Glossary

‘absolute priority’ rule: This is a principle requiring that creditors and other claimants against the debtor’s estate should be paid in the same order under a restructuring plan as they would be paid in a liquidation of the debtor’s business.

actio pauliana: An avoidance action derived from Roman law which provides for the avoidance of transfers of property that are made to defeat or delay the claims of creditors or to put the property beyond the reach of creditors.

avoidance rules: Those rules included in legislation that enable certain kinds of pre-insolvency transactions to be challenged, and if the action is successful, the transactions are usually set aside.

balance sheet insolvency: The value of the liabilities of a company or a person exceed the value of their assets.

bankruptcy: A legal process in which the debtors’ assets are liquidated and the proceeds of sale are distributed to creditors. The debtor’s debts, unless specifically exempted by law, are discharged unconditionally. The process can be commenced by the debtor. A moratorium on enforcement processes occurs.

bankruptcy trustee: A person who in a US bankruptcy context takes control of the debtor’s affairs.

carve-out: A proportion of recoveries under a security interest set aside for the benefit of parties other than the secured creditor.

cash flow insolvency: A company or a person is unable to pay their debts as they fall due.

centre of main interests (COMI): The place where main insolvency proceedings commenced under the European Regulation on Insolvency Proceedings must be opened.

connected person: A person or a company that is connected to the insolvent, usually through association or blood.

consumer: Natural person who is not an entrepreneur.

consumer over-indebtedness: Generic term for being unable, or having difficulty in meeting, payment obligations, whether temporarily or permanently.

debt advice: Advice provided to a debtor for the purpose of facilitating debt discharge.
**debt relief**: Procedures outside bankruptcy or debt settlement procedures, including an informal arrangement, which provide for agreed debt repayments which may or may not result in discharge. Such procedures can be voluntary and/or administrative.

**debt settlement organizer**: An individual who acts in a debt settlement procedure to organize the collection of periodic repayments, asset liquidation (if any) and debt discharge (if any).

**debt settlement procedure**: A legal process in which the debtor makes periodic debt repayments to a court or administrator in order to discharge one or more debts. The debtor’s assets may be liquidated in the legal process and outstanding debts may be reduced. Debt discharge will depend on the debtor’s actions over a period of time, to an extent. A moratorium on enforcement processes occurs in respect of the debts that are subject to the procedure.

**Delaware**: A small US State on the Eastern seaboard. It is regarded as the foremost US jurisdiction as far as corporate law is concerned and the place where more than 50 per cent of US listed companies are registered.

**discharge**: Permanent release from an obligation. This may be straight discharge (unconditional freedom from debt) or conditional discharge (dependent upon some payment of debt).

**disqualification**: A process that leads to a director being unable to act as a director and, in some jurisdictions, act in other capacities.

**dissenting creditors**: Creditors who object to the terms of a restructuring plan.

**enforcement process**: A procedure under the control of a court for collecting debt in respect of which there has been a court order, which may include seizing assets.

**entrepreneur**: An individual, with unlimited liability, carrying out a trade, profession, craft or business as a natural person.

**equitable subordination**: A principle whereby a shareholder loan may be deemed to constitute a disguised capital contribution and is therefore subordinated to ordinary unsecured claims on this basis.

**European Regulation on Insolvency Proceedings**: It came into force on 31 May 2002 and it seeks to foster co-operation between countries in the EU as far as insolvency proceedings are concerned. The Regulation has been ‘recast’ and the recast version will come into force generally from 26 June 2017.

**examiner**: A person who in a US bankruptcy context carries out the investigations that have been entrusted to it by the Bankruptcy Court.

**going-concern value**: The value of the debtor’s business if it is kept alive rather than liquidated.
harmonization: Rules on a particular issue are the same across the EU and compliance is required save where safeguard measures are needed.

household: A group of related individuals living under one roof.

illiquid: A company or a person is unable to pay their debts as they fall due.

impaired claims or interests: In the US bankruptcy context, refers to a situation where there is an alteration in the rights that the holder of a claim or interest would enjoy outside bankruptcy.

informal arrangement: Any contractual settlement of debts which is agreed without any involvement of a court.

insolvency practitioner (IP): Any person or body whose function it is to represent the collective interest of creditors and to administer or liquidate the assets of which the debtor has been divested or to supervise the administration of the debtor’s affairs.

lex concursus: The law of the place where insolvency proceedings have been opened.

lex situs: The law of the place where property is located.

liquidation: A process where the assets of an insolvent company are sold and after the paying of expenses the balance is paid out to creditors according to the provisions of the appropriate statute or other legal provision.

liquidation or ‘best interests’ test: This is a test which requires that creditors should receive at least as much under a restructuring plan as they would receive in a liquidation of the business.

‘loan-to-own’ strategy: This describes a situation where a lender advances money to a business with a view ultimately to acquiring an ownership stake in that business.

mediator: A person who assists the debtor and creditors in negotiations on a restructuring plan.

moratorium: A legal bar on creditors commencing or continuing legal action to recover debt.

new finance: Finance that is provided to a person or company in financial distress or even when insolvent.

no creditors worse off: This refers to a situation where creditors would receive at least as much under a restructuring plan as they would do in a liquidation of the business.

non-adjusting creditors: Creditors who are unable to adjust the explicit or implicit lending terms to take into account the fact that the borrower has granted security.

opening of insolvency proceedings: The point when insolvency proceedings are first commenced.

out-of-the-money creditors and shareholders: Parties who on a restructuring of a debtor’s business would not receive any payment or other consideration if the normal scheme of liquidation priorities were applied.
over-indebtedness: A company or a person’s assets do not cover their liabilities.

pari passu principle: This involves the payment of creditors in a collective insolvency on an equal and rateable basis.

payment plan: Schedule of payments over a specified time period agreed between the debtor and creditor or imposed by the court.

pre-insolvency transaction: A transaction entered into by a company before it has become subject to some form of formal insolvency proceedings.

pre-pack: An agreement for the sale of all or part of the debtor’s business or assets which is entered into before the commencement of formal insolvency proceedings.

priority (preferential) creditors: Creditors who by virtue of insolvency laws and regulations are given priority over some or all other creditors in the event of the debtor entering insolvency proceedings.

second chance: The opportunity to start again in terms of entrepreneurial activity.

security interests: Rights over property to ensure the payment of money or the performance of some other obligation.

supervisor: A person who oversees the activities of the debtor and takes the necessary measures to safeguard the legitimate interests of creditors and other interested parties.

suspect period: A period before a company or person enters formal insolvency proceedings during which transactions may be avoided.

tortious liability: Liability because of the commission of a civil wrong.

transaction defrauding creditors: Any transaction that was entered into by a debtor who subsequently becomes subject to formal insolvency proceedings and there was some intention to put creditors at a detriment as a result of the transaction. This derives from the actio pauliana.

trustee in bankruptcy: An individual who acts in a bankruptcy to liquidate assets and distribute proceeds of sale to creditors.