy Court. Bankruptcy Code Section 541(a) provides a list of what comprises Property of the Estate, and is intended to be as broad as possible. Bankruptcy Code Section 541(b) lists specific categories of items that would be excluded from Property of the Estate. Bankruptcy Code Sections 1115, 1207 and 1306 also address what constitutes Property of the Estate in certain cases. Bankruptcy Code Section 541 does not apply to an ancillary case commenced under Chapter 15. It is important to note that state law — or non-Bankruptcy law — plays an important role in determining what is and what is not

Property of the Estate since, although the Bankruptcy Code generally states that any property in which the Debtor has legal or equitable interests is Property of the Estate, the Bankruptcy Code does not provide any legal framework for determining whether a Debtor has an interest in a given property. This is where state law (or non-Bankruptcy law) comes into play: "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. ... Unless some federal interest requires a different result, there is no reason why such interests should be analysed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 54-55, 99 S. Ct. 914, 917-918, 59 L. Ed. 2d 136 (1979).

Proposal: a reorganisation proposal under Part III of the BIA, which may be made by an Insolvent Person, a Receiver, a liquidator, a Bankrupt or a Trustee in Bankruptcy. In Proposal proceedings, the Debtor must name a Trustee in Bankruptcy to act as trustee under the Proposal. The Proposal process is initiated when an NOI or the Proposal itself is filed with the Official Receiver, and the Proposal may be made to secured and/or Unsecured Creditors. Upon the initiation of the Proposal process, a stay of proceedings is automatically imposed under the BIA. To become effective, a Proposal must be accepted by the affected Creditors and then approved by the Canadian court. The statutory majority for each class of Creditors under the BIA is 50 per cent plus one in number and two-thirds in value of the claims of that voting class. The Canadian court will only approves a Proposal if it is satisfied that all statutory requirements have been complied with and the terms of the Proposal are reasonable. Once the Proposal is approved by the Canadian Court and implemented, it becomes binding on all members of all classes of Creditors affected by the Proposal, as if it were a contract between the Debtor and those Creditors. If the affected Secured Creditors reject the Proposal, they are free to enforce their rights over their security. If the Unsecured Creditors reject the Proposal, the Debtor is automatically deemed to have made an Assignment in Bankruptcy.

Proposal Stay: a stay of proceedings that arises automatically under the BIA upon the initiation of the Proposal process. The Proposal Stay operates to bind all Creditors, secured and unsecured, and operates throughout the period from the date of filing the NOI or the Proposal itself to the date of Canadian court approval and implementation. There are, however, certain exceptions to the application of this stay. With respect to Secured Creditors, those who actually took possession of secured assets before the Debtor filed its NOI or the Proposal itself are excluded, as are those who actually gave a Section 244 Notice more than 10 days prior to this date. The Proposal Stay does not apply to Secured Creditors who are not included within the Proposal, or who are in a class of Secured Creditors that has rejected the Proposal. In addition, Secured Creditors have the statutory right to apply to the Canadian court to lift a Proposal Stay where they can show that their security position is deteriorating or detrimentally affected by the stay imposed under the Proposal.

Proposal Trustee: a licensed Trustee in Bankruptcy that acts as trustee under a Proposal pursuant to the BIA. The Proposal Trustee has a number of BIA mandated duties and responsibilities in respect of the Debtor and the Proposal itself, including notifying Creditors of the filing of the Proposal, the date of the Creditors' meeting to vote on the Proposal, assisting with the preparation of financial information regarding the Debtor and reporting to both the Canadian court and Creditors.

Pro Rata: means in proportion, or prorated. In Bankruptcy, Creditors may be paid Pro Rata, or based upon the proportion of Claims each Creditor holds relative to the aggregate amount of Claims in the Class in which the Creditor's Claim is placed.

Protective Composition: the procedure by which a UAE trader may retain control over its affairs following bankruptcy and reorganise its debts with consent of its Creditors under the UAE Commercial Code. See Judicial Composition and Trader.

Provisional Relief: between the time a Foreign Representative files a petition for Recognition under Chapter 15 of the Bankruptcy Code and the time in which a court considers such petition, the Foreign Representative may seek Provisional Relief from the US Bankruptcy Court. Bankruptcy Code Section 1519. Such relief includes a number of things such as, for instance, a stay of execution against the Debtor's assets. Additionally, the statute also specifically excludes certain forms of relief from being granted on a provisional basis. For instance, a court may not enjoin police or regulatory action.

Public: when a trader says he's "public", it means he is trading on publicly available information and does not have, nor does he want to receive, MNPI.

Publication Notice: see Notice by Publication.

Purchase Money Security Interest or PMSI: Black's Law Dictionary defines a PMSI as "[a] security interest that is created when a buyer uses the lender's money to make the purchase and immediately gives the lender security by using the purchased property as collateral (UCC § 9–107); a security interest that is either (1) taken or retained by the seller of the collateral to secure all or part of its price or (2) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if that value is in fact so used." In essence, a PMSI secures a loan that enables a Borrower to get rights in some Collateral. So long as a lender properly Perfects its PMSI, it generally takes Priority over other Security Interests in the Collateral.

Pushdown: a procedure where Borrowers "push down" debt into operating companies to ensure a tax-efficient structure as the operating company can seek to deduct the Interest on the debt from its taxable profits. Also helps the ability of the lenders to take Collateral as issues such as Corporate Benefit and Financial Assistance can be eliminated

or reduced. Pushdown can occur in a variety of ways including a direct borrowing by the operating companies, a transfer of debt from a Holding Company to an operating company or a merger of a Holding Company and operating company.

QFC Holder: a Creditor who holds a Qualifying Floating Charge. A QFC Holder is able to appoint an Administrator via a court-based procedure or an out-of-court route at any time when an event has occurred that would allow the QFC Holder to enforce its charge, which may arise when the company is not Insolvent.

QFC: acronym for a Qualifying Floating Charge.

QFC: Qatar Financial Centre; a free trade zone in Qatar overseen by the Qatar Minister of Finance & Economy, with its own insolvency regulations.

Qualifying Floating Charge: a Floating Charge under English law over the whole or substantially the whole of the company's property. Under certain circumstances, Holders of a Qualifying Floating Charge are able to appoint an Administrator; see QFC Holder.

Quarterly Fees: in a Chapter 11 case, the fees payable to the United States Trustee for each quarter during which the case remains open, pursuant to 28 U.S.C. § 1930(a)(6). The fees are calculated based on the amount of disbursements during each quarter, with the current (amounts are adjusted from time to time) minimum being US$325 for disbursements totaling less than US$15,000 and the current maximum being US$30,000 for disbursements totaling more than US$30 million.

Rahn: an Islamic finance term meaning a pledge of Collateral for a debt.

Ranking: the level of Priority that a particular tranche of debt occupies in the overall capital structure.

Realisation of Pledged Property: after the Russian law pledge have been enforced (either through an in-court Enforcement Procedure or out-of-court Enforcement Procedure), the pledged property needs to be realised, in order for a Creditor to satisfy its monetary claim. Generally, the pledge can be realised by public Auction, a sale to a third party, a sale through commission or retention by a Creditor. Not all of these methods of Realisation of Pledged Property may be available in specific cases.

Receiver: under state law in the US, and generally at the behest of a Secured Creditor, a non-US Bankruptcy Court may appoint a person — the Receiver — to take control of the Debtor's assets for the benefit of the Creditor. Under Bankruptcy Code Section 105(b), the US Bankruptcy Court is specifically prohibited from appointing a Receiver. Under Bankruptcy Code Section 543, a Receiver is a Custodian that is generally obligated to Turnover property of the Debtor to the Trustee, although the US Bankruptcy Court may continue the Receiver in possession if the interests of Creditors are better served by doing so. The appointment of

a Receiver in a foreign country may preclude a US Bankruptcy Court from granting a foreign representative's request for Recognition. E.g., *In re Gold & Honey, Ltd.*, 410 B.R. 37 (Bankr. E.D.N.Y. 2009). Under English law, the holder of a Fixed Charge can appoint a Receiver (also known as a "receiver or manager") to enforce his security instead of having to apply to court for Liquidation of the Debtor. The appointment of the Receiver is a contractual remedy and the Receiver's duties are usually specified in the Security Agreement. See *Sindaco* for Receiver in Mexico. In Canada, a Receiver can be privately appointed by a Secured Creditor (where provided for in the security agreement) or appointed by a Canadian court.

Receivership: a process of enforcing Collateral by appointing an independent Insolvency practitioner to take possession of, and subsequently sell, an asset or business for the benefit of the Secured Parties only. Administrative Receivership in England, involving Receivership over substantially all of the company's undertaking, has mostly been repealed in order to promote greater use of Administration. Under Irish law, Receivership is an out-of-court process that is usually commenced when a receiver or a receiver and manager is appointed by a secured Creditor under its security documents, although the courts may also make the appointment. It can be used to sell a company's assets as a going concern. After the third day following the appointment of an Irish Receiver, it is not possible to appoint an Examiner to the company and so the Examinership procedure is blocked at this point. Under Canadian law, Receivership can be either an in-court or out-of-court process. Where provided for in the security agreement, a Secured Creditor may appoint a private receiver or receiver and manager to take possession of and realise upon the collateral of a Canadian Debtor on behalf of the Secured Creditor. This is often done where the Secured Creditor desires the assistance of a professional, usually a Canadian accounting firm, to act as its agent in the realisation process. A Secured Creditor also has the right to seek the appointment of a receiver or receiver and manager by a Canadian court. This remedy is usually used where difficulty is expected in exercising self-help remedies or appointing a private receiver, or where the secured party wishes to obtain the protection of a Canadian court appointment.

Recessionista: a person who can dress stylishly on a tight budget.

Recessionista-friendly: suitable for the *Recessionista* (i.e., cheap)!

Recharacterisation: in some instances, US Bankruptcy Courts will use their equitable powers under Bankruptcy Code Section 105 to recharacterise Claims. Generally, Recharacterisation occurs when a person makes a "loan" to a company that is in such poor financial health that the company cannot otherwise get a loan. Once the company files for Bankruptcy, the Claim for the loan may be recharacterised as an Equity Security. Recharacterisation differs from Subordination in that Recharacterisation turns on whether the Claim is actually a

Claim, as opposed to whether an actual Claim should be Subordinated. Recharacterisation is a fact-intensive inquiry, and a number of factors have emerged to assist US Bankruptcy Courts in deciding whether to recharacterise a Claim.

Rechter-Commissaris: the supervisory judge who supervises the *Curator* (bankruptcy trustee) during Dutch law *Faillissement* proceedings and whose prior consent is required for certain legal actions of the receiver. The *Rechter-Commissaris* may also be asked by any Creditor or the Debtor to order that the *Curator* perform or refrain from a certain act.

Reclamation: a Creditor's ability under the UCC and applicable state law to get back goods that were sold to a Debtor on credit if the Debtor was Insolvent at the time of the sale. Under the UCC, a Creditor's demand for Reclamation must be made within 10 days after delivery of the goods. Reclamation rights exist in US Bankruptcy under Bankruptcy Code Section 546(c), with respect to goods received within 45 days before the Petition Date, but the right is subject to the prior rights of a Secured Creditor with a Lien on the goods. To exercise the right, the Creditor must make written demand for Reclamation no later than 45 days after the date of receipt of the goods by the Debtor or not later than 20 days after the Petition Date if the 45-day period expires after the Petition Date. In a reorganizing case under Chapter 11, it is unlikely that the goods subject to a Reclamation demand will actually be returned. Instead, the Debtor may propose to give the Creditor an Administrative Claim for the value of the goods.

Recognised Claims: Claims set forth in a list prepared by the *Mediador* (mediator) based on the Insolvent entity's books and records and further recognised and ranked by the Mexican Insolvency Court for purposes of the Insolvency Proceeding, by means of a *Sentencia de Reconocimiento de Créditos* (claim recognition judgment).

Recognised Creditors: Creditors holding a claim duly recognised by the Mexican Insolvency Court.

Recognition: judicial assistance in recognizing a Foreign Main Proceeding or a Foreign Non-main Proceeding, forming an essential factor to be addressed in the context of international restructuring and Insolvency procedures. The Model law provides for Recognition and this provision is also in the EU Regulation. In the US, the provision for Recognition is given effect in Bankruptcy Code Section 1502(7). A Debtor who has filed a Bankruptcy or other Insolvency proceeding in a country other than the United States will, in some instances, file a Chapter 15 petition in the United States in which it seeks Recognition of the foreign Bankruptcy case. A court may only Recognise a case as a Foreign Main Proceeding or a Foreign Non-main Proceeding. Note that even if Recognition is granted, it can be modified or terminated. Bankruptcy Code Section 1517(e). With respect to Recognition of Insolvency proceedings among Nordic countries, see The Nordic Bankruptcy Convention.

Record Date: Indentures set forth Record Dates and interest payment dates. The Record Date is the date when the Trustee determines which bondholders are entitled to receive a given interest payment on the related interest payment date. In US Bankruptcy, Record Dates are important for purposes of, for instance, determining the holders of Claims or Interests who are entitled to vote on a Plan and determining the holders of Claims or Interests who are entitled to receive distributions under a Plan. See Distribution Record Date and Voting Record Date.

Recoupment: a right, similar to Setoff, but in US Bankruptcy not subject to the same restrictions as Setoff (see Bankruptcy Code Section 553). Recoupment exists under common law and continues without restriction in Bankruptcy. Recoupment permits the netting of mutual obligations between a Debtor and Creditor but only if they arise under a single, integrated transaction. In that sense it is different from Setoff, which when permissible in Bankruptcy would permit the netting of mutual obligations from different transactions.

"Redressement Judiciaire": French Insolvency proceedings of a company in a state of *Cessation des Paiements* for which reorganisation appears possible. These proceedings are very similar to a *Sauvegarde* (although they existed before the *Sauvegarde* was introduced into French law) and may also result in a Term-Out.

Reference: 28 U.S.C. § 157 provides that District Courts may refer US Bankruptcy cases in their entirety (with certain narrow exceptions) to the US Bankruptcy Court for the district. Most, if not all, District Courts refer Bankruptcy cases to US Bankruptcy Courts via a standing order. Under Bankruptcy Code Section 921, however, if a case is commenced under Chapter 9 of the Bankruptcy Code, "the chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case."

Refinanciación Protegida: refinancing agreement excluded from the scope of Spanish Clawback actions provided certain conditions are met, including approval by Creditors holding at least 3/5ths by value of the debts, and approval by an independent expert. Under Irish law, Receivership is an out-of-court process that is usually commenced when a receiver or a receiver and manager is appointed by a secured Creditor under a Debenture, although the courts may also make the appointment. It can be used to sell a company's assets as a going concern. After the third day following appointment of an Irish Receiver, it is not possible to appoint an Examiner to the company and so the Examination procedure is blocked at this point.

Refinancing: the repayment of existing debt with the proceeds of a new debt issuance. Any Refinancing will require a careful review of existing terms and conditions of the bond issues, Indentures and credit agreements to make sure the debt being Refinanced can, in fact, be repaid and to verify that any debt being left in place permits incurrence of new Debt. The bond terms and conditions, Indenture and credit agreement debt

baskets will generally allow the Refinancing of existing Debt, but subject to certain conditions that must be read carefully. See Latham & Watkins Client Alert No. 696, "Restructuring High Yield Bonds: Getting Ready for the Next Phase of the Cycle" (21 April 2008), available at www.lw.com.

Refinancing Rate: the rate at which the Central Bank of Russia lends Roubles to Russian banks. The Refinancing Rate is usually used as a reference rate; see Article 395 Interest.

Rehabilitation: a term used in Russia (*Sanatsiya* in Russian) which generally refers to the measures taken prior to Insolvency proceedings by the Debtor's shareholders, Creditors and others, with the aim of preventing the Debtor's Insolvency and restoring its solvency.

Reinstatement: the Unimpaired treatment of a Class of Claims or Interests under a Chapter 11 Plan pursuant to Bankruptcy Code Section 1124(2), which provides: "(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a Default — (A) cures any such Default that occurred before or after the commencement of the case under this title, other than a Default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured; (B) reinstates the maturity of such claim or interest as such maturity existed before such Default; (C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; (D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a Default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and (E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest."

Rejection: one of the options for dealing with an Executory Contract or Unexpired Lease under Bankruptcy Code Section 365(a). It is the Debtor's decision whether to cease performance under a contract or lease and to get out from under burdensome performance obligations. Rejection constitutes a breach of the contract or lease, which entitles the counterparty to assert rejection damages. A Claim for rejection damages is treated as an Unsecured Claim in Bankruptcy.

Rekonstruktion: the Moratorium procedure in Denmark aimed at affording Debtors who are unable to pay their debts as they fall a breathing space while trying to reorganise their businesses. The Danish Insolvency law offers two ways for the in-court restructuring of businesses, (i.e. the Moratorium procedure given by law): a *Virksomhedsoverdragelse* (a transfer of undertaking) or a *Tvangsakkord* (a compulsory composition), involving either a percentage write-down of the debt, a waiver of

the debt, or a deferment of payment, or a combination of the two. Restructuring may be applied for by Debtors and Creditors alike. The Danish bankruptcy court will appoint one or more restructuring administrators (*Rekonstruktør*) and a nominee, usually an accountant, to assess the assets and liabilities of the Debtor. During the course of the restructuring, the Debtor must not pay any of the debts in existence at the time of the filing of the application for restructuring. At the close of the restructuring, the Debtor's funds will be distributed equally among the Creditors. The restructuring procedure also prevents Creditors from enforcing claims against the Debtor. All substantial transactions by the Debtor during the course of the restructuring must be approved by the restructuring administrator.

Rekonstruktionsforslag: Danish for restructuring proposal. See *Rekonstruktionsplan*.

Rekonstruktionsplan: the restructuring plan drafted by the *Rekonstruktør* (restructuring administrator) during a Danish *Rekonstruktion* (restructuring). The restructuring plan will include a recommendation as to what type of restructuring to aim for — a *Virksomhedsoverdragelse* (transfer of undertaking) or *Tvangsakkord* (compulsory composition) or both. Creditors vote on the proposed restructuring plan at a Creditors' meeting held in the Danish bankruptcy court not later than four weeks after the filing of the application for restructuring. If the plan is rejected by the Creditors, *Konkurs* proceedings will usually be instigated. If the plan is adopted, the restructuring administrator will draft a *Rekonstruktionsforslag* (a restructuring proposal). Not later than six months after the Creditors' meeting in the bankruptcy court, a new Creditors' meeting shall be held in court, to vote on the restructuring proposal. If the proposal is rejected by the Creditors, *Konkurs* proceedings will usually be instigated. If the proposal is adopted, the restructuring will take place as approved, either in the form of a transfer of undertaking or a compulsory composition or both. If a compulsory composition is involved, it will be put into effect as a court settlement. The Debtor will be released from all debts not included in the composition.

Rekonstruktør: the restructuring administrator appointed by the Danish bankruptcy court during a Danish *Rekonstruktion* (restructuring). The restructuring administrator is responsible for supervising the business during the restructuring, continuously evaluating the viability of the business, and controlling the restructuring process. The *Rekonstruktør* will also draft a proposed restructuring plan. The restructuring administrator, therefore, adopts a more active role than a mere supervisor.

"Related-to" Jurisdiction: the term is used in 28 U.S.C. § 1334(b); cases that are "related to" a Bankruptcy case are generally non-core matters the outcome of which could conceivably have some effect on the Estate being administered in Bankruptcy. It is worth noting that different Circuits may have slightly different definitions of what types of matters are "related to" a Bankruptcy case. For this reason, it is important to check the law of the Circuit in which you are proceeding.

Release Clause: a clause usually found in an Intercreditor Agreement which, under certain circumstances, allows senior lenders to dispose of assets or shares in a company or group of companies free of any debt, Security Interests or Guarantees, without the requirement to obtain consent from the junior lenders. The scope and enforceability of Release Clauses was considered in a recent high profile English law case, *Barclays Bank PLC and others v HHY Luxembourg SARL and another (Rev 1)* [2010] EWCA Civ 1248. For more information on how the UK courts interpret Release Clauses, see Latham & Watkins Client Alert No. 1093, "*European Directories* — Court of Appeal Decision Intercreditor Release Clauses" (25 October 2010), available at www.lw.com.

Remand: send back. If a civil action pending in a non-Bankruptcy Court is removed to a District Court, or by Reference a US Bankruptcy Court, (see Removal) under 28 U.S.C. § 1452(b), the District Court or US Bankruptcy Court may decide to equitably Remand the case to the original court. The term is also used in the Appeals context, when the higher appellate court Remands a case to the lower court for further proceedings.

Remedy Bar: a Subordination provision that is not found in regular high yield deals but is found in certain kinds of mezzanine financings (usually only if the mezzanine lenders have the benefit of financial maintenance covenants) and often in Second Lien Financings. A Remedy Bar will prevent the Subordinated (or Second Lien) lenders from exercising certain (or possibly any) remedies during an agreed upon time-frame even if they are experiencing an Event of Default. Note that this form of Subordination is much more severe than a Payment Blockage Provision, which does not prevent junior Creditors from pursuing remedies (including putting the Borrower into Bankruptcy) if there is an Event of Default.

Removal: 28 U.S.C. § 1452 addresses the Removal, or transfer, of civil actions to District Courts, and by Reference to US Bankruptcy Courts, and 28 U.S.C. § 1441 is the general Removal statute. Generally, a civil action pending in a non-US Bankruptcy Court that relates to a Bankruptcy case can be removed from the non-US Bankruptcy Court and given to the District Court, or by reference the US Bankruptcy Court, in the district in which the Bankruptcy case is pending. Parties have also tried to remove cases pending in District Courts to US Bankruptcy Courts, but a majority of courts have held that § 1452 does not allow such removal.

Réorganisation Judiciaire: (*Gerechtelijke Reorganisatie* in Dutch) Belgian judicial reorganisation procedure under the Belgian Law on Continuity of Companies (*Wet continuïteit ondernemingen/Loi relative à la continuité des enterprises*). The Debtor in financial distress can apply to the competent commercial court for a judicial reorganisation if the continuity of the company is threatened (which is assumed to be the case if the net assets of the Debtor have decreased to below half of the value of its share capital). The aim of this procedure is to give a Debtor

some protection against its Creditors in order to maintain, under judicial control, the continuity of the company. Three types of reorganisation proceedings are available to the Debtor: an amicable settlement (*Accord Amiable/Minnelijk Akkoord*); a collective settlement whereby the Debtor obtains the approval of the Creditors' meeting to its restructuring plan or a transfer of all or part of the Debtor's business to one or more third parties. The Debtor can switch from one option to another to best adapt during the proceedings or can choose to combine these options. Creditors of a company cannot initiate a judicial reorganisation (except for a business transfer). If the court agrees to open the procedure, it will grant the Debtor a Suspension of Payments (*Sursis de Paiement/ Opschorting van Betaling*).

Reorganised Debtor: a Debtor that has successfully emerged from US Bankruptcy under a confirmed Plan of Reorganisation, as to which the Effective Date has occurred.

Required Class Lenders: for any Class under a credit agreement, the lenders holding more than 50 per cent of the aggregate principal amount of outstanding loans and unfunded commitments (if any) under a credit agreement with respect to such Class.

Required Lenders: the lenders holding more than 50 per cent of the aggregate principal amount of outstanding loans and unfunded commitments under the credit agreement. The consent of Required Lenders is usually required for approval of Amendments and waivers under a credit agreement, although certain Amendments require unanimous consent. In Bankruptcy, depending on the terms of the credit agreement, the Required Lenders may consent to treatment that minority lenders may oppose, with such consent being binding on the minority. A good example of this is the *Chrysler* case, where the US Bankruptcy Court approved a 363 Sale free and clear of Liens over the objection of certain minority lenders in view of the consent of the Administrative Agent and Required Lenders to the sale. *In re Chrysler LLC*, 576 F.3d 108, 119-120 (2d. Cir. 2009). See also Majority Lenders.

Requisite Lenders: another name for Required Lenders.

Restricted: when a trader says he is "restricted", he does not mean he is restrained or enchained for that matter, he means that he is prevented from trading, likely because he is holding MNPI.

Restructuring Advisor: a Professional hired for the sole purpose of providing restructuring advice. See also Financial Advisor.

Restructuring Committee: a corporate committee created by the Debtor to make the corporation's decisions with respect to the Insolvency proceedings (or Bankruptcy in the US) or Out-of-Court Restructuring.

Restructuring Loan: English for *Sanierungskredit*, a loan in Germany to a distressed company benefiting from a Restructuring Opinion as a safe-harbour to Lender Liability.

Restructuring Opinion: used in German restructurings; an opinion provided usually by an accounting firm confirming that a distressed company will be likely to continue its business if a restructuring plan is implemented. *Sanierungsgutachten* is the German term.

Restructuring Privilege: a defence to Equitable Subordination in Germany. *Sanierungsprivileg* (that being the German term) applies to loans from shareholders who became shareholders in the context of a restructuring (e.g., through a debt for equity swap). To make use of this, you need — no surprise — a Restructuring Opinion.

Restructuring Support Agreement: see Plan Support Agreement.

Restrukturering: literally "restructuring", the common short form for a Norwegian Out-of-Court Restructuring, be that financial or otherwise.

Retention Application: an Application filed in the US Bankruptcy Court requesting authorisation to retain a Professional pursuant to Bankruptcy Code Section 327, 1103 or 1114. In some courts, retention authorisation is sought by Motion rather than by Application.

Retention of Title: for use of this term under German law, see *Eigentumsvorbehalt* or *Droit de Rétention* for Luxembourg, France and Belgium law.

Retiree Benefits: benefits to retired employees, their spouses and dependents of the type described in Bankruptcy Code Section 1114(a) — generally, medical, surgical or hospital care benefits or benefits in the event of sickness, accident, disability or death. In Chapter 11, such benefits must be timely paid and cannot be modified unless authorised by the US Bankruptcy Court under Bankruptcy Code Section 1114(g) or 1114(h) or agreed by the authorised representative of the recipients. Under Bankruptcy Code Section 1129(a)(13), a Chapter 11 Plan cannot be confirmed if it does not provide for compliance with Bankruptcy Code Section 1114.

Reviewable Transaction: another generic name for Suspect Transactions. In Canada, a Reviewable Transaction is a transaction that could be challenged under Canadian law by a Creditor or a Canadian court-appointed officer (e.g. an unjust Preference, a Transaction at an Undervalue or a Fraudulent Conveyance). Remedies are available under Canadian federal insolvency legislation and provincial legislation. The BIA allows a Trustee in Bankruptcy to challenge unjust Preferences and other Transactions at an Undervalue. The provisions under the BIA available to a Trustee in Bankruptcy upon the bankruptcy of a Debtor are also incorporated by reference into Proposal proceedings under the BIA and CCAA proceedings and thereby available to a Proposal Trustee or a Monitor, as applicable, unless the Proposal or the CCAA Plan otherwise provides. In addition, the provisions of applicable provincial legislation to attack a Fraudulent Conveyance or an unjust Preference are available to Creditors, together with the Oppression Remedy under applicable corporate legislation, and court-appointed officers may also rely on the

provincial legislation, notwithstanding the commencement of Insolvency proceedings and other remedies available under the BIA or the CCAA.

Revocatoria Fallimentare: a Clawback action carried out by the *Curatore Fallimentare* revoking a payment or transaction that prejudices a Debtor's assets, other than, for example, payments and transactions made as part of an *Accordo di Ristrutturazione* that has obtained the *Omologazione* or a *Piano Attestato di Risanamento*.

Reyestr Trebovaniy Creditorov: in Russia, a register of Creditors' claims used in Russia that contains information on a Debtor's Creditors, including information on the amount of the Creditors' monetary claims, Priority of claims and grounds for such claims. Creditors' claims can be included in the Register of Creditors' Claims only after a court decision confirms these claims. Creditors must apply to have the claims included within the register and only monetary claims may be included.

Ricorso Abusivo al Credito: a criminal offence under Italian Insolvency Law, punishable by six months' to three years' imprisonment and imposing liability on directors, general managers, liquidators and entrepreneurs conducting a business enterprise who obtain or continue to obtain credit, while concealing their financial difficulties or State of Insolvency. Persons convicted of this criminal offence ("obtaining credit unlawfully" in English) are banned from conducting a business enterprise for up to three years and disqualified from holding managerial positions in any enterprise for the same period of time. See also *Abusiva Concessione del Credito* (granting credit unlawfully).

Riftunartímabil: equivalent to the Suspect Period, this Icelandic term literally means "the period for which transactions may be rescinded" and relates to the period that begins retroactively from the day when the petition for bankruptcy is filed with the court. For transactions with unrelated parties, this is generally six months and up to two years for transactions with related parties. There has been a temporary extension of the Suspect Period for related parties to 48 months in avoidance actions commenced prior to the end of 2012.

Rights Offering: a pro-rata offering by a Debtor in conjunction with a Plan of Reorganisation to Creditors or Equity Security Holders of short-term rights to purchase newly issued securities in the Reorganised Debtor. These securities are often in the form of stock in the Reorganised Debtor offered at a discount to Incentivise interested parties to provide needed capital to the Reorganised Debtor. The offering is sometimes backstopped (guaranteed) by a single party.

Ring-fencing: legal walling off of certain assets or liabilities within a company or credit group, as in a company forming a new subsidiary to protect (ring-fence) specific assets from certain Creditors. The concept includes a number of measures that may be implemented to protect the economic viability and credit ratings of companies and their Affiliates within a Holding Company structure.

Risk Sub-participation: a Sub-participation where the sub-participant doesn't fund the lender of record but still takes the risk of the Borrower failing to pay and must pay the lender of record if the Borrower fails to make any payment on its due date. Contrast to Funded Sub-participation.

Roll Up: the payment of Pre-petition debt with proceeds of Post-petition financing, or the conversion of Pre-petition debt into Post-petition Debt. Roll-ups normally occur in the context of DIP Financings, when the Pre-petition lender extends Post-petition credit and mandates that proceeds of the Post-petition financing be used to pay off Pre-petition Debt. Although Roll-ups are disfavoured and subject to heightened scrutiny, they do occur.

Roundtripping: usually allowed by a Carve-out to the restricted payments covenant, allowing a sponsor or parent company to put equity into a company and then take it back out. Roundtripping is also used to describe a method where the In The Money Secured Lenders fund an SPV which bids for the assets of a distressed group in an enforcement sale process. The Security Agent returns the sale proceeds to the Secured Lenders, effectively "roundtripping" the proceeds back to where they came from. The method allows lenders to buy the group without the need for lending more than they originally lent.

Rub ul-maal: an Islamic finance term meaning a person (such as an Islamic finance investor, like a bank in a conventional financing) who invests in *Mudaraba*.

Rule 2004 Discovery: discovery requested pursuant to Bankruptcy Rule 2004 as oppos to discovery under the Federal Rules of Civil Procedure (which are brought into Adversary Proceedings via Part VII of the Bankruptcy Rules). Rule 2004 Discovery is generally described as a "fishing expedition" and is much broader than what is permitted by the Federal Rules of Civil Procedure. See also 2004 Exam.

Safeguard Proceedings: see *Sauvegarde*.

Safe Harbor: certain provisions of the Bankruptcy Code give certain types of transactions special protections. In particular, Bankruptcy Code Sections 555, 556, 559, 560 and 561 deal with the right to liquidate, terminate or accelerate certain types of financial transactions — securities contracts, commodities contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements — notwithstanding other sections of the Bankruptcy Code, such as the Automatic Stay. The term may also be used with respect to Bankruptcy Code Section 1145, which exempts the offer or sale of certain securities from section 5 of the Securities Act of 1933.

Saisie Conservatoire: see *Créancier Titulaire d'une Sûreté Judiciaire*.

Salam: an Islamic finance term meaning a *Shari'ah*-compliant forward contract (i.e., a forward contract structured to avoid the *Gharar* or *Maisir* in a conventional forward contract).

Sale and Leaseback: a transaction where a company sells an asset (usually to a financial services company) and then immediately leases back that same asset. Companies engage in Sale and Leasebacks for a variety of reasons including to raise cash, get assets off their balance sheets and shift the market risk on the underlying asset. Sale and Leasebacks are very similar economically to Secured Debt, and are therefore treated very similarly under Indentures and credit agreements. In Bankruptcy, they are often the subject of litigation to determine whether they are true leases subject to Bankruptcy Code Section 365 or disguised financings to be treated as either Unsecured Claims or Secured Claims.

SAMA: Saudi Arabian Monetary Agency; the banking regulator in the Kingdom of Saudi Arabia.

SAMA Committee: the Banking Disputes Settlement Committee in the Kingdom of Saudi Arabia, established pursuant to High Order No. 729/8,10/7/1407 H., operating under the authority of SAMA, with jurisdiction over all disputes involving banks and their customers, other than those involving negotiable instruments; see NIO, Board of Grievances, *Shari'ah* Courts.

Sanction Hearing: the hearing at which the Canadian court considers a CCAA Plan and decides to either sanction (i.e. approve) or disapprove the CCAA Plan.

Sanction Order: an Order granted by a Canadian court that approves a CCAA Plan pursuant to the CCAA.

Sandbagging: a reference to financial forecasts and business, the suggestion that numbers have been artificially made worse for an interested party's self-serving purpose. See also Kitchen-sinking.

Sanierungskredit: a German term; see Restructuring Loan.

SARE: see Single Asset Real Estate.

Sauvegarde: so-called "French Chapter 11". A French Insolvency proceeding to allow solvent companies to be restructured under the Insolvency court's supervision. The company must not be in a state of *Cessation des Paiements*, but must be facing difficulties that it is not able to overcome. The aim of *Sauvegarde* is to facilitate the reorganisation of a company in order to allow (in that order) the continuation of its business, the protection of employment and the payment of its Creditors. May result in a Term-Out. Double Luxco Structures in French leveraged buyout financings are designed to avoid the risk of an abusive use (or threat of use) of the protection of *Sauvegarde* by Borrowers and sponsors.

Sauvegarde Financière Accélérée: a new proceeding introduced into French law on 22 October 2010, commonly referred to as the "pre-pack *sauvegarde*", which is reserved to the restructuring of the financial debt of companies that meet certain criteria, and in which only the committee including the lenders holding bank debt and other Creditors (other than main trade Creditors or bondholders) having extended credit to

the Debtor, and the Bondholders' Committee are formed to approve the plan. Trade debt must continue to be paid as due and the restructuring must occur within one month (that can be extended by a further month) of proceedings being commenced. This new proceeding is applicable as from 1st March 2011.

Schedules: various schedules required to be filed by Debtors in US Bankruptcy, except for Municipalities in Chapter 9. The Schedules consist of Schedule A - Real Property, Schedule B - Personal Property, Schedule C - Property Claimed as Exempt (individual Debtors only), Schedule D - Creditors Holding Secured Claims, Schedule E - Creditors Holding Unsecured Priority Claims, Schedule F - Creditors Holding Unsecured Nonpriority Claims, Schedule G - Executory Contracts and Unexpired Leases, Schedule H - Codebtors, Schedule I - Current Income of individual Debtor(s), and Schedule J - Current Expenditures of individual Debtor(s). Bankruptcy Code Section 521 and Bankruptcy Rule 1007 set forth the requirements for the filing of the Schedules. The form for the Schedules is prescribed in Official Form 6.

Scheme of Arrangement: an English statutory procedure involving a compromise or arrangement between a company and a Class of its Creditors or members, with the sanction of a court. To gain the sanction of the court, the Scheme of Arrangement must be fair and reasonable and must be a genuine attempt to reach an arrangement or compromise between the company and its Creditors and/or members. Approval requires 75 per cent by value of votes cast and a majority by number. A helpful tool in restructuring, allowing a Cramdown to be implemented on Creditors within the same Class without the company having to commence full scale Insolvency proceedings such as Administration. Can also be used in order to effect a public to private/takeover in the UK by either the cancellation of all existing shares upon payment of consideration to the target shareholders and the issuance of new shares to the bidco (a 'cancellation scheme') or by the transfer of all existing shares to the bidco (a 'transfer scheme'). In Ireland, a statutory Scheme of Arrangement is available for Irish-registered companies and in certain circumstances may apply to foreign registered companies. Approval requires at least 75 per cent in value of the Creditors and a majority by number of each class of Creditors, which is a significantly higher approval threshold than that required for a scheme of arrangement in Examination. Examination also offers an Automatic Stay and restrains actions against the company, so statutory Schemes of Arrangement in Ireland are rarely used.

Secondary Proceedings: under the EU Insolvency Regulation, this is an Insolvency proceeding opened after the Main Proceeding in another EU country where the Debtor has an Establishment. Akin to Foreign Non-main Proceeding under the Model Law.

Second Lien: a second Priority Lien that comes behind, and is junior to, the First Lien.

Section 244 Notice: a security enforcement notice issued by a Secured Creditor of an Insolvent Person and required under Section 244 of the BIA. Section 244 of the BIA generally provides that a Secured Creditor intending to enforce its security on all or substantially all of the inventory, accounts receivable or other property of an Insolvent Person used in relation to its business in Canada must send the Insolvent Person a notice of its intention in a prescribed form and manner — as a matter of caution, secured lenders almost always send such notices. The Secured Creditor is prohibited from enforcing its security for 10 days after sending the Section 244 Notice, unless the Insolvent Person consents to earlier enforcement.

Secured Claim: a right of payment (or, in US Bankruptcy, a Claim) that is based upon Secured Debt. In US Bankruptcy, a Secured Claim is only considered to be a Secured Claim to the extent of the value of the Collateral that secures it. A right of setoff as permitted under Bankruptcy Code Section 553 is also considered to be a Secured Claim in US Bankruptcy.

Secured Creditors or Secured Parties: those who hold or take the benefit of a given Security Interest or Secured Claims. Generally defined to include the lenders, the Administrative Agent, the Security Agent, the bank that issues the letters of credit under the credit agreement, the arrangers and the hedge counterparties, this group will incorporate all parties in favour of whom a grant of a Security Interest over assets has been made.

Secured Debt: indebtedness that is secured by a Lien on Collateral or Security Interest.

Securitisation: a structured finance transaction in which a party owning a pool of cash flow producing financial assets (the "originator") sells the assets to a Special Purpose Entity (the "issuer") that then sells securities to investors that are secured by those assets. In a Securitisation transaction, the transfer of the pool of assets from the originator to the issuer is designated to be a true sale rather than a financing so that if the originator goes Bankrupt, the assets of the issuer will not be distributed to the originator's Creditors.

Security Agent: in a Secured Debt financing, the agent to whom, on behalf of all the Secured Parties, all Security Interests in Collateral will be granted (save for certain Security Interests that need to be granted directly to the Secured Parties). Also known as Collateral Agent. See also Parallel Debt and Security Trustee.

Security Agreement: a contract that creates a Security Interest in favour of the applicable Secured Parties.

Security Interest: a Lien created by a Security Agreement over certain assets (i.e., the Collateral) to secure the payment or performance of obligations under a credit agreement, Indenture or other debt documents. A Security Interest gives the beneficiary of the Security Interest (i.e., the

Secured Parties) the right to foreclose upon the Collateral and use the proceeds thereof to repay its indebtedness. It also significantly improves the Secured Parties' rights in an Insolvency. In short, it is better to be secured than unsecured.

Security Trustee: same as Security Agent, just used in countries, such as the UK, which recognise the trust concept (the Security Trustee holding the relevant Security Interests on trust for all the Secured Parties).

Senior Debt: a level of Ranking. This is not a specific type of Debt, but rather a general reference to a Slug of debt that is "higher" in the overall structure of the company's debt and equity than other Debt. For example, if a company has both senior Subordinated notes and senior notes, the senior notes are "senior." If that company also has Secured Debt, the Secured Debt is effectively "senior" to the senior notes to the extent of the value of the Collateral granted in favour of the Secured Debt. In an Insolvency, it is better to be Senior Debt than Junior Debt.

Sentencia de Concurso Mercantil: meaning "insolvency judgment", this is a judicial resolution issued by a Mexican Insolvency Court declaring the legal Insolvency ("*concurso mercantile*") of such person.

Sentencia de Declaración de Quiebra: a bankruptcy judgment issued by the Mexican Insolvency Court in the event that (a) the Insolvent entity requests it; or (b) if the *Etapa de Conciliacion* (mediation stage) expires without the execution and approval of a *Convenio de Conciliación* (restructuring agreement) or (c) at the request of the *Mediador* (mediator) participating in the Insolvency Proceeding.

Sentencia de Reconocimiento de Créditos: a claim recognition judgment rendered by the Mexican Insolvency Court recognizing and ranking claims for purposes of the Insolvency Proceeding.

Setoff: the application of a mutual debt owed by a Creditor to the Debtor against the Claim held by such Creditor against the Debtor, to satisfy the Claim in the amount of the applied debt — effectively the netting of the two obligations. Bankruptcy Code Section 553 addresses Setoffs, and, although it does not create any rights, this section of the Bankruptcy Code generally preserves any setoff rights that were available Pre-petition. Notably, however, Bankruptcy Code Section 553 also contains certain limitations on any available setoff rights. See Recoupment.

Several Liability: the alternative to Joint and Several Liability and results in each party taking responsibility only for their own obligations and no-one else's. Multiple arrangers and lenders will require Several Liability as they will not commercially agree to be on the hook for the obligations of other unrelated financial institutions. It is important to ensure that each party's specific obligations are clearly defined and agreed.

Shadow Director: under English law, a person in accordance with whose directions or instructions the directors of a company are accustomed to act (e.g. a majority shareholder who influences the board's decisions).

Despite not being elected directors of the board, Shadow Directors can be liable for Wrongful Trading. In addition, certain sections of the Company's Act 2006 relating to the requirement to gain members' approval for loans to directors apply to Shadow Directors as do provisions under the Company Directors Disqualification Act 1986.

Shari'ah: term seen in Islamic financing (meaning literally, the way to the water). This is the principle from the Quran and Sunnah to guide Muslims in the good conduct of their lives and for the good of the community as a whole — the principles upon which Islamic finance transactions are based. The entire body of Islamic law; in general, comprised of a collection of fundamental principles derived from a number of Islamic sources, including the Holy Quran, the Sunnah (sayings of the Prophet Mohammed (PBUH)) and the works of Shari'ah scholars.

Shari'ah Courts: *Shari'ah* Courts in the Kingdom of Saudi Arabia with jurisdiction over all civil claims, in particular relating to immovable property, (but excluding claims the jurisdiction for which has been reserved to one of the other adjudicatory bodies established in the Kingdom of Saudi Arabia); see Board of Grievances, NIO and SAMA Committee.

Signs of Bankruptcy: a term used in Russia; see *Priznaki Bankrotstva*.

Síndico: individual (Receiver) appointed by the Mexican Federal Institute of Business Reorganisation Specialists upon the declaration of Insolvency of the Insolvent entity. The Receiver will be responsible for management of an Insolvent entity until its Liquidation.

Single Asset Real Estate (SARE) Case: a Chapter 11 case involving a Debtor whose only asset is a single piece of real property. Special provisions apply to a request for relief from the Automatic Stay in such a case, as set forth in Bankruptcy Code Section 362(d)(3).

Slug: technically, any land or acquatic gastropoda mollusk without a shell. Universally detested by gardeners as an obnoxious and highly destructive pest. Think of a snail without a shell. In restructuring, people speak of a Slug of debt generally when they mean a tranche of debt, or sometimes a large quantity of debt.

Small Business Case: a Chapter 11 case involving a "small business debtor," which, as more particularly defined in Bankruptcy Code Section 101(51D), is a person engaged in commercial or business activities with aggregate noncontingent liquidated dates of not more than US$2,343,300 (adjusted from time to time) in a case in which no Official Committee has been appointed or an Official Committee is not providing effective oversight. Special rules apply to such a case, including with respect to duties (Bankruptcy Code Section 1116), Exclusivity (Bankruptcy Code Section 1121(e), Disclosure Statements (Bankruptcy Code Section 1125(f)) and Confirmation (Bankruptcy Code Section 1125(e)).

Snooze-you-lose: the colloquial name given to a clause in a credit agreement that gives the Borrower (and indeed sometimes the other

lenders actively engaged in management of the transaction and in finding solutions) protection against lenders failing to respond in a reasonable time frame to a request for an Amendment or waiver. If a lender does not respond to such a request within a specified time frame (often between 10 and 15 business days), that lender's vote is not taken into account when calculating whether lenders holding the requisite percentage of the credit facilities have approved the Amendment or waiver (or in certain limited cases the lender is deemed to have consented). Also known as Use It or Lose It.

Solicitation Package: in the US, a package that is sent to the eligible Creditors or Equity Security Holders in Classes that are entitled to vote on the Plan. The Solicitation Package generally contains the Disclosure Statement, the Plan, any exhibits to either of those documents, the US Bankruptcy Court's Order approving the Disclosure Statement, the Ballot, notice of the deadline for objecting to and the hearing to consider confirmation of the Plan, and any other materials the Debtor will send to those that will be voting on the Plan.

Solicitation Period: the period of time provided to eligible Creditors or Equity Security Holders for purposes of voting on a Plan. The period is generally 28 days, but may be shorter. In cases with holders of public debt or Equity Securities, the period is usually longer than 28 days.

Soundair Test: a test and principles from the 1991 Ontario Court of Appeal decision of *Royal Bank of Canada v. Soundair Corp.* that are considered by Canadian courts when authorizing the sale of a Debtor's assets outside the ordinary course of business in a Canadian Insolvency proceeding. Generally, the moving parties are required to show the Canadian Court that there was an open and fair sales process run with integrity and that the successful bid was, in the opinion of the applicable court-appointed officer (e.g. a Monitor or a Receiver), the best alternative for the Debtor's estate.

Spanish Insolvency Act: Ley 22/2003, 9th July, Ley Concursal.

Special Committee: a special purpose committee consisting of members of the Board of Directors that is appointed by the Board of Directors to handle discrete issues, which may include the restructuring of the company.

Special Purpose Entity (SPE): can be used in a number of different contexts. For example, a Special Purpose Entity can be a company that is set up within a corporate group in such a way so as to prevent the Insolvency of that company from affecting any other company within the group, often for a limited corporate purpose. A typical example here would be when a Special Purpose Entity is set up for the purpose of acquiring or operating a particularly risky asset or making investments. Special Purpose Entities are also used for the purposes of issuing Asset-backed Securities, being structured to be "bankruptcy remote" from the risks of the corporate entities that transfer assets to the entity. Also

known as a Special Purpose Vehicle or a Bankruptcy Remote Vehicle. Special Purpose Entities are often used to accomplish off balance sheet arrangements.

Special Purpose Vehicle (SPV): another name for a Special Purpose Entity or Bankruptcy Remote Vehicle.

Special Revenues: term defined by Bankruptcy Code Section 902(2) for use in Chapter 9 cases. They are essentially revenues that derive from a municipality's transportation, utility or other service systems or projects. Unsurprisingly, Special Revenues are given special treatment in a Chapter 9 case.

Staking van Betaling: the Dutch term in Belgium for *Cessation de Paiements* (Cessation of Payments).

Stalking Horse Bidder: a "stalking horse" is defined in the Oxford English Dictionary as a horse that is trained to allow a hunter to conceal himself behind it for the purpose of getting within easy range of its prey; a person whose participation in a proceeding is designed to conceal the true nature from being discovered; or an underhanded way of making an attack or attaining some purpose. In US Bankruptcy, the term is much less sinister. A stalking horse bidder is the party that agrees to purchase assets of the Debtor prior to an Auction taking place. The stalking horse bid serves the purpose of providing a floor price for the assets in advance of an Auction. If the party loses at the Auction to another bidder, the stalking horse may get Breakup Fees and expenses if authorised by the US Bankruptcy Court.

Standstill: generally, an agreement between or among opposing parties to preserve the status quo or to refrain from taking certain actions during an agreed upon time-frame. More particularly, see Remedy Bar.

Standstill Agreement: another name for a Forbearance Agreement.

Standstill Period: a Standstill Period is a Subordination provision typically found in an Intercreditor Agreement that prevents holders of Subordinated Debt from taking certain (or possibly any) remedies during an agreed upon time-frame even if they are experiencing an Event of Default. Note that this form of Subordination is much more severe than a Payment Blockage Provision, which by itself does not prevent the junior Creditors from pursuing remedies (including putting the Borrower into Insolvency) if there is an Event of Default. Subordinated Debt holders can, however, expect to be subjected to both Payment Blockage Provisions and Standstill Periods. Note that Standstill Periods are not permitted for bond deals registered with the US Securities and Exchange Commission.

Statement of Financial Affairs (SOFA): a document required to be filed by all Debtors in US Bankruptcy, except for Municipalities in Chapter 9. The document provides a current and historical picture of the Debtor's financial affairs, including income, payments to Creditors, lawsuits and administrative proceedings, dispositions of assets, financial accounts and

management. Bankruptcy Code Section 521 and Bankruptcy Rule 1007 provide that the Debtor must file a SOFA. The Official Bankruptcy Form 7 is the SOFA.

State of Insolvency / State of Distress: Italian terms; see *Stato di Insolvenza / Stato di Crisi*.

Stato di Insolvenza / Stato di Crisi: in Italy, the *Stato di Insolvenza* (meaning "state of insolvency") refers to a particular situation where a Debtor is no longer capable of duly fulfilling its obligations. The meaning of "duly fulfilling its obligations" relates not only to the ability of the Debtor to meet payments on the due date but also to fulfil other usual obligations in the ordinary course of business. The *Stato di Crisi* (meaning "state of distress") is broader in that it can be temporary and reversible. The *Stato di Insolvenza* is a prerequisite for the applicability of the *Fallimento* procedure, *Liquidazione Coatta Amministrativa* procedure and *Amministrazione Straordinaria* procedure, while the *Stato di Crisi* is a prerequisite for the *Concordato Preventivo* and *Accordo di Ristrutturazione*.

Statstidende: The Danish Official Gazette — the means by which the court in Denmark advertises the adjudication of bankruptcy against businesses.

Statutory Arrangement: this is a process under Irish Insolvency law that permits the conclusion of an arrangement or compromise between the company, its shareholders and its Creditors where the company is about to be, or is in the course of being, wound up. The process is available to solvent as well as Insolvent Irish-registered companies and in some cases also to foreign-registered companies. The arrangement or compromise requires at least 75 per cent in value of the Creditors and a special resolution of the members to be binding on the company and the Creditors. The high approval threshold means that this process is rarely used in Ireland.

Steering Committee: see Coordinating Committee.

Structural Subordination: non-Contractual Subordination created where a Slug of debt is issued by a Holding Company or other parent entity, with no Guarantee from the operating subsidiary that is the Borrower/issuer under other indebtedness, thereby becoming effectively Subordinated to the debt held closer to the operating assets (since all the operating subsidiary's debt gets paid in full in an Insolvency before anything is dividended up to the Holding Company). See Subordination.

Subordinated Debt: sits in-between Senior Debt and equity in the overall structure of the company's debt and equity. Generally raised by selling High Yield Bonds or through a mezzanine financing. High Yield Bonds have looser covenants than the Senior Debt. However, whilst mezzanine financings have financial covenants set with a percentage of headroom over those for the senior facilities, all other covenants typically remain the same. Subordinated Debt is compensated for with a higher Interest Rate to reflect its Subordinated status.

Subordinate DIP: DIP Financing that is provided on a Subordinated basis.

Subordinated Shareholder Loan: a loan granted to the company by one of its shareholders or by a person who controls one of its shareholders, which loan is Subordinated to all other debts. Bond terms and conditions, Indentures and credit agreements often will provide a Carve-out to the debt covenant or equivalent that allows incurrence of Subordinated Shareholder Loans, provided that such loans have a maturity that extends beyond the maturity over the Notes/loans and that such loans are deeply Subordinated. For tax reasons in European leveraged buyouts, the portion of the acquisition consideration for the target company that is usually paid using equity money provided by the sponsor fund is often made by way of a Subordinated Shareholder Loan than by "pure" equity.

Subordination: types include Contractual Subordination, Lien Subordination, Structural Subordination and Effective Subordination. See also Junior Debt and Senior Debt.

Sub-participation: can be Funded Sub-participations or Risk Sub-participations. Both are in essence transactions whereby the lender of record sells the commercial risk of a credit facility to a third party ("the sub-participant") without entering into an Assignment, Assignment and Assumption or Novation. Can therefore be implemented without the knowledge of the Facility Agent, the Borrower or other lenders as the lender of record does not change. Also useful (if properly structured) to avoid rules whereby in a number of jurisdictions, only licensed credit institutions may grant loans to Borrowers in that jurisdiction.

Subrogation: the substitution of one party in the place of another party with respect to a claim by that other party against a third party, so that the substituted party succeeds to the rights of the other party with respect to such claim. Confusing, isn't it? An example would be if an insurer pays an insurance claim to a third party payee on behalf of an insured party, and then "steps into the shoes of" the insured party to make a counterclaim against the third party payee in order to get back all or a portion of the payment.

Substantial Contribution: a contribution made to a US Bankruptcy case by a Creditor, Indenture Trustee, Equity Security Holder or Official Committee that is substantial enough to justify payment from the Estate of (i) such party's "actual necessary expenses" — see Bankruptcy Code Section 503(b)(3), and (ii) reasonable compensation for professional services rendered by such party's attorney or accountant — see Bankruptcy Code Section 503(b)(4). A Substantial Contribution requires action to benefit the Estate or all parties in the case, and not simply action that the party would have taken in any event to protect its own interest.

Substantive Consolidation: an equitable remedy in US Bankruptcy that results in the pooling of assets and liabilities of related Debtors. Creditors of substantively consolidated Debtors will have a single Claim against

the single pool of assets, and guaranty Claims will be disregarded. Substantive Consolidation can be sought by Motion or pursuant to the terms of a Plan. Although the tests applied from Circuit to Circuit may differ, historically Substantive Consolidation has been reserved for cases where (i) the financial affairs among the related Debtors are so entangled — whether by design or sloppy business practices — that an accurate assessment of which Debtor is obligated to a particular Creditor or group of Creditors cannot be determined or could only be determined at undue cost or (ii) where Creditors generally had dealt with an enterprise consisting of the related Debtors as though it were a single consolidated entity (rather than each of the Debtors separately). Courts routinely state that Substantive Consolidation is to be granted "rarely", though courts routinely permit Substantive Consolidation when it is consensual. Over time, a variety of standards or "tests" for when Substantive Consolidation should be ordered over an objection have been articulated. See *In re Owens Corning*, 316 B.R. 168 (Bankr. D. Del. 2004), reversed by 419 F.3d 195 (3d Cir. 2005), or just give a call to Latham.

Success Fee: a fee enhancement, in addition to reasonable compensation for actual, necessary services, that may be sought by a Professional in a US Bankruptcy case that has had a particularly successful result. Any award of a Success Fee would be subject to approval by the US Bankruptcy Court. Success Fees are infrequently sought and more infrequently approved, even in the most successful of cases.

Sukuk: Islamic finance term for an Islamic bond, similar to a conventional bond in many respects but the bond certificate represents an undivided ownership of one or more assets forming part of the *Sukuk* structure — such as the assets forming part of the Islamic lease (*Ijara*) in an *Sukuk Al-Ijara*.

Sunnah: term seen in Islamic finance meaning the practices and sayings of the Prophet Mohammed, as documented in *Hadith*, being the fundamental part of Islamic jurisprudence upon which Islamic finance transactions are structured.

Superintendent of Bankruptcy: a Canadian federal government appointee who has general supervisory functions over all bankruptcy estates and all matters to which the BIA applies. The Superintendent of Bankruptcy is also responsible for the licensing of all Trustees in Bankruptcy.

Super Majority Lenders: lenders needed for Super Majority Voting.

Super Majority Voting: situation where a percentage of the lenders under a credit agreement greater than the Majority Lenders (usually at least 85 per cent) is required for certain material Amendments, such as releases of Collateral.

Super-priority: the highest Priority. In the US, a Super-priority Administrative Claim is the highest Priority of Claim. Super-priority Administrative Claims are specifically provided for in Bankruptcy Code Section 364(c) when DIP Financing cannot be obtained on a mere

Administrative Claim basis. Super-priority Administrative Claims are also provided for in Bankruptcy Code Section 507(b) when Adequate Protection proves insufficient.

Super-senior Credits: a term used in Italy; see *Crediti Prededucibili*.

Supervision: a term used in Russia. See *Nablydeniye*.

Supuestos de Concurso Mercantil: (meaning "insolvency standard" in English) under Mexican Insolvency Act, a person will be declared Insolvent when it generally fails to pay its obligations as and when they become due. Insolvency of a person will be adjudicated upon the request of the Insolvent entity, the attorney general's office or any Creditor of the Insolvent entity, when: (a) the Insolvent entity has defaulted in its payment obligations with two or more Creditors, and (b) when, on the date of such request (1) 35 per cent or more of such obligations have been delinquent for more than 30 days; and/or (2) the Insolvent entity does not have sufficient liquid assets to pay at least 80 per cent of its due and payable obligations on the date of filing of the insolvency request. If the insolvency request is filed voluntarily by the Insolvent entity, only one of the conditions described in items (1) or (2) of paragraph (b) above would have to be satisfied. If the attorney general's office or any Creditor of the Insolvent entity files the insolvency request, both conditions described in items (1) and (2) of paragraph (b) above would have to be satisfied.

Surseance van Betaling: Dutch formal corporate restructuring procedure for Suspension of Payments. Only the Debtor can initiate the procedure if it foresees that it can no longer continue to pay its debts when they fall due and it has the prospect of being able to fully repay its Creditors in the future or is able to offer a reorganisation plan that is accepted and confirmed. A provisional Suspension of Payments is granted by the court upon receipt of the application, and the court appoints an administrator (*Bewindvoerder*) and a supervisory judge (*Rechter-Commissaris*). The court notifies all Creditors in writing of a hearing date for Creditors to vote on the granting of a definitive Suspension of Payments, which the court may then grant unless more than one fourth of the Creditors in attendance at court or the Creditors together representing more than one third of ordinary claims oppose it, or if there is serious concern that the Debtor will prejudice its Creditors during the Suspension of Payments or it is foreseeable that the Debtor will not be able to satisfy its Creditors (in the latter case, it is highly likely that the Debtor will be declared bankrupt under *Faillissement* proceedings at the same moment that the court decides that the definitive Suspension of Payments will not be granted). Fast-track proceedings exist for Debtors who file a draft reorganisation plan with their request for Suspension of Payment proceedings. A Suspension of Payments can be granted for a maximum of three years. The procedure prevents Unsecured Creditors and non Preferential Creditors from taking individual enforcement action against the Debtor. Secured Creditors are not prevented from enforcing their security unless, during the Suspension of Payments, the administrator

has been granted a Moratorium (*Afkoelingsperiode*) from the court. During a *Surseance Van Betaling* a Debtor may only dispose of its assets with the cooperation or approval of the administrator (*Bewindvoerder*).

Sursis de Paiement: (*Opschorting van Betaling* in Dutch). In Belgium and Luxembourg, the Moratorium suspending the repayment of debts to Creditors and enforcement procedures. It is granted by the Belgian court to a Debtor company when it approves a Belgian law *Réorganisation Judiciaire/Gerechtelijke Reorganisatie*. Debts are initially suspended for six months but this can be extended to 12 months and 18 months in exceptional circumstances. In Luxembourg, the *Sursis de Paiement* is no longer commonly used. Initiated by the Debtor, it gives the Debtor company breathing space to reorganise and pay debts. It should not be confused with the Suspension of Payments (*Sursis de Paiement*) procedure under the Luxembourg Financial Sector Act of 5 April 1993, as amended.

Surveyo: individual appointed by any Creditor or group of Creditors holding title to at least 10 per cent of the aggregate claims before the Mexican Insolvent entity and who will be in charge of supervising the activities of the Mexican Insolvent entity, the *Mediador* (mediator) and/or the Receiver, as applicable.

Suspect Period: another term for Hardening Period or Preference Period. See *Période Suspecte* under Luxembourg and Belgian law.

Suspect Transactions: see Clawback. There are alternative names for this generic term, often depending on the jurisdiction, (e.g., Reviewable Transactions, Voidable Transactions, Suspicious Transactions and Avoidable Transactions.

Suspension of Payments: see *Surseance van Betaling* for a description of Suspension of Payments in The Netherlands; *Greiðslustöðvun* in Iceland; *Sursis de Paiement* in Luxembourg and Belgium (*Opschorting van Betaling* in Dutch (one of Belgium's other official languages)). In Denmark, the old Suspension of Payments (*Betalingsstandsning*) procedure was replaced by the *Rekonstruktion* procedure. See also Cessation of Payments.

Suspicious Transactions: see Suspect Transactions.

Tail Policy: a D&O Policy covering a Debtor's Board of Directors and officers typically expires upon the Effective Date of a Plan. A Tail Policy extends the period during which claims can be asserted under the D&O Policy. It is relatively common for a Debtor in Chapter 11 to purchase a Tail Policy prior to the Effective Date.

Tail Provision: term included in an engagement letter (usually of an investment banker) that allows a Professional to be paid in certain instances notwithstanding the fact that the engagement has ended.

Takaful: an Islamic finance, which means Islamic insurance based on the idea of mutual assistance (*Takaful* insurance is structured to avoid the

Shari'ah prohibitions against interest and gambling, which are ordinarily violated by conventional insurance arrangements).

Take-Back Notes: notes provided by the Reorganised Debtor to the holders of its debt (either Pre-petition or Post-petition) representing treatment of and distribution on account of such debt under a Plan. Typically, the Reorganised Debtor is the Obligor on the Take-Back Notes, however, buyers of the Debtor's assets may also be the Obligors on such notes if the Creditors receiving the Take-Back Notes consent.

Talk Tachlis: (pronounced "Takh — lis") Yiddish for a serious discussion about resolving an issue — "Let's talk Tachlis and see if we can get this settled".

Tawarruq: an Islamic finance term for the purchase of an asset (commonly a commodity) on a deferred payment basis (like a *Murabaha* structure) with the intent to immediately sell to a third party for cash. A *Tawarruq* is commonly used for working capital or revolving Islamic finance facilities.

Tax settlement: in the Italian *Concordato Preventivo*, a plan proposed by the Debtor which can provide, in principle, for the partial or deferred payment of taxes, relevant accessory costs, contributions administered by organisations which operate obligatory social security and welfare schemes, but only up to the portion of the debt that is unsecured, even if not included in a tax roll, except for taxes that constitute European Union resources. Regarding the value added tax (VAT), the proposal can only involve deferred payment.

Temporary Allowance: in a US Bankruptcy, when a Claim or Interest has been objected to, it is no longer an Allowed Claim, and therefore, it cannot vote on the Debtor's Plan. The Bankruptcy Rules, however, allow a US Bankruptcy Court to temporarily allow the Claim or Interest for voting purposes only.

Term-Out: "Nuclear dissuasion" in French Insolvency proceedings and not to be confused with a Term-Out Option. This is an English term coined by Insolvency practitioners to describe the power of the French bankruptcy court in French *Sauvegarde* or *Redressement Judiciaire*, failing adoption of a restructuring plan by the Creditors' Committees, to impose a rescheduling of the Creditors' claims (full face value and, with respect to all loans granted for an initial term greater than one year, accrued interest) over a maximum time period of 10 years. Funnily enough, there is no equivalent French term.

The Nordic Bankruptcy Convention: a convention signed by Denmark, Finland, Iceland, Norway and Sweden on 7 September 1933, providing for full Recognition of domestic Insolvency proceedings (both individual and corporate) opened in any signatory state concerning individuals or companies domiciled in such signatory state. Accordingly, Insolvency proceedings commenced in any Nordic country are now automatically Recognised by the other Nordic countries as applying to all assets in those countries and no other Insolvency proceedings may be opened

concerning the same Debtor. The Convention also sets out the assistance that should be given by the courts in the other Nordic countries. The EU Insolvency Regulation, introduced in 2000, provides for Recognition of Insolvency proceedings throughout the EU, except Denmark, which opted out of the EU Insolvency Regulations, and so the EU Insolvency Regulation has replaced the Nordic Bankruptcy Convention as between Sweden and Finland only, Iceland and Norway not being members of the EU.

Third-Party Release: in certain instances, settlement agreements and/or Plans (including CCAA Plans) seek to secure releases for and among certain non-Debtor third-parties. Whether such releases are permitted, and, if they are, the requirements for allowing those releases in the US, depends on the Circuit in which the US Bankruptcy case has been filed.

Tillsynsmyndigheten: the Supervisory office in Sweden that supervises the administration of *Konkurs* and is part of the *Kronofogdemyndigheten (*the Swedish Enforcement Authority*)*.

Tip: in the US, a small distribution given under a Chapter 11 Plan to a Class of Claims or Interests that is not otherwise entitled to such distribution. A Tip is given to secure the acceptance of the Plan by the Class receiving it.

Trader: under the UAE Commercial Code, Federal Law No. 18 of 1993, a trader is any person who undertakes commercial activity as his or her profession in his or her own name, and any company undertaking any commercial activity or taking one of the forms stipulated in the Commercial Code; there are Insolvency and reorganisation procedures available to traders that do not apply to individuals that do not carry on commercial activity; professionals that provide consultant-type services (e.g., doctors, lawyers, consultants, etc.) are not considered taxation traders.

Transaction at an Undervalue: varies from jurisdiction to jurisdiction but generally means a transaction entered into by a Debtor during the Suspect Period that is entered into for no consideration or consideration that is significantly less than the value of the consideration provided by the Debtor. Any such Transaction at an Undervalue may be set aside under English Insolvency law by a liquidator or an Administrator if the transaction was entered into within the two years preceding the Liquidation or Administration. The court will not set the transaction aside unless, at the time of entering into the transaction, the company was unable to pay its debts or became unable to pay its debts as a consequence of the Transaction at an Undervalue.

Transactions Aimed at Defrauding Creditors: Voidable Transactions under Russian law that meet all of the following conditions: (i) the purpose of the transaction was to prejudice the rights of Creditors (such purpose is presumed, if for instance, at the time of the transaction the Debtor was subject to *Neplatezhesposobnost* or Insufficiency of Funds

and (a) no consideration was paid to the Debtor or (b) the transaction was with Interested Persons (*Zainteresorannye Litsa*); (ii) such transaction resulted in the infliction of harm to Creditors' rights (i.e., such transaction or action resulted in (a) a decrease in the value of the claims against the Debtor or (b) other consequences that could result in the inability to satisfy Creditors' claims using the Debtor's assets) and (iii) the counterparty knew or should have known of the transaction's above purpose (Interested Persons are presumed to know of such purpose).

Transfer Tax: a tax imposed upon the transfer of property. In the US, under Bankruptcy Code Section 1146(a), the issuance, transfer or exchange of a Security, or the making or delivery of an instrument of transfer under a confirmed Chapter 11 Plan, is exempt from any law imposing a stamp tax or similar tax.

Treuhand: when used in a restructuring context, this term refers to a trust arrangement under German law (also frequently structured as and called "*doppelnützige Treuhand*") relating to company shares where the shares in the relevant company (usually at the very top of the group) are held by an independent trustee for the benefit of the original shareholders (usually the sponsor) and the financing banks at the same time. Typically, the trustee will be obliged to sell the shares if certain trigger events (e.g., Events of Default) occur or certain enterprise value thresholds are met. This structure is used mainly in restructurings to disenfranchise the sponsors while the restructuring is going on and to avoid certain disadvantages of the enforcement of a German law share pledge (see Public Auction). Needs to be structured carefully to avoid Equitable Subordination.

Tribunale Fallimentare: the Italian bankruptcy court invested with powers to manage the *Fallimento*; to decide on those disputes relating to this procedure that do not fall under the jurisdiction of the *Giudice Delegato* (Italian bankruptcy judge); and to appeal against the orders of the latter. The *Tribunale Fallimentare's* instructions are given in the form of an order, unless specific provisions require another form. The court is also invested with significant powers in the *Concordato Fallimentare*, the *Concordato Preventivo*, the *Liquidazione Coatta Amministrativa*, the *Accordo di Ristrutturazione* and in the *Amministrazione Straordinaria*.

True Sale: a term used globally to mean a transaction in which actual legal title to an asset is transferred, as opposed to the asset being loaned or pledged as Collateral in a financing transaction. The issue of whether a transaction is a True Sale or a financing has Insolvency implications, because if a transferor goes Insolvent, unless the asset in question is deemed to have been sold in a True Sale transaction, the relevant Insolvency court can determine that the asset is still owned by the transferor and can therefore be included as part of the assets in the Insolvency that are distributed to the Creditors.

Trustee: in non-Insolvency situations, the Trustee under a bond or Indenture performs as the bond equivalent of an Administrative Agent

under a credit agreement. The Trustee has certain assigned duties and rights under the trust deed or Indenture that become particularly important following Defaults or Events of Default. In US Bankruptcy, the Trustee under an Indenture is referred to as the Indenture Trustee, and the term Trustee is used in the context of a Bankruptcy Chapter 7 Trustee, Chapter 11 Trustee, Chapter 12 Trustee or Chapter 13 Trustee.

Trustee in Bankruptcy: an individual or a corporation licensed by the Superintendent of Bankruptcy that administers a bankruptcy under the Canadian BIA. The Trustee in Bankruptcy is nominated by the Debtor (in the case of an Assignment in Bankruptcy) or by the applicant Creditor (in the case of bankruptcy arising from a Bankruptcy Order). In either case, the Trustee in Bankruptcy must be either confirmed or replaced by the Creditors at a meeting of Creditors held within 21 days of the commencement of the bankruptcy. On bankruptcy, the BIA imposes a stay of proceedings against the Debtor, but this stay does not generally apply to Secured Creditors, who are free to exercise their secured rights outside of the BIA. The Trustee in Bankruptcy holds and distributes a Bankrupt's property among its Creditors in accordance with the BIA Distribution Scheme. The Trustee in Bankruptcy is required to follow the procedures under the BIA, including calling and holding Creditor meetings and sending Creditors various documents and notices required under the BIA.

Turn: (i) banker slang for a unit of measurement equal to the LTM EBITDA of a Borrower, often used with reference to leverage (e.g., a banker may ask you to draft a Closing Condition that leverage not exceed "three Turns"). If the Borrower's EBITDA of the latest 12 months was €100.0 million, that condition would be that total debt not exceed €300.0 million; or (ii) the process of making changes to and redistributing a document following a round of comments usually requested in a half-time timeframe, as in "do you think we will see the next Turn by tomorrow morning our time?"

Turnaround Firm: a firm that is hired by a company in distress to step in and manage or assist in managing the company in such a way that its fortunes are "turned around." In other words, a Turnaround Firm is hired with the hope that it will help to make an unsuccessful company successful.

Turnover: to return to the Debtor property belonging to the Debtor. In the US, Turnover of property in the hands of an entity other than a Custodian is generally required by Bankruptcy Code Section 542 and turnover of property in the hands of a Custodian is generally required by Bankruptcy Code Section 543. Also used globally in the context of provisions in an Intercreditor Agreement that require holders of Junior Debt to hand over cash received in circumstances where those senior to them have not been repaid in full.

Tvangsakkord: a compulsory composition under Danish law, the aim of which is to solve the debt problems of a company undergoing restructuring.

Previously a specific type of Danish Insolvency proceeding, compulsory compositions were replaced by the *Rekonstruktion* (restructuring) procedure when the Danish Bankruptcy Act was changed as per 1 April 2011. It is now a means available only as part of a restructuring.

Twenty-day Goods Claims: see 503(b)(9) Claim.

Twilight Zone: a now-famous television series created by Rod Sterling that dealt with instances of the unusual, unexplained, paranormal and supernatural; followed some years later by a movie of the same name that featured some of the best plots of the original series. In restructuring, companies in the Zone of Insolvency may often also feel themselves to be in "The Twilight Zone". In either instance, it's probably time to call Latham for advice.

UCC: the Uniform Commercial Code, which is a uniform act in the US primarily dealing with transactions involving personal property, that is intended to harmonise state laws governing sales and other commercial transactions. It is not itself the law in each state but its provisions have been adopted as the law in most states, with some variations. In Bankruptcy parlance, the term "UCC" is a variant of "the Committee."

Umm Al-Qura: the Official Gazette of the Kingdom of Saudi Arabia; see Article 180.

UNCITRAL: acronym for the United Nations Commission on International Trade Law.

UNCITRAL Legislative Guide on Insolvency Law: normally referred to simply as the "Legislative Guide," it was originally adopted by UNCITRAL in 2004. The purpose of the Legislative Guide is to assist countries when they are either preparing new laws and regulations or reviewing existing laws and regulations that pertain to cross-border insolvencies. Similar to the manner in which legislative history is used in interpreting domestic statutes, the Legislative Guide is also used when interpreting the language of the Model Law and/or Chapter 15.

UNCITRAL Model Law on Cross-border Insolvency: normally referred to as the "Model Law", it is the law, promulgated by UNCITRAL in 1997. It is designed (among other things) to create a framework for mutual Recognition of Insolvency proceedings. Although not many countries have adopted it, those that have include, among others, Canada, Great Britain (implemented by CIBR), Greece, Japan, Australia, New Zealand, Mexico and the US (Chapter 15 is in large part based on the Model Law). There is no requirement on countries to adopt any or all of the Model Law, which means that the manner of the Model Law's enactment can vary across jurisdictions.

Underhandsackord: a type of Swedish financial settlement in the form of a Voluntary Composition formed by informal compromise between the Debtor and Creditors (all above board we can assure you — despite the name). An *Underhandsackord* is proposed by the Debtor in order to write down the Debtor's debts; is unregulated by law; and needs approval of all Creditors. See *Ackord*.

Undersecured Claim: a Claim that is secured by Collateral but the amount of which Claim is more than the value of the Collateral securing the Claim. Under Bankruptcy Code Section 506(a), a Claim that is secured by Collateral is bifurcated into two Claims: a Secured Claim in the amount of the value of the Collateral, and an Unsecured Claim in the amount of the shortfall or deficiency.

Unencumbered: free from encumbrance. Assets that are not subject to a Lien are Unencumbered assets.

Unexpired Leases: leases of real or personal property that have not expired. In the US, Unexpired Leases are dealt with under Bankruptcy Code Section 365. Like Executory Contracts, they can be assumed, assumed and assigned, or rejected in Bankruptcy. Often, the issue in Bankruptcy is not whether the lease is an unexpired lease but whether it is in fact a lease and not instead a disguised loan. If a disguised loan, it is a Claim in Bankruptcy, either Secured or Unsecured, and is not subject to Assumption, Assumption and Assignment, or Rejection under Section 365. Additionally, pursuant to Bankruptcy Code Section 929, certain Unexpired Leases are treated differently in Chapter 9.

Unimpaired: in the context of the treatment of a Class of Claims or Interests under a Chapter 11 Plan, the opposite of Impaired. Generally, Claims or Interests that are not Impaired are left unaffected by the Chapter 11 Plan and have all the same legal, equitable and contractual rights as they had prior to the commencement of the Bankruptcy.

United States Trustee (UST or US Trustee): an appointee of the US Attorney General, the United States Trustee is charged with supervising the administration of US Bankruptcy cases. There is one United States Trustee for each of 21 regions within the United States (except Alabama and North Carolina). The duties of a United States Trustee are set forth in 28 U.S.C. § 586. Under Bankruptcy Code Section 307, the United States Trustee may raise and may appear and be heard on any issue in any Bankruptcy case, but is not permitted to file a Chapter 11 Plan. The influence of the United States Trustee in a Bankruptcy case varies from Bankruptcy Court to Bankruptcy Court; it is essentially a Party in Interest whose positions the court may or may not adopt, unless the Bankruptcy Code dictates otherwise.

Unliquidated Claim: in the US, a Claim that does not yet have a specific value.

Unsecured Claim: a right of payment (or, in US Bankruptcy, a Claim) held by a Creditor that is not secured by a Lien on any of the Debtor's assets, or for which no Collateral is held by the Creditor.

Unsecured Creditor: Creditors who hold Unsecured Claims.

US Bankruptcy Court: courts created in the US pursuant to Article I of the Constitution to deal specifically with US Bankruptcy cases. After *Northern Pipeline v. Marathon Pipe Line*, 458 U.S. 50 (1982), Bankruptcy

Courts are considered units of the District Court, and Bankruptcy cases are referred to the Bankruptcy Courts.

Use It or Lose It: another name for Snooze-you-lose.

Use of Proceeds: depending on the context, the agreement as to how certain funds obtained by the Debtor may be utilised. It may apply to the permitted use of proceeds from a loan or to the requirement that certain proceeds from a sale or other revenue generating transaction be used for a limited purpose, like repayment of a loan. It may apply to the funding requirements under a Plan.

Utenrettslig Gjeldsforhandling: out-of-court debt settlement proceedings under Norwegian Insolvency law. Mostly undertaken in smaller companies, involving all groups of Creditors, and possibly the shareholders.

Utility: generally an entity that holds a monopoly in a certain locality on the provision of essential services like electricity, gas, water, trash pickup and the like. Because of the monopoly, the same services are not available from an alternative provider. Therefore, the Bankruptcy Code limits the ability of a Utility to cut off service to or discriminate in the provision of service to a Debtor. In return, the Bankruptcy Code requires a Debtor to provide Adequate Assurance of Payment for Post-petition utility services.

VAN: Voluntary Arrangement Notification; the document by which a company initiates an insolvency proceeding under Dubai Decree No. 57 for 2009; see Decree 57.

VC: Britain's highest award for gallantry introduced by Queen Victoria in the Crimean War awarded to very brave people in HM's armed forces for valour "in the face of the enemy". Eleven VCs were awarded in a single action at Rorke's Drift in 1879 (think "Zulu" starring Michael Caine). Also an acronym for Venture Capitalists, who display a completely different type of bravery (if indeed that is the right word) when investing their money in start-ups.

Venue: the geographic location of a particular US Bankruptcy case or proceeding, which must comply with the venue provisions of 28 U.S.C. §§ 1408 (for cases under Chapter 7, Chapter 9, Chapter 11, Chapter 12 and Chapter 13), 1409 (for proceedings arising under title 11 or arising in or related to cases under title 11) and 1410 (for cases under Chapter 15). Venue may be transferred from one district to another under 28 U.S.C. § 1412. See Affiliate Rule.

Verdachte Periode: the Dutch name in Belgium for Suspect Period (*Période Suspecte* in French (one of Belgium's other official languages) The Suspect Period is from the date on which the Debtor is deemed to have entered into a state of *Cessation de Paiements/Staking van Betaling* (Cessation of Payments) until the *Faillite/Faillissement* decision. The trustee can ask the court to retroactively set the date of the Cessation of

Payments to begin a set amount of months prior to the *Faillite/Faillisement* decision when the company actually stopped its payments prior to the date of that decision. The *Verdachte Periode* cannot exceed six months prior to the *Faillite/Faillisement* decision. Transactions made during the *Verdachte Periode* are particularly vulnerable to attack. For instance, an act can be declared unenforceable if it was made during the *Verdachte Periode* and the Creditor knew the Debtor was in a state of Cessation of Payments. If an act or payment is made with the intent of defrauding other Creditors, it can be declared unenforceable regardless of the period in which it was made.

Verlängerter Eigentumsvorbehalt: meaning an Extended Retention of Title, this is a common arrangement under German law between a supplier of goods and the purchaser of the goods. In addition to a "simple" Retention of Title (*Eigentumsvorbehalt*), the purchaser assigns to the supplier the receivables which the purchaser generates when selling the goods to its customers. In cases in which the purchaser processes delivered materials into a new product, the Assignment to the supplier of the materials under the Extended Retention of Title typically also covers the receivables generated from the sale of such new product. As a matter of German jurisprudence, the Assignment of receivables to a supplier under an Extended Retention of Title takes Priority over an Assignment of the receivables to a bank that is financing the purchaser. Therefore, customer receivables of a German company which are subject to an Extended Retention of Title are typically not valuable Collateral for Secured Debt financing and are not an eligible category of Collateral for the borrowing base in an asset-based loan.

Virksomhedsoverdragelse: a Danish in-court restructuring procedure involving a transfer of undertaking, whereby the Debtor sells off its business.

Visitador: individual appointed by the Federal Institute of Business Reorganisation Specialists to review the accounting and financial records of the Mexican Insolvent entity, and determine whether such entity satisfies the *Supuestos de Concurso Mercantil* (insolvency standard).

Vneshneye Upravleniye: (meaning "external administration") a proceeding in Russia, which may be initiated by the Arbitrazh Court at the application of the company's Creditors if there is a real possibility of restoring the company's solvency within 18 months (subject to possible extension by another six months). External Administration usually follows the Financial Rehabilitation (*Finansovoye Ozdorovleniye*). During this stage, the External Administrator replaces the Debtor's management and has maximum authority to restore the company's ability to meet its payment obligations. The External Administrator can veto any corporate transaction, impose a Moratorium and sell the Debtor's assets. Similar to the Financial Rehabilitation, External Administration may not be ordered in all cases.

Vneshniy Upravlyaushiy: a Russian term meaning "external administrator", in Russia this is an Arbitration Administrator appointed by the Arbitrazh Court to replace the Debtor's management body, to compile an inventory of the Debtor's assets and to prepare the External Administration Plan (*Plan Vneshnego Upravleniya*).

Voidable Transactions: see Suspect Transactions.

Voluntary Arrangement: generally a procedure involving a restructuring proposal whereby the Creditors and the Debtor agree between themselves to accept from the Debtor payment of less than the amounts due to them in full satisfaction of their claims. There is frequently limited or no involvement by the court. In Dubai, a Voluntary Arrangement is the form of proposal by which a company may be reorganised under the DIFC Insolvency Law and Dubai Decree No. 57 for 2009; see Decree 57 and DIFC Insolvency Law. In England, see Company Voluntary Arrangement and in the Netherlands, see *Buitengerechtelijk Akkoord*. Voluntary Arrangement is also known as "voluntary composition" and "voluntary settlement". For Voluntary Composition in Iceland, see *Frjálsir Nauðasamningar*, in Belgium, see *Accord Amiable*, in Denmark, see *Frivillig Akkord* and in Sweden, see *Underhandsackord*. See also *Utenrettslig Gjeldsforhandling* in Norway.

Voluntary Arrangement Notification (VAN): the document by which a company initiates an insolvency proceeding under Dubai Decree No. 57 for 2009; see Decree 57.

Voluntary Composition: see Voluntary Arrangement.

Voluntary Petition: a Petition for relief under one of the chapters of the Bankruptcy Code that is filed by a person or Municipality on a voluntary basis. The filing of a Voluntary Petition constitutes an Order for Relief under Bankruptcy Code Section 301.

Voluntary Settlement: see Voluntary Arrangement.

Vorläufiges Insolvenzverfahren: a German term; see Preliminary Insolvency Proceedings.

Vote Selling: in the Italian *Concordato Preventivo*, the negotiation between one or more Creditors and the Insolvent company or among one or more Creditors and others acting in the Insolvent company's interest with the aim of favouring a Creditor that gives its vote in the *Concordato Preventivo* or in the proceedings of the Creditors' Committee. This criminal offence is punishable by six months to three years' imprisonment and a fine of not lower than €200,000. The same punishment is imposed on the [officer of the insolvent company and/or Creditor] and on whoever made arrangements with the Creditor in the bankrupt's interests.

Voting Deadline: the deadline by which Ballots cast on a Chapter 11 Plan must be received to be counted as timely. Except in a Pre-packaged Case, the Voting Deadline is established by Order of the Bankruptcy Court usually in conjunction with approving the Disclosure Statement

and related solicitation procedures. In a Pre-packaged Case, the Voting Deadline is established by the Debtor and is subject to after-the-fact approval by the Bankruptcy Court. The length of the voting period prior to the Voting Deadline depends on the nature of the Claims or Interests being solicited.

Voting Record Date: in connection with voting on a Chapter 11 Plan, the date on which eligible voters are determined. Only voters who hold their Claims or Interests on the Voting Record Date are entitled to vote to accept or reject the plan. It has particular relevance where Claims or Interests are frequently traded, as it prevents a vote once taken from being disturbed by traders of Claims or Interests.

Vremenniy Upravlyaushiy: a Russian term meaning Interim Administrator in English, this is an Arbitration Administrator appointed by the Arbitrazh Court in Russia to administer the Debtor's assets, manage its business, identify the Debtor's Creditors and convene the first Creditors' meeting. During the Supervision (*Nablyudeniye*) stage, the Interim Administrator conducts a financial audit of the Debtor and determines whether the company can be restored to solvency.

Wage Cap: in a US Bankruptcy case, the dollar amount for Pre-petition wages, salaries or commissions that is entitled to Priority under Bankruptcy Code Section 507(a)(4). The amount is adjusted at specified three-year intervals under Bankruptcy Code Section 104(b).

Wage Earner Protection Program Act: Canadian federal program that is intended to protect employees of bankrupt or Insolvent companies. It generally operates as follows: upon a bankruptcy or Receivership occurring, employees of the bankrupt or Insolvent company who are owed amounts for unpaid wages are entitled to submit claims to the Canadian federal government, who will make payment immediately to all such parties in amounts of up to CA$3,250 for unpaid wages or accrued and unpaid termination, severance or vacation pay entitlements, in exchange for which the Canadian federal government receives an assignment of that employee's claim for the amount so paid and receives a Priority claim for up to CA$2,000 per employee for unpaid wages (but not for unpaid termination, severance or vacation liabilities). The amount of the Canadian federal government's prior ranking claim, up to CA$2,000 per employee, constitutes a first charge on the current assets of the Debtor, in Priority to existing Secured Creditors.

Waterfall: sometimes called a "payment waterfall", generally refers to the order of application of funds or proceeds. Think of the funds in question as water running down a flight of stairs with a bucket placed one each step — the water (money) flows to the top step first and fills that bucket before the overflow continues on to the second step, and fills that bucket before proceeding to the third step, etc. So, if your deal is that you get paid before someone else, your proverbial bucket will be placed higher in the waterfall. The guy most likely to be left with an empty bucket (or in practice, an unpaid obligation) is of course whoever is at the bottom of the waterfall. The goal is to not come out dry.

Waterfall Plan: a Plan that pays its Creditors on a Waterfall, with the steps being consistent with legal priorities under the Bankruptcy Code.

WEPPA: an acronym for the Canadian term Wage Earner Protection Program Act.

Winding Up: the process of liquidating a company, usually out-of-court, and sometimes involving the appointment of an independent Insolvency practitioner (the liquidator) who liquidates the assets of a company in order to make a distribution to Creditors in the order of legal Priority.

Window Shop Clause: in the context of a sale of assets, "a promise not to solicit a later, better offer, but which permits a board to look at such an offer, provide information to the offeror, and, under appropriate circumstances, accept the offer." *In re Integrated Resources, Inc.*, 147 B.R. 650, 655 (S.D.N.Y. 1992). With 363 Sales in Bankruptcy, a Window Shop Clause is preferred over a No-Shop Provision because it allows a Debtor to exercise its Fiduciary Duties to benefit the Estate.

Withdrawal of the Reference: under 28 U.S.C. § 157, if cause exists, parties in interest to a Bankruptcy case may request that the District Court withdraw the Reference from the Bankruptcy Court of "in whole or in part, any case or proceeding referred …" Additionally, a District Court may, for cause, withdraw the reference on its own motion. The District Court "shall" withdraw the reference if, on a timely motion by a party, the District Court determines that "resolution of [a] proceeding requires consideration of both title 11 and other laws of the United States regulating organisations or activities affecting interstate commerce."

Wrongful Trading: an offence under English law that applies to directors, Shadow Directors and former directors where they continue to trade past the point when they knew or ought to have concluded that there was no reasonable prospect of the company avoiding Insolvent Liquidation. It is a less serious offence than Fraudulent Trading. Only the liquidator can bring a claim for Wrongful Trading.

"X" Clause: an exception to the general Subordination scheme in an Indenture. It allows a junior noteholder to retain shares or obtain new shares of a reorganised company under a Plan of Reorganisation that provides senior noteholders with payment in full or securities that are senior to those received by the junior noteholders.

Yank-a-Bank: a credit agreement provision that allows the Borrower to throw a lender out of a credit facility if it won't agree to an Amendment. Certain credit agreement Amendments (including Amendments affecting pricing of the loans) cannot be achieved without approval of all lenders. Yank-a-Bank provisions enable the Borrower to squeeze out dissenting lenders in a 100 per cent vote situation so long as the Majority Lenders (or a higher threshold of the lenders) have approved the Amendment. The "yanked" lender is replaced with a new lender who does approve the Amendment and is willing to purchase the outstanding loans and commitments of the yanked lender, usually at par. The concept has over

time been further expanded in certain transactions to allow repayment of lenders rather than replacement and/or to apply to Super Majority Lender decisions. "Yanking" can also happen to defaulting lenders; lenders who make claims under increased cost clauses (i.e., clauses in a credit agreement that require a Borrower to pick up the tab if, for example, there is an additional cost to the lender as a result of a change in law or regulation etc.) and lenders claiming an increased payment from the Borrower for any amounts imposed on the Lender as a result of withholding tax.

Zainteresorannye Litsa: a Russian term; see Interested Persons.

Zombie: creature of Creole folklore — the walking dead. Zombies normally walk at night, and always eat human flesh. They were famously depicted by George Romero in the cinema classic, "Night of the Living Dead". In the restructuring field, it is a company believed to be hopelessly Insolvent and in obvious need of restructuring, but, for a number of reasons, it is not restructured. Lenders are often complicit in their creation, since many Zombie companies are signatories, along with lenders, to an Amend and Pretend. The term Zombie was widely used in 2008 when a number of US companies received bailouts by the US government, but were widely believed to be in need of restructuring. For a variety of reasons, it is rarely desirable to allow a Zombie to continue to exist. See *The Zombie Survival Guide: Complete Protection from the Living Dead* for additional information.

Zone of Insolvency: no, this is not a TV series or sitcom. When a previously solvent Borrower gets close to Insolvency, the courts in certain jurisdictions (including the US and UK) have held that the Board of Directors' Fiduciary Duties morph to include (or in certain circumstances are owed exclusively to) the Borrower's Creditors. Prior to entering the Zone of Insolvency, Borrowers do not owe their Creditors any Fiduciary Duties. Because this is an imprecise concept, it is falling out of favour.

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