2. Preventive Restructuring Terminology

2.1 Introduction to Chapter

This Chapter is an amalgamation of the JCOERE Team's experience with interpreting, analysing, and synthesising different jurisdictions' perception of what are quite similar concepts. The necessity of this Chapter became apparent when different understandings of the same or similar terms arose during the analysis of the contributor responses to the JCOERE Questionnaire. These differences go beyond simple differences of language. Often, the same term has subtle differences - and occasionally significant differences – in meaning across the contributing Member States, which can cause confusion and conflict when trying to communicate in a comparative context. Moreover, in a practical cross-border restructuring case we would expect these problems to be exacerbated. Better understanding of these nuances can only help to encourage and facilitate more wide-spread understanding and co-ordination of procedures, communication between practitioners, and increased efficiency within procedures. Rather than being a comprehensive legal glossary, this Chapter is designed to provide the reader with some context to the Report, with specific reference to preventive restructuring.

2.2 Rescue (Corporate and Business), Rehabilitation, Reorganisation, Restructuring, and Preventive Restructuring

2.2.1 Corporate Rescue

A broad understanding of corporate rescue processes includes "statutory corporate insolvency procedures that offer an alternative to liquidation procedures."[1]

Corporate rescue is generally understood as referring to the rescue of a corporate entity in its entirety although "a major intervention …[is]...necessary to avert the eventual failure of the company."[2] In all cases it is typical that the company retains the same corporate personality, but both the debt and equity structures of the company will be reorganised. Even though it is common to see some continued ownership of the underlying business entity, equity structures will change in many restructurings.[3]

2.2.2 Business Rescue

Business rescue refers to a situation where one or more *businesses* of the company or corporation (as a separate economic entity) is saved, often by selling it to a new corporate owner through an asset sale, thus changing the ownership of the business. This term is sometimes also used to refer to the rescue of the corporate entity, which has been known to cause confusion. This Report distinguishes between the rescue of the corporate entity and the rescue of the underlying business entity.

2.2.3 Rehabilitation

Rehabilitation is an umbrella term that refers to a variety of procedures aiming to rescue the corporate entity or the business or businesses of that entity in order to preserve the economic benefits of an ongoing concern, including the preservation of employment. The concept is derived in part from a communitarian vision of insolvency law that places an emphasis on encouraging the survival of viable

[1] Rebecca Parry, 'Introduction' in Katarzyna Gromek Broc and Rebecca Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries in Europe* (Kluwer Law International 2004) 1-17, 2.
[2] A Belcher, *Corporate Rescue* (Sweet & Maxwell 1997) 12.
[3] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (CUP 2017) 197.

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independent economic entities to the benefit of a variety of stakeholders.[4]

2.2.4 Reorganisation

A reorganisation is a process designed to revive a financially or economically troubled or insolvent firm by means of financial measures, which are often tied to operational changes at the same time. The CODIRE Report[5] helpfully separated these measures into those aimed at dealing with assets as opposed to those aimed at dealing with liabilities.

i. Operational reorganisation will often include reorganisational measures on the asset side of a company which can include the sale of a business. The business may then be owned by an entirely new set of investors. Such a transaction, while similar to liquidation, is undertaken to preserve value that would otherwise be lost in a liquidation.[6] An asset focussed reorganisation may also include the sale of non-strategic assets and changes in the workforce. Changes in the workforce are often also referred to as an operational reorganisation.

ii. A financial reorganisation tends to deal with the liabilities of a company in which financial terms of credit exposures might be amended to create a less onerous situation for the debtor; including a possible change in interest rate; postponement of debt; debt write-downs; the treatment of loan covenants; new contributions from shareholders or third parties; and debt-for-equity swaps.[7] The latter will naturally lead to changes in the original ownership of the corporate entity as indicated in 2.2.a above as the ownership of the company shares will change hands.

A reorganisation will often include measures that deal with both financial and operational problems in a combination of the measures set out above.

2.2.5 Restructuring

In the PRD:

> "Restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes."[8]

Article 2(1) states:

> "'restructuring' means measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements."

2.2.6 Preventive Restructuring

In the PRD:

> "Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. Those frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors — in comparison to what they would receive in the event of the liquidation of the enterprise's assets or in the event of the next-best-alternative scenario in the absence of a plan — as well as to owners and the economy as a whole."[9]

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[4] *idem* 35-36.
[5] L Stanghellini, et al., *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law* (Wolters Kluwer 2018). See also <https://www.codire.eu/>
[6] *idem.*53-54.
[7] *idem* 56-59.
[8] PRD, recital 2.
[9] *ibid.*

2.3 Pre-insolvency

Pre-insolvency refers to the financial circumstances of a company that are definitionally prior to a Member State's threshold of insolvency, often predicated on the balance sheet or cash flow tests. The PRD relies on a "likelihood of insolvency" but leaves the definition of this to the Member States. The term is not mentioned in the PRD or in the Recommendation, but is mentioned three times in the Proposal for a Preventive Restructuring Directive, in which it is stated that "pre-insolvency procedures must be available at the earliest where there is a likelihood of insolvency, …[and]…procedures must include all or a significant part of a debtor's creditors and must be public."[10] In France, for example, pre-insolvency is prior to *cessation of paiements*, which is the inability of a company to meet its liabilities with the available assets.[11] The JCOERE Project adopts a technical interpretation of pre-insolvency processes that refers to all situations where no additional or alternative *formal* insolvency process has commenced.

2.4 Homologation

Homologation refers to judicial confirmation of a restructuring plan proposed in the preventive restructuring procedure in order to make it binding.[12] From the contributor responses, this term appears to mean the same thing in the Netherlands, France, Spain, and Romania. It is interesting to note this word is not generally used in English speaking countries.

2.5 Concordat, Composition, Arrangement, and Plan

2.5.1 Concordat

In Romania, the preventive concordat is a contract between the debtor and particular creditors, which requires judicial approval. It has a similar meaning in Italy; the concordat (*concordato preventivo*) refers to a judicial composition with creditors. From research conducted on the project, it appears that the term "concordat" is particular to those two jurisdictions.

2.5.2 Composition

In England and Wales:

> "A composition is an agreement in settlement of a claim which is in doubt, dispute, or difficulty of enforcement. It involves no transfer of assets or change of any kind in the structure of the company or the rights of its members *inter se* vis a vis creditors."[13]

In the Netherlands, a composition is an agreement between the debtor and its creditors. It is also referred to as a restructuring plan.

2.5.3 Arrangement

In Ireland, an "arrangement", in relation to a company, includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both methods. The same statutory provision describes a compromise or arrangement proposed between a company and its creditors (or any class of them) or its members (or any class of them). In Ireland, the term "Scheme of Arrangement" has also been used to refer to a compromise reached by an Examiner under the Examinership process.[14] For this reason, the "Scheme

[10] Proposal for a Directive of the European Parliament and of the Council COM(2016) 723 final of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016] 2016/0359 (COD) (the "Proposal") including the Explanatory Memorandum, 9.

[11] What constitutes a situation of *cessation de paiements* is not straightforward and has been debated by courts and commentators over the years, in particular the accounting basis of the concept. Following the introduction of the Law of 1967, French case law was referring to the concept of *cessation de paiements* as an essentially accounting-based notion, reliant on a comparison of available assets to meet the due liabilities. Yet, many courts have departed from this accounting view and have interpreted elements of the concept, such as what constitutes an asset and a liability and whether the debt is in fact due. Solely relying on the balance sheet test would not necessarily be a true reflection of the reality of the business.

[12] France, Romania, Italy, Austria, the Netherlands all gave similar definitions for this term, however, the grounds for court confirmation vary within the jurisdictions.

[13] *Mercantile Investment & General Trust Co v International Co of Mexico* [1893] 1 Ch 484, 491, cited in *Re Guardian Assurance Co* [1917] 1 Ch 431 per Younger J, 443, as cited in Kristin van Zweiten, *Goode on Insolvency of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 49.

[14] See generally, I Lynch Fannon and G Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury Professional 2012) chapters 12 and 13.

of Arrangement" based in company law is sometimes referred to as a "statutory Scheme of Arrangement".[15] This latter arrangement is based on the same legal provisions as the English Companies Act of 1948, upon which the English Scheme of Arrangement was based. This is now contained in the Companies Act 2006. In England and Wales, an authoritative definition is as follows: "an arrangement is a compromise or arrangement that has been submitted to the court for approval under Pt 26 of the Companies Act 2006."[16] This term is used in the Scheme of Arrangement and in the Company Voluntary Arrangement in England and Wales.

In Romania, an arrangement is a compromise between the debtor and one or several of its creditors, in order to overcome the financial difficulties, which the debtor faces.

2.5.4 Restructuring Plan

Per the PRD, Article 8 - Content of Restructuring Plan:

> "1. Member States shall require that restructuring plans submitted for adoption in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10, contain at least the following information:
>
> (a) the identity of the debtor;
>
> (b) the debtor's assets and liabilities at the time of submission of the restructuring plan, including a value for the assets, a description of the economic situation of the debtor and the position of workers, and a description of the causes and the extent of the difficulties of the debtor;
>
> (c) the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restructuring plan;
>
> (d) where applicable, the classes into which the affected parties have been grouped, for the purpose of adopting the restructuring plan, and the respective values of claims and interests in each class;
>
> (e) where applicable, the parties, whether named individually or described by categories of debt in accordance with national law, which are not affected by the restructuring plan, together with a description of the reasons why it is proposed not to affect them;
>
> (f) where applicable, the identity of the practitioner in the field of restructuring;
>
> (g) the terms of the restructuring plan, including, in particular: (i) any proposed restructuring measures as referred to in point (1) of Article 2(1);
>
> (ii) where applicable, the proposed duration of any proposed restructuring measures;
>
> (iii) the arrangements with regard to informing and consulting the employees' representatives in accordance with Union and national law;
>
> (iv) where applicable, overall consequences as regards employment such as dismissals, short-time working arrangements or similar;
>
> (v) the estimated financial flows of the debtor, if provided for by national law; and
>
> (vi) any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan;
>
> (h) a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan. Member States may require that that statement of reasons be made or validated either by an external expert or by the practitioner in the field of restructuring if such a practitioner is appointed."

[15] *ibid* chapter 14.
[16] van Zweiten (n 12) 50.

2.6 Examiner, Receiver, Trustee, and Administrator, PIFOR

2.6.1 Examiner

In Ireland, "an examiner means an examiner appointed under section 509" of the Irish Companies Act. It is essentially an insolvency practitioner appointed to "the company for the purpose of examining the state of the company's affairs and performing such functions in relation to the company as may be conferred by or under this Part."[17] The provision goes on to state that:

> "The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern." [18]

The Irish examiner is similar to the Dutch 'plan expert' referred to in 2.6 f.[19]

In Austria's preventive restructuring framework, the professional responsible for the process is also called an examiner. The examiner must be independent from creditors and the company (including not being a competitor of the company).

2.6.2 Judicial Commissioner

In Italy, the court nominates an insolvency practitioner as c*ommissario giudiziale* (which translates as a judicial commissioner), whose role is to inform the court of any misconduct by the debtor or any situation, which may impact the restructuring process negatively. The c*ommissario giudiziale* provides independent information to creditors to facilitate their assessment of the proposal. After court confirmation of the plan, the c*ommissario giudiziale* can implement it by adopting the measures that the debtor was supposed to (but did not) adopt under its terms.[20]

2.6.3 Receiver

Under the UK Insolvency Act 1986, Receiver means:

> "(a) a receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities; or (b) a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property."[21]

In Ireland a receiver includes, "a receiver and manager of the property of a company" or can be "a manager of the property of a company" or simply a manager of "part of the property of the company" or simply a receiver only of the income arising from that property.[22]

2.6.4 Trustee

A Trustee is the professional responsible for debtor-in-possession insolvency proceedings in Germany.

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[17] Irish Companies Act 2014, s 509(1).
[18] *ibid* s 509(2)
[19] The legislative history of the Irish Examinership process is that it was originally part of a major reform Bill presented as the Companies Bill 1987. However, with the immanent collapse of the AIBP group in late summer of 1990, the examinership legislation was extracted from the full Bill and passed as the Companies (Amendment) Act 1990. The remainder of the legislation was passed as the Companies Act 1990 later that year. All of this legislation is now consolidated in the Companies Act 2014. It would seem that it (and other parts of this legislation) were modelled on US codes. It is interesting to note that the term Examiner appears in the Chapter 11 process as follows:

> "Although the appointment of a case trustee is a rarity in a chapter 11 case, a party in interest or the U.S. trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a chapter 11 case. The court, on motion by a party in interest or the U.S. trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. 11 U.S.C. § 1104(a)."

'Chapter 11: Bankruptcy Basics' (United States Courts 2019) <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> accessed 4th January 2020. The first Irish Examinership was a resounding success rescuing AIBP and a significant part of the Irish Beef Processing industry.
[20] CCI, art 44, para 1b.
[21] UK Insolvency Act 1986, s 29(2). Note following amendment in the Enterprise Act 2002, the appointment of a receiver and manager is not generally available under English law unless this relates to an appointment on foot of a charge over real property.
[22] Irish Companies Act 2014, s 2(9).

In the common law a trustee is not usually a professional position but refers to a person appointed as a trustee under a trust which can arise in many different contexts and is not specifically confined to insolvency. It is not necessary for a trustee to be qualified as such.

However, under US Bankruptcy Law, and Chapter 11 in particular, the debtor in possession is placed in the position of a fiduciary but the presiding official is the US trustee.[23] It is also envisaged that in certain cases, a case trustee can also be appointed, this is sometimes referred to as an examiner. The latter performs monitoring functions in the US system, which is a lesser role than that occupied by an Irish turnaround professional appointed as examiner.[24]

2.6.5 Administrator

Under the Insolvency Act 1986 in England and Wales, an "administrator" of a company means a person appointed under [schedule B1] to manage the company's affairs, business and property.[25] An administrator is an officer of the court.[26] Finally, a person may be appointed as administrator of a company only if he is qualified to act as an insolvency practitioner in relation to the company.[27]

In Romania and Germany, the administrator is the professional responsible for the preventive concordat and insolvency proceeding, respectively. However, a key distinction between the English administrator and the administrator in Romania and Germany is that only in England and Wales does the administrator fully step into the shoes of the company management, taking over business decisions entirely.

In France, an administrator (*administrateur judiciaire*) is tasked with supporting the company in the first instance but may have a more specific role, which is outlined as part of his appointment.

2.6.6 Insolvency Practitioner

In England and Wales, insolvency practitioners must have passed the Joint Insolvency Exam Board and have acquired a minimum of 600 hours of insolvency experience over the previous three years, subject to a minimum of 150 hours per annum, of which half must be work of a type reserved to insolvency practitioners under the Insolvency Act 1986.[28]

In Ireland, an insolvency practitioner is a liquidator or examiner regulated under s 633 of the Companies Act 2014. Receivers are not currently regulated under this legislation.[29]

In Romania, the Insolvency Practitioner carries out insolvency proceedings, voluntary or amicable liquidation procedures, as well as pre-insolvency proceedings provided by law, including financial supervision or special administration measures. In the Netherlands, "insolvency practitioner" is a generic term used for court appointed actors in insolvency proceedings.[30] In Italy, insolvency practitioners need to be signed in a public registry held by the Ministry of Justice.[31] In order to be eligible, it is necessary to attend regular training sessions and to be qualified as a lawyer, accountant, auditor or to have managed or supervised a company (in the latest case, showing adequate entrepreneurial abilities).

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[23] "Section 1107 of the Bankruptcy Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and it requires the debtor to perform of all but the investigative functions and duties of a trustee. These duties, set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the US trustee or bankruptcy administrator (discussed below), such as monthly operating reports. 11 USC §§ 1106, 1107; Fed R Bankr P 2015(a)." See 'Bankruptcy Basics' (n 18).

[24] "Although the appointment of a case trustee is a rarity in a Chapter 11 case, a party in interest or the US trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a Chapter 11 case. The court, on motion by a party in interest or the US trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. 11 USC § 1104(a)." See 'Bankruptcy Basics' (n 18).

[25] UK Insolvency Act 1986, schedule B1, para 1(1).

[26] *idem* para 5.

[27] *idem* para 6.

[28] 'Making a Career as an Insolvency Practitioner' (R3 2019) <r3.org.uk/media/documents/publications/professional/Making_a_Career_Brochure_V2.pdf> accessed 14 November 2019.

[29] See further proposals to regulate receivers in the 'Company Law Review Group Annual Report 2018' (CLRG 2019) <http://www.clrg.org/CLRG/Publications/CLRG-Annual-Report-2018.pdf > accessed 12 December 2019.

[30] This includes the *bewindvoerder*, i.e. the joint administrator in suspension of payments proceedings and the *curator* i.e. liquidator in bankruptcy proceedings.

[31] CCI, art 356.

2.6.7 Plan Expert (The Netherlands)

The so-called '*herstructureringsdeskundige*' is an expert appointed by the court on the request of either the debtor or creditors. The plan expert prepares and offers a plan to (some of) the creditors and shareholders. The plan expert is required to perform his tasks effectively, impartially, and independently.[32]

2.6.8 PIFOR (Practitioner in the Field of Restructuring)

In the PRD:

> "'practitioner in the field of restructuring' means any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks:
>
> (a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan;
>
> (b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority;
>
> (c) taking partial control over the assets or affairs of the debtor during negotiations."[33]

2.6.9 The Observer (The Netherlands)

The observer is a court appointed supervisor that can only be appointed when a plan expert has not yet been appointed. Its task is to supervise the realisation of the restructuring plan and, in so doing, take into account the interests of all creditors.[34]

2.7 Pledge, Mortgage, Charge, and Floating Charge

2.7.1 Pledge

A pledge is given as security for the fulfilment of a contract or the payment of a debt and is liable to forfeiture in the event of failure. In Italy, generally, the pledge is possessory but, pursuant to the recent Law n. 119/2016, it can also be, by derogation, non-possessory (meaning that the debtor does not lose the powers of management that he has over the specific asset).

In the Netherlands, a right of pledge can be vested on transferable assets, except on registered property. With a pledge, the pledgee obtains security over the assets for claims until they are paid in full, meaning that the pledgee can sell the pledged goods if the debtor is in default. The proceeds of the sale may be used to repay the outstanding debt in accordance with the ranking of the pledge.

2.7.2 Charge (Fixed)

> "A fixed charge is a charge over a particular asset where the chargee controls any dealing or disposal of the asset by the chargor. A fixed charge ranks before a floating charge in the order of repayment on an insolvency."[35]

2.7.3 Mortgage

"A mortgage is a debt instrument, secured by the collateral of specified real estate property, that the borrower is obliged to pay back with a predetermined set of payments."[36]

In the Netherlands, a right of mortgage can be vested on transferable assets that are registered property. A mortgage is established by a notarial deed which will be included in the public register. The mortgagee obtains security over the assets for claims until they are paid in full, meaning that the mortgagee can sell the asset when the debtor is in default. The proceeds of the sale may be used to repay the outstanding debt in accordance with the ranking of the mortgage.

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[32] WHOA, art 371(1) & (6).
[33] PRD, art 2(1)(12).
[34] WHOA, art 380(1).
[35] 'Fixed Charge' (Practical Law Glossary 2019) <https://uk.practicallaw.thomsonreuters.com/0-107-5768?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 14 November 2019.
[36] 'Mortgage' (Investopedia 2019) <investopedia.com/terms/m/mortgage.asp> accessed 14 November 2019.

2.7.4 Floating Charge

In England and Wales and Ireland, floating charges can be understood with reference to case law. In *Illingsworth v Houldsworth*, Lord MacNaghten stated:

> "[a floating charge] is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."[37]

According to Romer LJ, if a charge had the following 3 characteristics, it would be floating:

> "(i) If it is a charge on a class of assets of a company present and future;
>
> (ii) If that class is one, which in the ordinary course of the business of the company, would be changing from time to time; and
>
> (iii) If you find that by the charger it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as concerns the particular class of assets I am dealing with."[38]

In other words, a floating charge can be understood as a charge over assets owned by a company, which allows the charged assets to be bought and sold or otherwise dealt with, during the course of a company's business without reference to the chargeholder, provided that the company is not insolvent. The floating charge crystallises – i.e. becomes fixed - if there is a default or other equivalent event.

Although floating charges developed out of the common law, they do also exist in some other European jurisdictions, for example, Denmark.

2.8 Non-performing Loans

> "A nonperforming loan (NPL) is a sum of borrowed money upon which the debtor has not made the scheduled payments for a specified period. Although the exact elements of nonperformance status vary, depending on the specific loan's terms, 'no payment' is usually defined as zero payments of either principal or interest."[39]

In the context of European banking law, NPLs or, rather, NPEs (exposures) are exposures which are not necessarily past due, as suggested in the definition, but also "unlikely to pay" (to be paid) whilst not yet past due.

2.9 Interim and New Financing

2.9.1 Interim Financing

In the PRD:

> "'interim financing' means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business"[40]

2.9.2 New Financing

In the PRD, "'new financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan."[41]

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[37] [1904] AC 355.
[38] *Re Yorkshire Woolcombers Association* [1903] 2 Ch 284.
[39] 'Non-Performing Loans' (Investopedia 2019) <https://www.investopedia.com/terms/n/nonperformingloan.asp> accessed 14 November 2019.
[40] PRD, art 2(1)(8).
[41] PRD, art 2(1)(7).

2.10 Supervising Judge, Syndic Judge, Notary

These terms arose from specific jurisdiction reports and are explained by the contributors of those jurisdictions. This section is not intended to be a comprehensive description of all administrative authorities involved in restructuring, but will give context for the substantive Chapters to follow. Report 2 will provide a more complete consideration of administrative authorities.

2.10.1 Supervising Judge

A supervising judge is the judge who has the duty to supervise debtor's actions and to authorise its extraordinary actions, if still in possession, and to oversee the procedural and substantial fairness of the procedure. In the Netherlands a '*rechter-commissaris'*, is a judge that is tasked with supervision of the insolvency proceedings, such as tasks.[42] In Italy, after verifying the economic feasibility and legal compliance of the plan, the Tribunal with jurisdiction nominates the *giudice delegato*. (S)he has supervisory powers. In France, a supervisory judge is systematically appointed during the opening order of safeguard proceedings.

2.10.2 Syndic Judge

A syndic judge is a judge with specific powers in bankruptcy and insolvency proceedings in Romania.

2.10.3 Notary

In Spain, a notary is a civil servant who intervenes in certain situations to provide legal certainty. (S)he is the competent authority to examine the requests for extra-judicial payment compositions in relation to natural persons only. A mediator performs this role for extra-judicial payment compositions for corporate entities. In the common law, a notary has a significantly different meaning referring to a person who attests to the veracity of certain documents.

2.11 Patrimonial Liability

Patrimonial liability is a form of civil liability and is a common term in Civil Law jurisdictions; it can just be referred to as "liability".

2.12 Retention of Title

In England and Wales and Ireland, a retention of title clause is a clause that prevents ownership of goods transferring to a purchaser until a seller has been paid in full. While a purchaser may possess the goods in question, legal title has not passed and so the goods are subject to being recovered by a seller should payment terms not be met. However, depending on the nature of the asset and the rights purportedly exercised by the seller, the retention of title clause may be deemed to be a charge and therefore void for want of registration as such.

In the Netherlands, a retention of title is the right of the seller that the title to the goods sold shall remain with the seller and will only be passed to the buyer when the full purchasing price is paid and received by the seller.[43] In Italy, it refers to a contractual provision, which delays the transfer of the property right on a certain asset up until the payment of the last instalment.

While the definition is essentially the same across most jurisdictions, these rights may be treated differently in insolvency, i.e. the right to repossess is not necessarily absolute. In common law countries, the retention of title clause was originally viewed as a European construct which did not translate exactly into the common law, hence the inadvertent creation of a charge described above.

2.13 Right in Rem

In rem is "a Latin term meaning "against a thing." An *in rem* proceeding adjudicates the rights to a particular piece of property for every potential rights holder, even potential rights holders who are not named in the lawsuit. Generally, an *in rem* proceeding must be commenced in the jurisdiction where the subject property is located. The presence of the subject property in the forum state usually satisfies any due process concerns for binding out-of-state claimants to the court's judgment. However, notice of

[42] Dutch Bankruptcy Act, art 64.
[43] Dutch Commercial Code, art 3:92.

the suit still must be given to all individuals known to have interests therein."[44] This understanding seems to be commonly accepted amongst our contributors.

2.14 Extra-judicial Payment

In Spain, an extra-judicial payment is one that is obtained as a result of an out-of-court procedure.

2.15 Unsecured, Secured, Preferential, and Subordinated Creditors

2.15.1 Secured Creditor

A general definition of secured creditor is as follows:

> "A secured creditor is any creditor or lender associated with an investment in or issuance of a credit product backed by collateral. Secured creditors have a first-order claim on the pay-outs of a distressed credit investment. If a borrower defaults on a secured credit product the secured creditors have a legal right to the secured asset used as collateral which can be seized and sold to pay off remaining obligations."[45]

Secured creditors are those creditors with a security rights, (a right of pledge or mortgage). In France, secured creditors also include those "secured" by law, for example, employees or tax authorities.

2.15.2 Unsecured Creditor

A general definition of unsecured creditor is as follows:

> "An unsecured creditor is an individual or institution that lends money without obtaining specified assets as collateral. This poses a higher risk to the creditor because it will have nothing to fall back on should the borrower default on the loan. If a borrower fails to make a payment on a debt that is unsecured, the creditor cannot take any of the borrower's assets without winning a lawsuit first."[46]

In addition to this definition which refers to loans, the term "unsecured creditors" also refers to all suppliers of goods, services, utilities and so on who have no collateral or contractual arrangements to secure payment. This can also include involuntary creditors such as tort creditors. Unsecured creditors – also ordinary creditors – are those creditors without a security (a right of pledge or mortgage). Again, this seems to be a commonly accepted understanding.

In France, unsecured creditors are called *créanciers chirographaires.* They do not have a collateral on specific assets but rather benefit from the *droit de gage general*, which means that the creditors have an overall "right of pledge," which guarantees payment of the claims from all of the estate of the debtor, rather than from specific assets. This essentially guarantees a base line right over the entire estate rather than over specific assets to which the debt is associated.[47]

2.15.3 Preferential Creditor

Preferential creditors are generally understood as creditors with a state created priority which gives the creditor priority rights over other creditors.

Preferred creditors may take many different forms or classes, each with a claim that may take precedence over another claimant depending on the jurisdiction. They include:

- Employees: Workers at a bankrupt company who are owed pay for work that has been performed (wages) are the top preferred creditor. Preferential status can also attach to outstanding payments under working time legislation.
- Tax and revenue authorities: Government authorities such as tax authorities may be paid before anyone else (after employees).

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[44] 'In Rem' (Practical Law Company 2019) <https://uk.practicallaw.thomsonreuters.com/8-520-2353?transitionType=Default&contextData=(sc.Default)> accessed 15 November 2019.
[45] 'Secured Creditor' (Investopedia 2019) <https://www.investopedia.com/terms/s/secured-creditor.asp> accessed 15 November 2019.
[46] 'Unsecured Creditor' (Investopedia 2019) <https://www.investopedia.com/terms/s/unsecured-creditor.asp> accessed 15 November 2019.
[47] See French Civil Code, art 2284: "Anyone who has a personal obligation is bound to fulfil his commitment on all his movable and immovable property, present and to come." And art 2285: "The debtor's property constitutes the common pledge of his creditors; and the price is distributed among them by contribution, unless there are legitimate legal preferences between the creditors."

- Environmental remediation: When bankrupt companies that have been found to have caused environmental damage as a result of their business operations, the clean-up costs may receive preferential treatment by the courts in some jurisdictions.
- Tort victims: Victims of such a civil wrong may be given preferred creditor status in some jurisdictions based on their status as an involuntary creditor. Since tort victims did not make the choice to become a creditor to a bankrupt entity, they are generally not penalized. Otherwise these creditors are unsecured creditors.

The following jurisdictions are considered as examples.

In Ireland preferential creditors are recognised in s 621 of the Companies Act 2014. Primarily these creditors are the State in relation to tax debts and employees in relation to outstanding payments. In the UK these were abolished by the Enterprise Act 2002. However, the UK government has indicated an intention to reinstate Crown Preference in its next budget.[48]

In the Netherlands, preferential creditors hold claims, which are given a preference by law and rank higher than unsecured creditors. There are three types of preferential creditors:

(i) the Dutch employee insurance agency (UWV);

(ii) the tax authority; and

(iii) employees with a salary claim that arose prior to the bankruptcy.

2.15.4 Subordinated Creditors (Subordinated Debt)

In the Netherlands, subordinated creditors are creditors that have subordinated their claims to rank after those of ordinary (unsecured) creditors. In France, their repayment depends on the prior repayment of other creditors.

In Austria, subordinated creditors are typically shareholders who granted loans to the debtor, which are regarded as a substitute of equity. Subordinated claims result either from the law – equity replacing loans of shareholders – or from an agreement and are only taken into account after full satisfaction of the creditors of the insolvency proceedings. Subordinated claims feature in the Austrian frameworks. This term is understood similarly elsewhere.

A typical description of subordinated debt is: "Debt that is unsecured and/or ranks for interest and repayment after the senior debt of a company."

For example, subordinated debt may rank below senior debt in the following ways:

- "Repayment of principal.
- Interest margins.
- Security: Senior, second lien and mezzanine debt will typically share the same security package (normally held by a security trustee), which means that the security granted by the borrower and any other obligors will be granted in favour of all the lenders under each of those instruments of debt. However, the intercreditor agreement between the lenders will provide that senior debt will be repaid first from the proceeds of any enforcement of security, followed by second lien debt, followed by mezzanine debt.
- Intercreditor terms: Terms in an intercreditor agreement (or any other financing agreement) by which one creditor (or group of creditors) agrees to subordinate itself in any way to another creditor (or group of creditors) are all examples of what is termed contractual subordination."[49]

2.16 Self-Administration and Debtor in Possession

2.16.1 Self-Administration

[48] 'Changes to Protect Tax in Insolvency Cases' (HMRC Policy Paper 2019) <https://www.gov.uk/government/publications/changes-to-protect-tax-in-insolvency-cases> accessed 6th January 2020.

[49] This is not an exhaustive list. 'Subordinated Debt' (Practical Law Company 2019) <https://uk.practicallaw.thomsonreuters.com/7-107-7330?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 15 November 2019.

Self-administration refers to debtor-in-possession in Germany. In Austria, it refers to the debtor itself administering the assets involved in the insolvency proceedings (under the supervision of an insolvency administrator).

2.16.2 Debtor in Possession

An insolvency or restructuring procedure in which "debtors…remain totally, or at least partially, in control of their assets and the day-to-day operation of their business."[50]

2.17 Court Protection, Stay, and Moratorium

2.17.1 Court Protection

In Ireland, this is the term used to refer to a stay or moratorium. It applies to all creditor claims against the company and any other proceedings relating to the company can only be commenced with leave from the court.[51]

2.17.2 Stay

Though sometimes the terms are used interchangeably, the stay and the moratorium are explained separately below, as the responses received from some contributors indicated that the words were sometimes understood differently.

A stay generally refers to the statutory or otherwise stopping of debt enforcement claims as well as at times other claims against a debtor company.

In Romania, this is the term used to refer to suspension of all forced execution procedures. In Germany, it refers to a stay of enforcement actions. Austria considers the stay to mean that claims of debt execution against the debtor by unsecured creditors are inadmissible. In the Netherlands, the stay and moratorium mean the same thing; a (temporary) suspension of any legal action of creditors to enforce or recover a claim, unless they have obtained permission. In Italy, it refers to a protective measure against creditors' enforcement action, the goal of which is to preserve the going concern - in case of a restructuring procedure - or to ensure a liquidation of the assets in an orderly manner. In Italy, a stay does not hinder litigation, only enforcement and precautionary measures. In Spain, only individual enforcement actions against assets that are necessary for the continuation of the business are stayed, others can be if certain circumstances are present.[52]

a. Moratorium

In Romania, this is the term used to refer to postponement of payment of public and private debts due, established by law for a certain time or for the period of existence of special circumstances. In Austria, a moratorium only applies to credit institutions in that it consists of the closure of an institution for payment transactions and the prohibition of accepting payments in cash or by bank transfers.

2.18 Intra- and Cross-class Cram-Down

a. Intra-class Cram-down

This refers to the approval of a plan by a class of creditors if a majority of creditors within that class votes in favour. The majority binds the minority to the plan, once confirmed by the relevant authority.

b. Cross-class Cram-down

As defined in the PRD, a cross-class cram-down refers to a:

> "restructuring plan which is not approved by affected parties in every voting class but is confirmed by a judicial or administrative authority upon the proposal of a debtor or with the

[50] PRD, art 5(1).
[51] Irish Companies Act 2015, s 520(5).
[52] In the case of assets that are not necessary for the continuation of the business, individual actions will only be stayed when the negotiations that may lead to the adoption of a refinancing agreement are supported by 51 % of financial claims and creditors agreed not to enforce their claims during the negotiations. In the case of secured claims, foreclosure proceedings are stayed until the adoption of an extra-judicial payment composition, or the filing of a confirmation request for a refinancing agreement, or the end of the three months period foreseen in art 5(5) bis of the Spanish Insolvency Act for the adoption of a refinancing agreement or an extra-judicial payment composition. Public claims are not affected by the stay.

debtor's agreement and becomes binding upon dissenting voting classes."[53]

2.19 Absolute Priority

As defined in the PRD, the absolute priority rule aims to:

> "…protect a dissenting class of affected creditors by ensuring that such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the 'absolute priority rule')."[54]

2.20 Relative Priority

The following is largely accepted as being a relative priority rule under the PRD:

> "dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class…"[55]

2.21 Unfair Prejudice

Article 11(2) of the PRD states that in relation to confirmation of plans and the operation of a cross class cram down provision:

> "Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties."

In the Irish Examinership procedure, unfair prejudice is one of the concepts used in the test provided for in the legislation which guides the court in confirming a rescue.[56] Section 541 of the Companies Act 2014 provides that on presentation by the Examiner of the compromise or arrangement, the court shall not confirm any proposals unless "at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals" and it is satisfied that "the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation" and the proposals are not "unfairly prejudicial" to the interests of any interested party..."[57]

Under the UK Insolvency Act 1986, "any creditor who was entitled to vote at the creditors' meeting may apply to court to challenge the CVA on grounds of unfair prejudice or material irregularity."[58] "Where…a group of creditors' uses its votes to deprive a creditor or group of their rights against third parties, while preserving its own rights, the courts are likely to find that unfair prejudice was suffered."[59] Similarly, the court will assess a Scheme of Arrangement and will approve only if it is "satisfied that the scheme does not operate unfairly between groups and will ask whether an intelligent and honest member of the class could reasonably have approved the proposal."[60]

Under the WHOA, unfair prejudice means judicial review of a restructuring plan where the court will assess if the restructuring plan provides unfair preferential treatment of one or more creditors or shareholders over other creditors or shareholders.

2.22 Best Interest of Creditors

Under the PRD, "satisfying the 'best-interest-of-creditors' test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed."[61] This test has also

[53] PRD, art 11(1).
[54] PRD, recital 55.
[55] PRD, art 11(1)(c).
[56] Companies Act 2014, s 541(4)(b)(ii).
[57] See generally John O'Donnell and Jack Nicholas, *Examinerships* (Roundhall 2016) and Lynch Fannon & Murphy (n 13) chapters 12 and 13.
[58] Finch & Milman (n 3) 436-437.
[59] *Re a Debtor (No 101 of 1999)* [2001] BCLC 54 and *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] BCC 500.
[60] Finch & Milman (n 3) 411; *Re Linton Park Plc* [2008] BVV 17 and *RAC Motoring Services Ltd* [2000] 1 BCLC 307.
[61] PRD, recital 52.

been developed in Irish law.[62]

2.23 Conclusion and Transition

This Chapter has introduced some commonly used terms as well as jurisdictional specific terms in order to dispel some of the confusion associated with them. The next Chapter will explore the way in which cross-border insolvencies are regulated within the EU. This will include some background on the development of the European Insolvency Regulation (Recast) through a series of failed treaties and conventions beginning in the 1970s. The key features and function of the EIR Recast will also be described as well as the influence it has had on choice of forum in the European Union. This leads on to issues of substantive harmonisation in the EU. The PRD aims to address harmonisation of restructuring measures. A consideration of the interface between the EIR Recast and the PRD leads on to the prospect that some preventive restructuring frameworks may effectively avoid inclusion in Annex A of the EIR Recast. This could potentially lead to the development of procedures that will compete across jurisdictions due to the ability to choose a forum without reference to the EIR Recast. Chapter three provides background commentary on the regulation of cross-border insolvency generally, while highlighting some of the issues that could arise depending upon the characteristics of the preventive restructuring frameworks that are eventually implemented.

[62] Lynch Fannon & Murphy (n 13) (Page No?) and Irene Lynch Fannon, 'Examinership: Approval of Schemes — Re SIAC Construction Ltd and in the Matter of the Companies (Amendment) Act 1990 (as Amended)' (2015) 1 Commercial Law Practitioner; *Re SIAC Construction Limited* [2014] IESC 25, [2014] ILRM 357