

Standard Insolvency and Related Terms

Adequate Protection	This term is not used in New Zealand.
Antecedent Transactions	A type of transaction which can be reversed in liquidation and personal bankruptcy proceedings to allow more assets to be available to creditors. The main categories of such transactions in New Zealand are: (1) transactions at an undervalue; (2) unfair preference transactions (voidable transactions); and (3) voidable charges.
Automatic Moratorium	See definition of Moratorium below. The applicable statutory moratorium arises automatically upon commencement of Liquidation, Voluntary Administration, Statutory Management or Business Debt Hibernation.
Bankruptcy	The insolvency regime in New Zealand for natural persons.
Bankruptcy Trustee	This term is not used in New Zealand. However, the terms 'trustee' and 'provisional trustee' are used in the context of a compromise proposal to creditors by an insolvent individual filed with the court. A provisional trustee is a supervisor of such a compromise proposal to creditors before creditor approval of such proposal and a trustee takes such role after creditor approval.
Classification of Creditors	In a scheme of arrangement (Part XV Companies Act 1993 (NZ)) or creditors compromise (Part XIV Companies Act 1993 (NZ)), creditors will be separated into different classes. In general, the classification of creditors is based upon the similarity of their legal rights in considering whether they can sensibly consult one another with a view to their common interest.
Clawback Period	The period before liquidation or bankruptcy is commenced in which antecedent transactions (which take place during this period) may be unwound by a liquidator or Official Assignee.
Company	A company is a legal entity incorporated pursuant to the Companies Act 1993 (NZ). It has a separate legal personality from the owners and provides limited liability.
Compulsory Liquidation	When a creditor applies to court to place a debtor company into liquidation.
Cram Down	The act of imposing a restructuring plan on dissenting creditors in a scheme of arrangement, creditors compromise or deed of company arrangement. Generally, there is a cram down within classes of creditors as unanimous consent is not required. Cross-class cram down is not available.
Creditors' Meeting	A meeting of creditors during which they will vote on a particular issue or restructuring plan. Such creditors meetings are relevant in a scheme of arrangement, creditors compromise, voluntary administration, business debt hibernation or liquidation.
Creditors' Voluntary Liquidation	This term is not used in New Zealand.
Crystallisation	In New Zealand, there is no longer a distinction between a fixed and floating charge, and accordingly the concept of crystallisation of a floating charge is no longer relevant - see below the definition of Security Interest .
Debentures	This term is not used in New Zealand.
Debt Repayment Scheme	This term is not used in New Zealand.
Discharge	In personal bankruptcy, a discharge has the effect of releasing the individual from all debts provable in the bankruptcy proceedings. Subject to limited exceptions, a personal bankrupt will be automatically discharged after three years.
Dissolution	This term is not used in New Zealand, but the functional equivalent is de-registration. De-registration occurs either voluntarily if a company has ceased trading or at the end of the liquidation process. Upon de-registration, the company will be removed from the Register of Companies and cease to exist as a legal entity.
Extension of Moratorium	This term has no formal legal meaning in New Zealand but a moratorium (as defined below) can be extended in certain circumstances.
Fixed Charge	In New Zealand, there is no longer a distinction between a fixed and floating charge - see below the definition of Security Interest .
Floating Charge	In New Zealand, there is no longer a distinction between a fixed and floating charge - see below the definition of Security Interest .

Standard Insolvency and Related Terms

Fraudulent Trading	Section 380 of the Companies Act 1993 provides that it is an offence for directors to continue the business of the company or complete various types of transaction, with an intent to defraud the creditors of the company.
Guarantee	An undertaking by a third party (the surety) to the creditor in respect of the payment obligation of the debtor. If the debtor fails to meet his payment obligations, the creditor has a claim against the surety.
Individual Voluntary Arrangement	This term is not used in New Zealand. However, a similar concept is the No Asset Procedure (NAP) which is an alternative to personal Bankruptcy. Under a NAP, an individual who has no assets and total debts of less than NZ\$50,000 can go through a simplified one-year procedure (as an alternative to full bankruptcy) in order to discharge their debts (subject to certain exclusions).
Insolvency Practitioner	Defined in the Insolvency Practitioners Regulation Act 2019 as any Administrator, a Deed Administrator, an insolvent company Liquidator, a Receiver or a trustee or provisional trustee (in respect of a proposal to creditors by an insolvent individual).
Interim Judicial Manager	The term is also colloquially used to describe persons working in the insolvency industry in New Zealand who are in the business of accepting formal insolvency appointments.
<i>Ipsa Facto</i> Clauses	This term is not used in New Zealand.
Judicial Management	A contractual provision which allows a party to unilaterally terminate or modify existing rights by reference to an event of insolvency on the part of the counterparty. There are restrictions on the operation of such clauses during a Moratorium applied under Business Debt Hibernation.
Judicial Management Order	This term is not used in New Zealand – refer to Statutory Management below.
Judicial Manager	This term is not used in New Zealand – refer to Statutory Management below.
Limited Liability Partnership	This term is not used in New Zealand – refer to Statutory Manager below.
Liquidation	The functional equivalent term in New Zealand is limited partnership. A limited partnership is a body corporate which is formed by being registered under the Limited Partnerships Act 2008 (NZ) and which has a separate legal personality from that of its partners.
Liquidation General Account	The process in which a company's assets are realised and distributed by a liquidator to the company's creditors. This process ends with the de-registration of the company.
Liquidation Special Account	This term is not used in New Zealand.
Liquidator	This term is not used in New Zealand.
Members' Voluntary Liquidation	The party responsible in administering the liquidation of a company. This can be the Official Assignee. This term is not used in New Zealand. Please refer to the description below of Voluntary Liquidation .
Moratorium	A stay against the commencement of various enforcement or recovery actions by creditors. A statutory moratorium is applicable in New Zealand during Liquidation, Voluntary Administration, Statutory Management and Business Debt Hibernation. A contractual moratorium can be included in the terms of a Creditors Compromise or Scheme of Arrangement.
Official Assignee	The Official Assignee is a Government official who administers the affairs of personal bankrupts and can also, in some circumstances, be appointed as a Liquidator.
Official Receiver	This term is not used in New Zealand.
Partnership	A general partnership (as distinct from a limited partnership – refer to Limited Liability Partnership above) is a relationship between persons who carry on a business together with a common view of obtaining profits. There is no separate legal personality between the partnership and the partners.
Preferential Creditor	A creditor who is entitled to be paid certain sums in priority to all other unsecured debts. Sums include, among others, administrative expenses, wages and taxes.
Proof of Debt	A declaration by a creditor of a statement of account showing the debt owed by the debtor together with supporting documents.

Standard Insolvency and Related Terms

Provisional Liquidation	This term is not used in New Zealand. However, the functional equivalent in New Zealand is an interim liquidator. An interim liquidator is appointed by an order of the court pursuant to a creditor application. An interim liquidator is appointed to preserve the debtor company's assets pending the court's determination of whether or not to place the company into final liquidation. An interim liquidator has limited powers compared to a full liquidator and cannot realise or distribute the assets of the debtor company.
Provisional Liquidation in Compulsory Liquidation	This term is not used in New Zealand – see discussion above of Provisional Liquidation .
Provisional Liquidation in Voluntary Liquidation	This term is not used in New Zealand – see discussion above of Provisional Liquidation .
Receiver	Appointed by a secured creditor typically under a general security interest over all assets of the debtor. The primary responsibility of the receiver is to gather the assets subject to the security interest pursuant to which they are appointed, realise them and provide the proceeds of sale to the secured creditor. A receiver appointed over all asset of a debtor has full power to manage the affairs of the debtor and can trade the business of the debtor.
Receiver and Manager	This term when used in New Zealand is used interchangeably with the term Receiver, as all Receivers are given powers of management of the assets to which they are appointed under the Receiverships Act 1993.
Receiver appointed under a court order	A receiver may be appointed by the court, rather than pursuant to the terms of a security agreement.
Receiver in Aid of Mareva Injunction	This term is not used in New Zealand.
Receivership	The process in which a secured creditor exercises their right to appoint a receiver to realise the value of their security to discharge the outstanding debt obligation.
Registered Business Trust	This term is not used in New Zealand.
Registration of Charges	This term is not used in in New Zealand, but registration of security interests is required in order to perfect a security interest and achieve best priority. Registration in respect of a security interest in personal property can be completed by filing a financing statement on the online Personal Property Securities Register (NZ). Registration of a security interest in respect of real property (a mortgage) must be registered on the title to the affected real property maintained electronically by Land Information New Zealand.
Rescue Financing	This is not a term used in New Zealand with specific legal meaning. However, the term rescue financing is used generally in New Zealand to describe financing provided to distressed entities to prevent their imminent insolvency.
Scheme of Arrangement	A scheme of arrangement is a debtor led procedure under Part XV of the Companies Act 1993 (NZ). A scheme can encompass a wide range of possible outcomes and can include a compromise with creditors, a reorganisation of share capital, an amalgamation of two or more companies or any combination of such concepts which affects the rights and obligations of a company, its creditors and shareholders. Once sanctioned by the court, a scheme becomes binding on a company, its creditors and shareholders. The essence of a scheme of arrangement is that it is non-consensual and derives its authority from the court's approval of the scheme, as opposed to approval by creditors.
Secured Creditor	A creditor who has a security interest over the assets of the debtor.
Security Interest	As defined in section 17 of the Personal Property Securities Act 1993 includes: (a) an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to— (i) the form of the transaction; and (ii) the identity of the person who has title to the collateral; and (b) an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).
Shadow Director	Section 126 (1)(b)(i) and (ii) of the Companies Act 1993 (NZ) provides that a "director" includes persons in accordance with whose directions and instructions an appointed director may be required or accustomed to act. Once found to be a shadow director, the relevant person incurs, in many circumstances, the same level of personal liability as a duly appointed director.

Standard Insolvency and Related Terms

Sole Proprietorship	The functionally equivalent term in New Zealand is sole trader. A sole trader is a business that is owned and controlled by an individual trading on their account. There is no separate legal personality between the business and the owner. Thus, the business owner has unlimited liability and can be sued directly.
Statement of Affairs	This term is not used in New Zealand but a functionally equivalent concept of "statement of position" is relevant in voluntary administration. In voluntary administration, the directors of the debtor company must provide a statement to the administrator about the company's business, property, affairs, and financial circumstances and such statement is tabled at a creditors meeting. In addition, an individual debtor may be requested by a financier from time to time to provide a "statement of position" setting out all their assets and liabilities.
Statutory Demand	A written demand by a creditor for the amount of outstanding debt owed by the debtor. The failure to satisfy the statutory demand is a ground to commence bankruptcy proceedings or liquidation.
Transactions at an Undervalue	A type of antecedent transaction in which the debtor did not obtain fair value in the transaction. The following must be present: (1) there must be a transaction; (2) the transaction must be at an undervalue; (3) the transaction must have taken place during the relevant clawback period; and (4) the debtor was unable to pay its debts at the time of or in consequence of entering into the transaction.
Unfair Preference Transactions	A type of antecedent transaction in which preference to a particular creditor is shown. The following must be present: (1) the transaction, enabled another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation; (2) the transaction occurred during the relevant clawback period; and (3) the debtor was unable to pay its debts at the time of the transaction.
Unsecured Creditor	A creditor which does not have any security interest over the assets of the debtor. Preferential creditors may be unsecured creditors.
Variable Capital Company	This term is not used in New Zealand.
Voluntary Liquidation	The liquidation of a company commenced voluntarily by the shareholders of the company when the company is solvent or insolvent.
Winding Up Order	This term is not used in New Zealand however the functional equivalent is an order of the court for the compulsory liquidation of the debtor company.
Worldwide Moratorium	This term is not used in New Zealand.
Wrongful Trading	This term is not used in New Zealand however the functionally equivalent concept is "reckless trading" as provided for under section 135 of the Companies Act 1993. Under section 135, a director of a company must not: (a) agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or (b) cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors. If directors are found to be in breach of s 135, directors can be held personally liable for some or all of a liquidated company's losses. On application by a liquidator, a creditor or a shareholder, the court can, order the director to pay, by way of compensation, an amount that "the court thinks just".

Frequently Used Terms

Administrator	A person who is appointed administrator of a company in voluntary administration.
Business Debt Hibernation	In response to the economic impact of the COVID-19 pandemic, amendment was made in urgency to the Companies Act 1993 to introduce business debt hibernation (BDH) as a new insolvency procedure (Schedule 13). BDH allows struggling entities (including companies and a wide range of other legal persons) to propose an arrangement with creditors that is intended to provide a breathing space to recover from the economic effects of COVID-19 by protecting entities from creditor actions for an agreed period of up to six months (moratorium). Importantly, the BDH process does not permit a compromise with creditors and all debt must be paid in full (albeit subject to deferral). In order to utilise BDH, debtors must have been solvent as at 31/12/19, have or be likely to have in the next 6 months significant liquidity problems as a result of the effects of COVID-19 and have reasonable prospects of a return to solvency by 30/09/21. BDH is scheduled to be automatically repealed as at 31/05/22.
Convening Period	An administrator of a debtor company in voluntary administration must convene a watershed meeting within the convening period. The convening period is the period of 20 working days after the date on which the administrator is appointed. The court may, on the administrator's application, extend the convening period.

Frequently Used Terms

Creditors Compromise	<p>Part XIV of the Companies Act 1993 (NZ) provides a regime by which a company can, by agreement with its creditors, compromise its indebtedness. Such compromises can be implemented without court approval (which distinguishes a creditors compromise from a scheme of arrangement). The purpose of a creditors' compromise is to allow a company that is under financial distress to cancel or vary certain debts owed to creditors, or to allow a company to alter its constitution in a manner that affects the likelihood of the company being able to pay some or all of its debt. Unlike voluntary administration, a compromise is not a reorganisation procedure where an administrator is brought in to run the company.</p>
Decision Period	<p>In relation to a secured creditor holding a charge over all or substantially all of the property of a company in voluntary administration means the period of 10 working days following the date of commencement of voluntary administration. During this period, the secured creditor can elect to exercise and enforce their security notwithstanding the moratorium imposed by the commencement of voluntary administration.</p>
Deed Administration	<p>The period following the end of voluntary administration after a deed of company arrangement (DOCA) has been approved at a watershed meeting. Such period shall last as long as provided for in the terms of the DOCA. The debtor company must operate in accordance with and subject to the terms of the DOCA in this period.</p>
Deed Administrator	<p>The person (often the former Administrator) appointed under a deed of company arrangement to oversee implementation of the deed of company arrangement by the company.</p>
Deed of Company Arrangement	<p>A deed of company arrangement (DOCA) is a form of reorganisation plan for a company in voluntary administration. There are no set terms or requirements for a DOCA but it is common for a DOCA to provide for a partial or full repayment of debts and an order in which proceeds from the sale of company property will be distributed among creditors.</p> <p>A DOCA must be approved by the requisite majority of creditors voting at a watershed meeting.</p> <p>If approved, a DOCA is binding on all unsecured creditors of the company, secured creditors who have voted in favour of the DOCA, owners or lessors of property possessed, used, or occupied by the company who have voted for the DOCA, the Company and its directors, officers and shareholders and a deed administrator.</p> <p>A DOCA must provide for the appointment of a deed administrator who will provide oversight of the implementation of the plan agreed in the DOCA.</p>
General Security Agreement	<p>A security agreement or deed providing for the creation of a security interest over all or substantially all present and after acquired property of the debtor. A general security agreement will usually include provision for the appointment of a receiver over all assets and undertakings of the debtor upon the occurrence of an event of default.</p>
Mortgage	<p>A security interest over real property. In order to obtain best priority, a mortgage must be registered on the electronic title to the relevant real property maintained by Land Information New Zealand.</p>
Statutory Management	<p>Statutory management is a rarely used legal regime applied by the Corporations (Investigation and Management) Act 1989 that is intended to deal with companies (or group of companies) that have been operating fraudulently or recklessly, or that have problems of such an extraordinary or systemically significant nature that the ordinary law cannot adequately deal with them. Statutory management is instigated by the government of New Zealand, and ultimately acts to freeze the position of a company (or group of companies) so as to preserve the interests of shareholders, creditors, and the public. There are two main processes by which statutory management freezes the position:</p> <p>(a) putting in place a moratorium with extensive provisions that preclude creditors from exercising rights and powers; and (b) management of the company and associated persons in statutory management being undertaken by a statutory manager.</p>
Statutory Manager	<p>A person appointed as a statutory manager of a company or group of companies in statutory management with the powers provided for in the Corporations (Investigation and Management) Act 1989. Essentially, statutory managers have all the powers, rights and privileges of the debtor company.</p>
Voidable Charge	<p>A type of antecedent transaction in which preference to a particular creditor is shown by way of the grant of a charge (security interest) over the property of the company (often for past previously unsecured advances). The following must be present: (1) the charge did not secure new money actually advanced or paid, or the actual price or value of property sold or supplied to the company, or any other valuable consideration given in good faith by the grantee of the charge at the time of, or at any time after, the giving of the charge; (2) the charge was granted during the relevant clawback period; and (3) the debtor was unable to pay its debts immediately after the charge was given.</p>

Voluntary Administration

The focus of the voluntary administration (VA) regime (under Part 15A of the Companies Act 1993 (NZ)) is to give companies which are facing financial troubles a “breathing space” to rehabilitate and face their creditors at the earliest possible time. An administrator is most often appointed by the board of directors of a debtor company. On appointment, the administrator assumes the control and management of the company and may exercise any powers or perform any functions it considers to be in the best interests of the company, including disposing of any company property. A moratorium on creditor enforcement applies for the duration of VA. VA operates subject to a strict statutory timeline pursuant to which the administrator must act. Critically, within 25 working days of appointment, the administrator must convene a first and second meeting of creditors, the second meeting commonly referred to as a ‘watershed meeting’. The creditors must determine at the watershed meeting whether the company should adopt a Deed of Company Arrangement (“DOCA”), end the administration and return the company to the control of its directors, or place the company into liquidation.

Watershed Meeting

A second meeting of creditors held in Voluntary Administration. At such meeting, the future of the debtor company will be determined by the creditors. The creditors must determine at the watershed meeting whether the company should adopt a Deed of Company Arrangement (“DOCA”), end the administration and return the company to the control of its directors, or place the company into liquidation.

Insolvency and Related Legislation

Companies Act 1993	Available at http://www.legislation.govt.nz/act/public/1993/0105/latest/DLM319570.html
Corporations (Investigation and Management) Act 1989	Available at http://legislation.govt.nz/act/public/1989/0011/latest/whole.html
Insolvency Act 2006	Available at http://www.legislation.govt.nz/act/public/2006/0055/latest/DLM385299.html
Insolvency Practitioners Regulation (Amendments) Act 2019	Available at http://www.legislation.govt.nz/act/public/2019/0028/latest/whole.html
Insolvency Practitioners Regulation Act 2019	Available at http://www.legislation.govt.nz/act/public/2019/0029/latest/whole.html
Personal Property Securities Act 1999	Available at http://www.legislation.govt.nz/act/public/1999/0126/latest/whole.html
Receiverships Act 1993	Available at http://www.legislation.govt.nz/act/public/1993/0122/latest/whole.html

Prepared by

Scott Abel
Fellow, INSOL International
Buddle Findlay