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RESTRUCTURING AND INSOLVENCY

Association of Corporate Counsel

Restructuring and insolvency in the UK (England & Wales): overview

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FORMS OF SECURITY

1. What are the most common forms of security granted over immovable and movable property? What formalities must the security documents, the secured creditor or the debtor comply with? What is the effect of non-compliance with these formalities?

Immovable property

Common forms of security. The most common forms of security over immovable property are:

- **Mortgage.** A mortgage is a transfer of ownership in land or other property to secure the payment of a debt or to discharge some other obligation. The debtor has a right of redemption, under which the creditor must transfer title back to the debtor when the debt is repaid or the obligation discharged.
- **Fixed charge.** A fixed charge is typically taken over a specific, valuable asset (such as land, machinery, ships or aircraft). Title and possession remain with the borrower, but the borrower usually cannot dispose of the asset without the lender's permission or until the debt is repaid. This can cause difficulties where the relevant assets (for example, accounts receivable) are used in the ordinary course of the borrower's business and therefore floating charges are used in these cases (*see below, Movable property*).

A lender holding a fixed charge has recourse to the asset if the borrower defaults under the loan. The lender usually has a power of sale over the asset, or the power to appoint a fixed charge receiver to deal with and realise the asset on its behalf (because of concerns over lender liability, the second option is normally used). The lender therefore has a claim over the proceeds of sale in priority to other creditors. Where the sale proceeds are less than the amount of the loan, the lender has an unsecured claim for the balance, but if there is a surplus after repayment of the loan, the balance must be returned to the borrower.

A fixed legal mortgage or charge is the best security interest available as it gives the secured lender a proprietary interest in the asset ahead of the costs and expenses of office holders appointed on an insolvency (other than those of the receiver appointed by the lenders), and the claims of floating charge holders, preferential creditors and unsecured creditors (*see Question 2*).

Movable property

Common forms of security. The most common forms of security over movable property are:

- **Mortgage and fixed charge.** See above, *Immovable property*.
- **Floating charge.** A floating charge secures a group of assets, which fluctuate with time, such as cash in a trading bank account. Assets secured by a floating charge are identified generically rather than individually (for example, a borrower's undertaking and assets or inventory).
- Unlike a fixed charge, a floating charge allows the borrower to deal with the charged assets in the ordinary course of business without the charge holder's consent. If certain events occur (usually events of default set out in the charging instrument), the floating charge crystallises into a fixed charge in relation to all assets over which it previously "floated", and which remain in the borrower's possession. From this point onwards, the borrower is unable to dispose of the assets without the lender's consent. However, the crystallisation of a floating charge does not change the ranking or priority of that floating charge, which will continue to be treated as a floating charge for the purposes of insolvency legislation.
- In the order of payment on an insolvency, floating charge holders rank behind fixed charge holders and certain other creditors (*see Question 2*).
- **Pledge.** A pledge is a way to create security by delivering an asset to a creditor to hold until an obligation is performed (for example, a debt is repaid). The creditor takes possession of the asset while the debtor retains ownership. The creditor can sell the pledged asset if the obligation is not performed.
- **Lien.** A lien is the right to retain possession of another person's property until a debt is settled. Liens arise automatically under English law in certain types of commercial relationships, such as a client's relationship with its solicitors or bankers. They can also be created contractually. A lien does not confer a right on the holder to dispose of the relevant asset if the debt is not paid.

Formalities

Formalities for creating a security interest depend on the nature of the asset over which security is to be granted and the nature of the security interest to be granted.

To be effective against liquidators, administrators and buyers of relevant assets for value, most mortgages and fixed charges, and all floating charges, created by a company must be registered with Companies House within 21 days from the day after the date of their creation. Registration is not a requirement for attachment; an unregistered charge is effective against the company provided it is not in liquidation or administration.

Pledges and liens do not require registration.

Security over certain assets (for example, land, certain intellectual property rights, ships and aircraft) may also require registration at specialist registers.

Effects of non-compliance. In a liquidation or administration, if these security interests are not registered, these charges will be void.

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CREDITOR AND CONTRIBUTORY RANKING

2. Where do creditors and contributories rank on a debtor's insolvency?

In liquidations or administrations where a distribution is to be made, creditors and shareholders are paid in the following order of priority:

- **Fixed charge holders.** Fixed charge holders are paid up to the amount realised from the assets covered by the fixed charge (net of the costs of realising those assets). If the value of the charged assets is less than the amount of the debt, the charge holder can claim the balance as an unsecured creditor (or under any valid floating charge in its favour).
- **Liquidators and administrators.** Liquidators' and administrators' fees and expenses have priority over preferential creditors and floating charge holders (subject, in the case of liquidators, to restrictions relating to certain expenses which have not been authorised or approved by floating charge holders, by preferential creditors or the court).
- **Preferential creditors.** These are mainly employees with labour-related claims (such as unpaid wages and contributions to occupational pension schemes). Solely in the insolvency of financial institutions, and not in general corporate insolvencies, preferential debts are divided into two categories; ordinary preferential debts and secondary preferential debts, being claims for repayment of non-protected deposits held by the insolvent financial institution.
- UK HM Revenue and Customs (HMRC) has been promoted to secondary preferential creditor status in insolvency procedures that commence on or after 1 December 2020. This preferential status only applies to specified taxes that are collected by a company on HMRC's behalf, such as VAT, pay as you earn (PAYE) and employee National Insurance Contributions (NICs). This status means that, in respect of those specified tax debts only, HMRC will rank behind preferential creditors but ahead of prescribed part creditors (see *below, Floating charge holders*).
- **Floating charge holders.** Floating charge holders are paid up to the amount realised from the assets covered by the floating charge. However, part of the proceeds from realising assets covered by any floating charge created on or after 15 September 2003 must be set aside and made available to satisfy unsecured debts (the Prescribed Part). The Prescribed Part is calculated as 50% of the first GBP10,000 of net floating charge realisations and 20% of the remainder, subject, to a cap of GBP600,000 where the first ranking floating charge was created before 6 April 2020 or a cap of GBP800,000 where the first ranking floating charge was created on or after 6 April 2020.
- The prescribed part must not be distributed to floating charge holders, unless the claims of unsecured creditors have been satisfied and there is a surplus. The insolvency officeholder can choose not to pay the prescribed part if both:
  - the company's net property is less than GBP10,000; and
  - the officeholder considers the cost of making a distribution to unsecured creditors to be disproportionate to the benefits.
- **Unsecured creditors.** Unsecured creditors are creditors who do not have a security interest in the debtor's assets.
- **Interest.** Interest incurred on all unsecured debts post-liquidation.
- **Shareholders.** Any surplus goes to the shareholders of the debtor according to the rights attached to their shares.

UNPAID DEBTS AND RECOVERY

3. Can trade creditors use any mechanisms to secure unpaid debts? Are there any legal or practical limits on the operation of these mechanisms?

The main mechanism used by trade creditors to secure unpaid debts is a retention of title clause in sale contracts. This provides that title in goods does not pass from the trade creditor to the buyer until it has received full payment for the goods. These clauses sometimes provide for title to be retained by the trade creditor until all outstanding amounts due to the trade creditor have been paid (and not simply the price for the particular goods sold).

Difficult issues can arise where goods which are subject to a retention of title clause are mixed or incorporated with other goods as part of a manufacturing process or the clause provides that, if the buyer sells the goods, it must account to the trade creditor for the sale proceeds.

4. Can creditors invoke any procedures (other than the formal rescue or insolvency procedures described in *Question 6* and *Question 7*) to recover their debt? Is there a mandatory set-off of mutual debts on insolvency?

Court judgment

An unpaid creditor can bring proceedings against a debtor seeking a judgment for the debt. If the debt is undisputed, judgment can be sought on a summary basis.

Once judgment has been obtained, the creditor can enforce it by seeking either:

- A charging order over the debtor's property.
- An order requiring a third party to pay a receivable due to the debtor to the judgment creditor instead.

Receivership

Receivership is an out-of-court enforcement mechanism for secured creditors. If the debtor defaults under the relevant security documents, the secured creditor can appoint a receiver over secured assets to satisfy its debt.

Any duty the receiver owes to the company, its directors, other creditors and shareholders is secondary to the receiver's duty to realise the charged assets on behalf of the appointing chargee.

There are two main types of receivership under English law:

- **Administrative receivership.** Under the Insolvency Act 1986 (*see Question 6, Administrative receivership*).
- **Fixed charge receivership.** Where a creditor has fixed charges over specific assets, that creditor may appoint one or more fixed charge receivers over those specific assets. The receiver's main function is typically to sell the charged assets and to account to the appointing secured creditor for the sale proceeds (net of costs). A fixed charge receiver need not be an authorised insolvency practitioner.

Insolvency set-off

The rules of insolvency set-off are mandatory and cannot be varied by contract. Where a creditor proves in a liquidation or administration (*see Question 6* and *Question 7, Liquidation*), an account must be taken of the mutual dealings between the creditor and the company in liquidation or administration. The sums due from one party will be set off against the sums due from the other, except that sums due from the insolvent party will not be taken into account if the other party had notice, at the time they were incurred, of:

- A resolution or petition to wind up.
- An application for an administration order or notice of an intention to appoint an administrator.

All amounts, including future, contingent and unliquidated sums, are brought into account.

In the case of an administration, insolvency set-off takes place as at the date on which notice of the intended distribution is issued by the administrator with retrospective effect as at the date of administration.

STATE SUPPORT

5. Is state support for distressed businesses available?

Special rescue and insolvency procedures for banks

The Banking Act 2009 (2009 Act) came into force in February 2009. The most significant aspect of the 2009 Act is the special resolution regime (SRR) which gives the government authorities various powers to deal with banks and other deposit-taking institutions which are failing. The rescue mechanisms are referred to as "stabilisation powers" and the SRR provides for five stabilisation options in relation to UK banks:

- Transfer of the banking business to a third party, to facilitate a private sector solution.
- Transfer of all or part of the bank's business to a publicly controlled "bridge bank".
- Transfer of the bank into temporary public sector ownership.
- Transfer of all or part of the bank's business to an asset management vehicle (asset management stabilisation option).
- Bail-in of shareholders and creditors (bail-in stabilisation option).

The asset management stabilisation option and the bail-in stabilisation option formed part of the UK's implementation of the EU's Bank Recovery and Resolution Directive (BRRD). The UK has implemented the BRRD by means of a number of statutory instruments and the Financial Services (Banking Reform) Act 2013 (2013 Act), which amends the 2009 Act. This legislative framework has since been further amended by statutory instruments that seek to ensure that the UK's SSR continues to function following Brexit.

The 2009 Act also contains insolvency and administration regimes for banks and building societies. The main features of the bank insolvency procedure are based primarily on the liquidation provisions of the Insolvency Act 1986. The bank administration procedure is to be used when part of the business of the bank has been sold to a third party or transferred to a "bridge bank" under the SRR and provides for a bank administrator to be appointed by the court to administer the affairs of the insolvent residual bank. The 2009 Act, as amended by the 2013 Act, allows the Bank of England to appoint a resolution administrator to administer a "bail-in".

In 2012, the Financial Services Act 2012 extended the SRR to UK clearing houses with certain modifications and both the SRR and the bank administration procedure to investment firms.

Investment bank insolvencies are governed by the Investment Bank Special Administration Regulations 2011 (SAR 2011), which were amended in 2017. The SAR 2011 creates a fast-track special administration regime to allow the assets of an insolvent investment bank to be returned to clients or retained, if the investment bank can be rescued as a going concern.

Enterprise Finance Guarantee

The Enterprise Finance Guarantee (EFG) is a loan guarantee scheme aimed at facilitating additional bank lending to small and medium-sized enterprises (SMEs) with viable business cases but insufficient security. By providing lenders with a government-backed guarantee, the aim is to facilitate lending that would otherwise not be available and to ensure that SMEs can obtain the working capital and investment they require.

Business Payment Support Service

The Business Payment Support Service (BPSS), established by HMRC, is designed to meet the needs of businesses affected by the economic downturn. The BPSS is available to all businesses who are experiencing difficulties in paying tax due in full and on time. Although HMRC review each case on an individual basis, there is scope to suggest temporary, tailored options (such as arranging for tax payments to be made over a longer period, which are sometimes referred to as Time to Pay (TTP) arrangements).

RESCUE AND INSOLVENCY PROCEDURES

6. What are the main rescue/reorganisation procedures in your jurisdiction?

Administration

Objective. The administration procedure is a way of facilitating a rescue of a company or the better realisation of its assets. It allows an insolvent company to continue to trade with protection from its creditors through a statutory moratorium (*see below, Conclusion*).

The main objective of administration is to rescue the company as a going concern. However, if the administrator thinks this is not reasonably practicable or that a better result can be achieved for creditors as a whole, the second objective is to achieve a better result for the company's creditors than is likely if the company is wound up (without first being in administration).

The third objective, which only applies if the administrator thinks it is not reasonably practicable to achieve the first two objectives and if it will not "unnecessarily harm" the interests of the creditors as a whole, is to realise property to distribute the proceeds to the secured or preferential creditors.

Initiation. An administrator can be appointed by court order. An application is usually made by:

- The company.
- The company's directors.
- One or more creditors of the company.

There is also an out-of-court procedure for placing a company in administration, which is available to both:

- A company through its directors or shareholders.
- Qualifying floating charge holders.

Administration is potentially available to both UK and foreign-registered companies. The rules concerning cross-border insolvencies are complex but the availability of the administration procedure generally depends on a company's centre of main interest (COMI) being located in the UK. A company's COMI depends on where it administers its interests on a regular basis and should be ascertainable by third parties.

Substantive tests. In most cases, an administration cannot begin unless it can be demonstrated that both:

- The company is, or is likely to become, unable to pay its debts.
- Administration is likely to achieve one of the purposes (*see above, Objective*).

If a qualifying floating charge holder appoints an administrator, there is no requirement for the company to be insolvent, although the floating charge underlying the appointment must be enforceable.

Consent and approvals. Where the court appoints the administrator, the applicant must notify any qualifying floating charge holder. If a qualifying floating charge holder has already appointed an administrator or administrative receiver, the court does not usually grant an administration order. Where the appointment is made out of court, the company or its directors must give all persons holding a qualifying floating charge five business days' written notice of their intention to appoint an administrator, who must also be identified in the notice. This is to enable a qualifying floating charge holder to appoint its own administrator, rather than the prospective administrator chosen by the company or the directors. A qualifying floating charge holder who wishes to appoint an administrator must also give two business days' written notice of their intention to make the appointment to any person holding a prior ranking qualifying floating charge.

Supervision and control. One or more licensed insolvency practitioners can be appointed as administrators. The administrators:

- Are officers of the court (whether or not appointed by the court) and act as the company's agent.
- Have very extensive management powers (*see Question 11*).
- Have investigatory and enforcement powers, including powers to apply to the court to unwind pre-insolvency transactions (*see Question 10, Challenging pre-insolvency transactions*).

The directors' management powers generally cease although the administrator may leave some or all of the powers with the directors of the company. (For information regarding carrying on the business during insolvency, *see Question 11.*)

Protection from creditors. See below, *Conclusion*.

Since 26 June 2020, the commencement of an administration will likely prevent many trade creditors from exercising termination rights that they may have under contracts with the company in administration. For more information, see below, *Ipso facto protection (termination clauses in contracts for the supply of goods or services)*.

The administrator is given no power (unlike a liquidator; see *Question 7, Liquidation*) to disclaim onerous property. However, an administrator can cause the insolvent company to breach the terms of the contract and allow the counterparty to sue for damages. If successful, the counterparty would rank as an unsecured creditor.

Length of procedure. The administrator's appointment terminates one year after the date the appointment took effect. However, the appointment can be extended by the court for a specified period, or with the creditors' consent, for a period not exceeding one year.

Conclusion. An automatic statutory moratorium, which comes into effect when an application for administration or a notice of intention to appoint an administrator is filed, helps the administrator achieve the objectives of the administration. The moratorium is a stay on creditors from taking any legal action or enforcing their security against the company or its property.

There is no direct impact on employees if an administrator is appointed and the procedure does not interfere with company contracts.

The way in which an administration is concluded depends on its objective. Administration usually results in one or more of the following:

- The administrator selling the company's assets and distributing their proceeds to creditors and shareholders.
- A composition of creditors' claims through a company voluntary arrangement (*see below, Company voluntary arrangement*).
- A scheme of arrangement (*see below, Scheme of arrangement*) or, going forward, a restructuring plan (see *below, Restructuring plan*).
- Liquidation and dissolution of the company (*see Question 7, Liquidation*).

Company voluntary arrangement

Objective. A company voluntary arrangement (CVA) is a form of statutory composition between a company and its unsecured creditors. Its aim is to enable a company in financial difficulty to propose a compromise or arrangement with its creditors.

Initiation. A CVA can be commenced by a company's directors, or if the company is already in administration or liquidation, by the company's administrators or liquidators.

A copy of the proposed arrangement is filed with the court, but, unless the CVA is challenged, the court has no active involvement in the procedure. While it does not need to be prefaced by an administration, it is often used in conjunction with administration because a CVA does not itself provide for a moratorium unless the company is a "small company" defined as a company which satisfies two or more of the following criteria:

- Has an annual turnover of no more than GBP10.2 million.
- Has balance sheet assets of no more than GBP5.1 million.
- Employs no more than 50 employees.

A CVA is available to the same companies as for administration (*see above, Administration*).

Substantive tests. There are no formal requirements that a company must satisfy to be placed into this procedure. Therefore, the company does not need to demonstrate that it is, or is likely to become, insolvent (even though a CVA is a procedure available to companies under the Insolvency Act 1986).

Consent and approvals. A CVA must be approved by creditors holding at least 75% by value of the claims held by all unsecured creditors who respond to the CVA supervisor's invitation to vote on the proposal. At least 50% (by value) of those voting in favour of the CVA must be unconnected with the company. Shareholders may also approve the CVA by a simple majority by value vote, but if the creditors approve the CVA and the shareholders do not, the creditors' approval prevails (although dissenting shareholders can challenge the CVA by applying to the court on the grounds of unfair prejudice or procedural irregularity).

Supervision and control. If a proposal for a CVA is approved, it is normally implemented under the supervision of a licensed insolvency practitioner. The company's directors must do everything possible to put the relevant assets of the company into the hands of this supervisor. The directors do, however, otherwise remain in control. (For information regarding carrying on the business during insolvency, see *Question 11.*)

Protection from creditors. There is generally no protection but a moratorium on legal processes, including the enforcement of security, is available for small companies contemplating a CVA (*see above, Initiation*). This moratorium lasts between one and three months. Further, since the introduction of the Part A1 moratorium procedure (see *below, Part A1 moratorium*), companies that are eligible for the Part A1 moratorium procedure may use that moratorium in parallel with the CVA.

In relation to company contracts, the default position is that a CVA will not interfere with the contracts of the company unless specifically provided for by the terms of the CVA. *Ipso facto* protection (*see below, Ipso facto protection (termination clauses in contracts for the supply of goods or services)*) will apply from the date an approved CVA takes effect.

Length of procedure. The duration of a CVA depends on its terms.

Conclusion. The CVA binds the company and all unsecured creditors, irrespective of whether they responded to the CVA supervisor's invitation to vote or received notice of the vote (although any creditor who did not receive notice of the vote is entitled to treatment under the CVA as if he/she received notice of it, and has 28 days to challenge the CVA from the date he/she becomes aware of it). However, the CVA does not bind secured creditors unless they consent to be bound by it.

There is no direct impact on employees. See above *Protection from creditors* regarding the impact of a CVA on company contracts.

A CVA is concluded once its terms have been implemented. The company reverts to its former status and control returns to its directors and shareholders.

Scheme of arrangement

Objective. Like a CVA (*see above, Company voluntary arrangement*), a scheme of arrangement (scheme) enables a company to reach a compromise or arrangement with its creditors or with certain classes of its creditors.

Initiation. A scheme can be initiated by the company itself or by the company's administrator or liquidator. The process is relatively complex, time consuming and can be costly, as it involves both applications to court and meetings of the various classes of creditors and/or shareholders who may be affected by the scheme. Since the preparatory steps of a scheme are not protected from creditor actions, when they are used in restructuring scenarios, they may be used in tandem with administration (*see above, Administration)* which provides a moratorium or the new Part A1 moratorium procedure (*see below, Part A1 Moratorium)*. However, a scheme is not an insolvency proceeding.

A scheme is generally available to companies registered in England and Wales. However, it may also be available in the case of a foreign company which could be wound up in England and Wales and which has a sufficient connection with England and Wales. The English courts have found that a sufficient connection can exist where the COMI of a foreign incorporated company is located in England and Wales. The courts have also found, in cases where a scheme is proposed solely to amend finance documents, that a sufficient connection exists on the basis that English law is the governing law of the documents. In a number of recent cases, the English courts have confirmed that there is sufficient connection even where the finance documents were originally governed by foreign law and jurisdiction, and were amended to English governing law and jurisdiction purely to give the English court jurisdiction over the scheme. The courts will require expert evidence that the scheme of arrangement of a foreign entity is likely to be recognised and given effect in its jurisdiction of incorporation and the jurisdictions in which the group primarily operates.

Substantive tests. The company must be liable to be wound up in England and Wales, but does not need to show that it is (or is likely to become) insolvent.

Consent and approvals. All classes of creditors affected by the scheme must approve the scheme. A class approves the scheme if at least 75% by value and more than half in number of the creditors in that class present and voting at the scheme meeting (in person or by proxy) vote in favour of it. Once all required classes have approved the scheme at the scheme meetings, the company requests the court to sanction or approve it.

Supervision and control. The directors of the company remain in control. (For information regarding carrying on the business during insolvency, see *Question 11.*)

Protection from creditors. A scheme does not create an automatic moratorium, but companies that are eligible for the Part A1 moratorium procedure may use it in parallel with the scheme (*see below, Part A1 moratorium*). Schemes may also be used in tandem with an administration, which would provide moratorium protection (*see above, Administration*).

In relation to company contracts, the default position is that a scheme will not interfere with the contracts of the company. *Ipso facto* protection (*see below, Ipso facto protection (termination clauses in contracts for the supply of goods or services)*) does not apply when a company proposes or enters into a scheme.

Length of procedure. The duration of a scheme depends on its terms.

Conclusion. Once the scheme has been sanctioned by the court and a copy of the order filed at Companies House, it binds the company and all of its creditors, including any creditors who did any of the following:

- Voted to reject the scheme.
- Did not attend the scheme meeting.
- Did not receive notice of the scheme.

Secured creditors can also be bound if their class approves the scheme.

There is no direct impact on employees and the procedure does not interfere with company contracts.

The scheme is concluded in accordance with its terms and the company reverts to its former status.

Restructuring plan

Objective. The restructuring plan is a new procedure that was introduced by the Corporate Insolvency and Governance Act 2020 (CIGA). Like a scheme (*see above, Scheme of arrangement*), a restructuring plan enables a company to reach a compromise or arrangement with its creditors or members or with certain classes of its creditors or members. The restructuring plan is similar in many respects to a scheme and it is expected that the courts will apply the wealth of scheme case law to many aspects of the new restructuring plan. However, there are a number of critical differences (*see below*).

Initiation. A restructuring plan can be initiated by the company itself, any of the company's creditors or members, or by the company's administrator or liquidator. As is the case with a scheme, the process is relatively complex, time consuming and can be costly, as it involves both applications to court and meetings of the various classes of creditors and/or members who may be affected by the restructuring plan. Further, the preparatory steps of a restructuring plan are not protected from creditor actions so, when they are used in restructuring scenarios, they may be used in tandem with administration (*see above, Administration)* which does provide a moratorium or the new Part A1 moratorium procedure (*see below, Part A1 Moratorium*).

Like schemes, restructuring plans are generally available to companies registered in England and Wales and any foreign company which could be wound up in England and Wales and which has a sufficient connection with England and Wales (*see above, Scheme of arrangement*). The "financial difficulties" test set out below must also be met by the relevant company.

Substantive tests. Restructuring plans are generally available to companies registered in England and Wales and any foreign company which could be wound up in England and Wales and which has a sufficient connection with England and Wales. However, unlike schemes, the following further conditions must also be met in connection with the proposal of a restructuring plan:

- The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
- A compromise or arrangement is proposed between the company and its creditors or members (or any class of them) and the purpose of such compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in the point above.

Consent and approvals. A scheme requires the approval of each class voting on it. In contrast, the restructuring plan includes a "cross-class cram down" mechanism that will allow dissenting classes of creditors or members to be bound to the restructuring plan, provided that:

- None of the members of a dissenting class would be any worse off under the restructuring plan than they would be in the event of the "relevant alternative" (*see below*).
- At least one class who would receive a payment or would have a genuine economic interest in the company in the event of the "relevant alternative" must have voted in favour of the restructuring plan.

The "relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the restructuring plan were not sanctioned. While liquidation will often be the "relevant alternative", it will not always be the case.

The approval threshold for a class of creditors or members is 75% by value. There is no numerosity requirement for a restructuring plan, whereas a scheme also requires approval by a majority in number (of each class).

Once the requisite classes have approved the restructuring plan at the restructuring plan meetings, the company requests the court to sanction or approve it.

Supervision and control. The directors of the company remain in control (*see Question 11* for information regarding carrying on the business during insolvency.)

Protection from creditors. As is the case with a scheme, a restructuring plan does not create an automatic moratorium. Companies that are eligible for the Part A1 moratorium procedure may use that procedure in parallel with the restructuring plan (*see below, Part A1 moratorium*). In relation to company contracts, *ipso facto* protection (*see below, Ipso facto protection (termination clauses in contracts for the supply of goods or services)*) automatically applies from the date the court makes an order to convene creditor meetings to vote on the restructuring plan.

Length of procedure. Like a scheme, the duration of a restructuring plan depends on its terms.

Conclusion. Once the restructuring plan has been sanctioned by the court and a copy of the order filed at Companies House, it binds the company and all of its creditors in accordance with its terms, including, in the case of a cram down restructuring plan, any dissenting creditors or members who were crammed down under the cross-class cram down mechanism.

Secured creditors can also be bound by a restructuring plan.

There is no direct impact on employees. See above *Protection from creditors* regarding the impact of a restructuring plan on company contracts.

The restructuring plan is concluded in accordance with its terms and the company reverts to its former status.

Part A1 moratorium

Objective. The CIGA introduced a new standalone moratorium procedure in Part A1 of the Insolvency Act 1986. The key objective of the Part A1 moratorium is to facilitate the rescue of a company in financial distress by providing it with a payment holiday in respect of certain debts and protection from action from certain types of creditors, so that the company has breathing space in which to explore its rescue and restructuring options.

Initiation. The Part A1 moratorium is available to "eligible" companies, including eligible overseas companies with a sufficient connection to England and Wales. A company is eligible unless it is excluded from being eligible because:

- On the date of filing for a Part A1 moratorium, it is or has been subject to an insolvency procedure or moratorium in the preceding 12 months (this restriction can be temporarily lifted in certain cases to account for the impact of the 2019 novel coronavirus disease (COVID-19) pandemic).
- It is an excluded entity, the list of which includes any entity that is:
  - an insurance company;
  - a bank;
  - an electronic money institution;
  - an investment bank or investment firm;
  - a party to market contracts or market charges;
  - a participant in designated systems;
  - a payment institution;
  - an operator of payment systems;
  - a recognised investment exchange;
  - a recognised clearing house;
  - a recognised CSD;
  - a securitisation company;
  - a party to capital market arrangements;
  - a public-private partnership project company.
- Certain overseas companies are also not eligible companies.

The Part A1 moratorium is also available to limited liability partnerships, certain charitable incorporated organisations and certain co-operative and community benefit societies.

The Part A1 moratorium is obtained by an eligible company filing papers at court (and, in certain circumstances, requires the grant of a court order) and lasts for an initial period of 20 business days. The Part A1 moratorium period may be extended by the company for a further 20 business days, or for a longer period with the agreement of the company's creditors or the court (*see below, Consent and approvals).*

Substantive tests. In order to qualify for the Part A1 moratorium, the relevant eligible company must be unable to pay its debts or be likely to become so, but it must still be capable of being rescued. The Part A1 moratorium is a standalone procedure (meaning it does not need to be used in conjunction with another restructuring or insolvency process).

Consent and approvals. In certain circumstances, a court order is required to obtain a Part A1 moratorium. Extensions of the Part A1 moratorium period beyond 40 business days also require the agreement of the company's creditors or the court. At each extension, all moratorium debts and pre-moratorium debts that are not subject to a payment holiday must have been paid or discharged (*see below, Protection from creditors*) and the monitor must confirm that the Part A1 moratorium is likely to ultimately result in the rescue of the company as a going concern.

Supervision and control. During the period of the Part A1 moratorium, the directors will remain in charge of the company. However, the Part A1 moratorium will be overseen by a qualified insolvency practitioner who will act as monitor. The monitor can bring the moratorium to an end if all moratorium debts and pre-moratorium debts that are not subject to a payment holiday are not paid as they fall due (*see below, Protection from creditors*) or if there is no longer a prospect of the company being rescued. To help the monitor form a view on this, the directors must provide the monitor with any information that the monitor requires in order to carry out their functions (*see Question 11* for information regarding carrying on the business during insolvency).

Protection from creditors. During the Part A1 moratorium, the company will have a payment holiday for its pre-moratorium debts, being its debts that fall due before or during the moratorium by reason of an obligation incurred before the moratorium. However, the payment holiday does not extend to pre-moratorium debts that consist of amounts payable in respect of the following:

- The monitor's remuneration or expenses.
- Goods or services supplied during the moratorium.
- Rent in respect of a period during the moratorium.
- Wages or salary arising under a contract of employment.
- Redundancy payments.
- Debts or other liabilities arising under a contract or other instrument involving financial services.

The category relating to debts or other liabilities arising under a contract or other instrument involving financial services is significant as it means that the company must continue to pay its financial creditors throughout the moratorium. The company will also not have a payment holiday in respect of any moratorium debts, being its debts that fall due during or after the moratorium by reason of an obligation incurred during the moratorium.

The other aspects of the Part A1 moratorium are similar to the moratorium that applies in an administration (*see above, Administration*). For as long as the moratorium applies, unless the court permits otherwise, the moratorium prevents the:

- Enforcement of security (other than financial collateral or collateral security charges).
- Crystallisation of floating charges.
- Commencement of insolvency proceedings or other legal proceedings against the company.
- Forfeiture of a lease.

The company also cannot dispose of property (other than in the ordinary course of business) or grant security over its assets without the consent of the monitor or the court.

Length of procedure. The maximum length of a Part A1 moratorium is 12 months from its commencement in the case of extensions to a moratorium with creditor consent (rather than with the approval of the courts). However, it is possible for directors to apply to court for a longer period or to request a further extension once the 12 months are over (*see above, Consent and approvals,* for the conditions for each extension).

Conclusion. The key objective of the Part A1 moratorium is to rescue the company. If that is achieved, the company reverts to its former status at the end of the moratorium.

If proceedings for the winding-up of a company are begun within 12 weeks from the end of the Part A1 moratorium, there is an impact on the priority of creditors in the winding-up of that company. In such a winding-up, both of the following will have priority over all other debts except those of fixed charge holders (to the extent those fixed charge holders can be paid out of the assets which are subject to the fixed charge) and any fees and expenses of the official receiver:

- Moratorium debts, being the debts that fall due during or after the moratorium by reason of an obligation incurred during the moratorium.
- Priority pre-moratorium debts, being the pre-moratorium debts for which a company does not have a payment holiday during the moratorium (*see above, Protection of creditors*).

Debts under financial services contracts will only constitute priority pre-moratorium debts to the extent that they fell due as scheduled before or during the moratorium, rather than falling due by way of acceleration or under an early termination clause.

If a scheme, restructuring plan or CVA is proposed within 12 weeks of the end of any Part A1 moratorium of a company, and the affected creditors include creditors with moratorium debts or priority pre-moratorium debts, the relevant procedure may not be sanctioned/approved without the agreement of each of the creditors of those affected moratorium debts or priority pre-moratorium debts.

Administrative receivership

Objective. Administrative receivership is an out-of-court enforcement mechanism for secured creditors. The circumstances in which an administrative receiver may be appointed are limited and this process is used very rarely.

The mechanism is used to realise assets to satisfy a secured creditor's debt. Any duty the administrative receiver owes to the company, its directors, other creditors and shareholders is secondary to its duty to realise the charged assets on behalf of the appointing secured creditor.

Initiation. A holder of a floating charge which was granted in relation to certain specialised financing arrangements, such as securitisations, and certain regulated industries and which secures all or substantially all of the relevant company's assets, can appoint one or more administrative receivers after an event of default. Otherwise, administrative receivership is unavailable. Administrative receivership is available only to a company incorporated in the UK.

Substantive tests. The appointment of an administrative receiver is subject to the enforcement provisions contained in the security documents.

Consent and approvals. No consent or approval is required.

Supervision and control. The administrative receiver controls the affairs of the company. The directors' powers of management are suspended. (For information regarding carrying on the business during insolvency, see *Question 11*).

Protection from creditors. The appointment of an administrative receiver does not create an automatic moratorium. Creditors can therefore commence or continue legal actions against the company. In relation to the treatment of company contracts, the position is broadly similar to administration (*see above, Administration*) in that *ipso facto* protection (see *below, Ipso facto protection*) applies from the appointment of an administrative receiver.

Length of procedure. There is no time limit, but an administrative receiver usually seeks to realise and distribute assets as quickly as possible.

Conclusion. Administrative receivers have the power to sell all or part of the company's business and assets to satisfy the secured creditors' claims.

There is no direct impact on employees. See above, *Protection from creditors* regarding the impact of the appointment of an administrative receiver on company contracts.

Once a sale has occurred and the administrative receiver has accounted to the secured creditor for the proceeds of sale (net of costs), control of the company is returned to the directors for either continued operations or final liquidation (*see Question 7, Liquidation*).

Ipso facto protection (termination clauses in contracts for the supply of goods or services)

Objective. The CIGA introduced provisions into the Insolvency Act 1986 to protect a company's contracts for the supply of goods and non-financial services (supply contracts) in the event it goes into a corporate insolvency process. This will mean that, subject to certain exceptions, suppliers will not be able to terminate or amend their supply contracts with companies which are subject to a relevant insolvency procedure (*see below*), with the hope being that this will allow companies to trade through those processes.

Initiation. This protection applies to companies that become subject to a relevant insolvency procedure, specifically:

- A Part A1 moratorium comes into force for the company.
- The company enters administration.
- An administrative receiver of the company is appointed.
- A voluntary arrangement takes effect in relation to the company.
- The company goes into liquidation.
- A provisional liquidator is appointed to the company.
- A court grants an order under section 901C(1) of the Companies Act 2006 in respect of a restructuring plan.

This protection does not apply to companies which propose or enter into a scheme, because it is not an insolvency procedure. However, this protection does not apply to supply contracts where either the company or the supplier is involved in financial services (which is extensively defined in the legislation).

Protection from creditors. The protection relates to a provision of a supply contract that either:

- Provides for the termination of, or which would entitle the supplier to terminate, the contract because the company has become subject to any of the relevant insolvency proceedings.
- Provides for any other thing to take place or would entitle the supplier to do any other thing, because the company becomes subject to any of the relevant insolvency proceedings.

The protection also restricts a supplier from exercising an entitlement to terminate a supply contract where the entitlement arose because of an event occurring before the start of the insolvency proceedings, but that entitlement was not exercised before the start of the insolvency proceedings.

There are some safeguards for suppliers. For instance, the supplier may apply to court to terminate the supply contract on grounds of hardship. Further, the restrictions do not apply to small suppliers until 30 June 2021.

7. What are the main insolvency procedures in your jurisdiction?

Liquidation

Objective. There are two types of liquidation:

- **Voluntary liquidation.** This is not a court proceeding and can be started in relation to a solvent company (members' voluntary liquidation (MVL)) and an insolvent company (creditors' voluntary liquidation (CVL)).
- **Compulsory liquidation.** This is a court proceeding.

Liquidation is used to wind up a company, and realise and distribute its assets to creditors and shareholders.

Initiation. Voluntary liquidation is initiated by a shareholders' resolution to wind up the company. Compulsory liquidation is started by the presentation of a petition to the court by any of the following:

- The company.
- The company's shareholders.
- The company's directors.
- The company's creditors.

A company and its directors are not required to file for liquidation on insolvency, but may wish to do so to avoid incurring liability for wrongful or fraudulent trading (*see Question 9*).

While the rules relating to cross-border insolvencies are complex, CVL and compulsory liquidation are potentially available to both UK and foreign-registered companies, provided they can demonstrate that their COMI is in, or they have an establishment in, the UK (for both CVLs and compulsory liquidation) or potentially some other sufficient connection (for compulsory liquidation only). MVL is only available to companies incorporated in the UK.

Substantive tests. The most common ground on which creditors petition the court for a compulsory winding-up order is that the company is unable to pay its debts, which is deemed if any of the following occur:

- A creditor who is owed more than GBP750 by the company serves a statutory demand on the company and the company fails to pay the demanded amount within three weeks.
- A judgment remains unsatisfied.
- It is proved to the court that the company is unable to pay its debts as they fall due.
- It is proved to the court that the company's liabilities (including contingent and prospective liabilities) are more than the company's assets.

A court can also wind up a company if it can be shown that it is just and equitable to do so.

However, the CIGA placed certain temporary restrictions and limitations on presenting winding-up petitions and on the making of winding-up orders in connection with the COVID-19 pandemic. Specifically, the CIGA prevents a creditor from petitioning for the winding-up of a company:

- On the basis of a statutory demand served between, at the time of writing, 1 March 2020 and 31 June 2021.
- During the relevant period (at the time of writing, 27 April 2020 to 31 June 2021) on the basis of the company's inability to pay its debts, unless the creditor has reasonable grounds for believing that COVID-19 has not had a financial effect on the company or that the relevant difficulties would have arisen even if coronavirus had not had a financial effect on the company.
- The CIGA also restricts a court from making a winding-up order on winding-up petitions presented during the relevant period (at the time of writing, 27 April 2020 to 31 June 2021) where it appears to the court that COVID-19 had a financial effect on the company before the petition was presented to court, unless the court is satisfied on the facts that the relevant difficulties would have arisen even if coronavirus had not had a financial effect on the company.

A MVL must be supported by a statutory declaration sworn by the directors that the company will be able to pay its debts in full, together with interest, within 12 months after the start of the MVL.

Consent and approvals. Resolutions for MVL and CVL must be approved by 75% of shareholders voting at the relevant shareholders' meeting, at which the shareholders nominate a liquidator. In a CVL, the directors must also seek creditors' nomination for the liquidator either by the deemed consent procedure or a virtual meeting.

Under the deemed consent procedure, the decision maker (typically the insolvency officeholder, but, in a CVL, the directors) gives notice of the decision taken to creditors (who would otherwise be entitled to vote). The creditors will be treated as having made the particular decision if less than 10% of those entitled to vote (by value) object to the decision. Alternatively, the company must hold a physical meeting to seek creditors' nomination for liquidator if at least 10%

of the company's creditors object to the shareholders' choice of liquidator.

At the physical (or virtual) meeting, a majority in value of creditors present and voting must approve the nomination of the liquidator. If the shareholders and creditors nominate a different individual to be liquidator, the creditors' choice will prevail. A court order is required to place a company into compulsory liquidation.

Supervision and control. See below, *Conclusion*. For further information regarding carrying on the business during insolvency, see *Question 11*.

Protection from creditors. See below, *Conclusion*.

Length of procedure. This depends on the substance of the liquidation and the company's situation.

Conclusion. Compulsory liquidation (unlike a MVL or CVL) provides for an automatic stay or moratorium by prohibiting any action or proceedings from being started or continued against the company or its property, without leave of the court. The liquidation moratorium does not prohibit out-of-court enforcement of security by a secured creditor or forfeiture of a lease. Once the court makes a winding-up order, the company's directors are automatically dismissed and replaced by the liquidator, who is vested with extensive powers to act in the name of the company (*see Question 11*).

On a compulsory liquidation and CVL, employees' service contracts are automatically terminated, unlike in an MVL.

Company contracts are not automatically terminated. *Ipso facto* protection (*see above, Ipso facto protection (termination clauses in contracts for the supply of goods or services)*) applies from the date the liquidator is appointed. A liquidator also has the ability to terminate onerous contracts under section 178 of the Insolvency Act 1986 to facilitate a winding-up.

The company is dissolved once the liquidator has realised all the company's assets and, where applicable, made distributions to creditors and shareholders.

STAKEHOLDERS' ROLES

8. Which stakeholders have the most significant role in the outcome of a restructuring or insolvency procedure? Can stakeholders or commercial/policy issues influence the outcome of the procedure?

Stakeholders

While English insolvency procedures are favourable to senior lenders, most restructurings involve negotiations outside of any statutory procedure between a company and its key creditors. If an agreement cannot be reached on a consensual basis, a CVA, scheme or restructuring plan may then be proposed as a means of imposing a restructuring on any non-consenting creditors. A proposed CVA or scheme can be defeated if the statutory majorities of creditors do not vote in favour of it. The new restructuring plan may be used to "cram-down" dissenting classes of creditors provided that:

- None of the members of a dissenting class would be any worse off under the restructuring plan than they would be in the event of the "relevant alternative".
- At least one class who would receive a payment or would have a genuine economic interest in the company in the event of the "relevant alternative" must have voted in favour of the restructuring plan.

For more information on the new restructuring plan, see *Question 6, Restructuring plan*.

Influence on outcome of procedure

The 2008 financial crisis had a direct effect on employees and businesses. Since the 2008 financial crisis, it has been a high political priority to promote economic recovery, boost investment and safeguard employment. Rehabilitation of debtors so that they can operate more efficiently and where necessary, make a fresh start, became a key element of these policy objectives as borne out by the statutory measures which have been introduced since 2008 and considered as part of the 2016 Insolvency Law Consultation and the 2018 BEIS Consultation on Corporate Governance and Insolvency (*see Question 14*). That focus on the rehabilitation and rescue of debtors sharpened with the COVID-19 pandemic and its significant impact on businesses and the economy. It resulted in the expedited passing into law in June 2020 of the new restructuring measures under the CIGA.

LIABILITY

9. Can a director, partner, parent entity (domestic or foreign) or other party be held liable for an insolvent debtor's debts?

Director

The main ways in which a company's directors (including de facto and shadow directors) can be held liable to contribute to the company's assets are as follows:

- **Misfeasance or breach of fiduciary duty.** A liquidator, any creditor or any contributory can bring proceedings against any officer of the company or anyone involved in promoting, forming or managing the company, in connection with any alleged misfeasance or breach of fiduciary or other duty.
- **Fraudulent trading.** Any person who is or was knowingly a party to the carrying on of business by a company with intent to defraud creditors may be liable to contribute to the company's assets. Criminal penalties may also be imposed for fraudulent trading even if the company is not insolvent.
- **Wrongful trading.** A successful wrongful trading action imposes personal liability on directors if they allow a company to continue trading after they knew, or ought reasonably to have known, that there was no reasonable prospect of avoiding insolvent liquidation, or insolvent administration. However, it is a defence to a wrongful trading action if the directors can show that, from the relevant time, they took every step to minimise the potential loss to the company's creditors. This allows directors to continue with a restructuring if they conclude that there is a reasonable prospect of avoiding an insolvent liquidation, or an insolvent administration and improving the return to creditors.
- Subject to certain exceptions, the wrongful trading regime has been temporarily suspended under the CIGA with the objective of allowing directors of companies that are impacted by COVID-19 to take decisions in relation to those companies without the threat of wrongful trading liability. The suspension period runs from 1 March 2020 to 30 September 2020, and for a further period from 26 November 2020 to (at the time of writing) 30 June 2021. During that time, the court is to assume in any wrongful trading proceedings that the directors are not responsible for the worsening of the financial position of the company or its creditors. However, the general duties of directors remain unchanged during the suspension of wrongful trading, and so the directors of a company in the zone of insolvency still have a duty to act in the best interests of creditors. Further, the existing fraudulent trading, misfeasance and director disqualification laws also remain unchanged.

Historically, only liquidators have had the power to bring proceedings for fraudulent or wrongful trading. As a result of the changes introduced by the Small Business Enterprise and

Employment Act 2015 (SBEEA), administrators now also have the power to bring proceedings for wrongful or fraudulent trading which arise out of the carrying on of any business of the relevant company on or after 1 October 2015.

Further amendments introduced by the SBEEA mean that wrongful trading claims and fraudulent trading claims (or the proceeds of those claims) can now be assigned by a liquidator or administrator to third parties. The liquidator or administrator can only assign claims in respect of companies which entered into administration or liquidation on or after 1 October 2015. The proceeds of those claims or assignments will not form part of the assets available to meet the claims of holders of floating charge security.

Partner

There are three types of partnership:

- General partnership.
- Limited partnership.
- Limited Liability Partnership (LLP).

A general partnership does not have its own legal personality. It must contract with a third party through one or more of its partners but all partners will be liable for the partnership's debts.

A limited partnership does not have its own legal personality. It will have one or more general partners, who will be responsible for managing the business of the partnership and they will have unlimited liability for the debts and obligations of the partnership. A limited partnership will also have one or more limited partners, who do not take an active role in the operation of the limited partnership and have limited liability (unless they take an active role in the management of the limited partnership's business, in which case they may lose that limited liability).

An LLP is a body corporate with a separate legal personality. Generally, the liability of the members of an LLP will be limited to the amount they have contributed to it. However, it is possible for a liquidator or an administrator of an insolvent LLP to bring proceedings against its members for wrongful trading, fraudulent trading, or for a liquidator of an insolvent LLP to bring proceedings against its members for misfeasance or breach of duty to the LLP, in much the same way as liquidators or administrators can bring claims against directors of an insolvent limited company (*see above, Director*). A liquidator of an insolvent LLP can also seek to recover amounts paid by the LLP to its members in the two years prior to its insolvency if the member knew (or ought to have known) that there was no reasonable prospect of the LLP avoiding an insolvent liquidation.

Parent entity (domestic or foreign)

As a matter of English law, a parent entity (domestic or foreign) of a limited company cannot be held liable for the debts of that subsidiary upon its insolvency unless it has contractually agreed to accept liability. In certain circumstances, the parent entity of a limited company in liquidation can be required to repay distributions which it has received from that subsidiary. For example, the parent entity will be liable to repay a distribution if and to the extent that it exceeded the distributable profits of the subsidiary and the parent entity knew, or had reasonable grounds to believe, this was the case. The parent entity will also be liable for any unpaid contribution on the shares it holds.

There is no limit on the liability of the shareholders (domestic or foreign) of an unlimited company. They will therefore be liable for the debts of the unlimited company if it enters liquidation. This liability extends to the statutory interest on debts provable in the liquidation of the subsidiary and also to any unprovable liabilities it has incurred.

The shareholders of a company limited by guarantee will be liable for its debts but only up to the amount which they have undertaken to contribute to its assets in the event that it is wound up.

The shareholders of an unlimited company or a company which is limited by guarantee will be liable only in the case of a liquidation of that company, and not if it enters administration.

Other party

If an insolvent company is an employer with an occupational defined benefit pension scheme, the pensions regulator can, in certain circumstances, serve notices on persons who are connected or associated with the company (including other members of a corporate group, directors and shareholders with one-third or more voting control), which may make them liable for the company's pension obligations.

SETTING ASIDE TRANSACTIONS

10. Can an insolvent debtor's pre-insolvency transactions be set aside? If so, who can challenge these transactions, when and in what circumstances? Are third parties' rights affected?

Challenging pre-insolvency transactions

On a company's liquidation or administration, the liquidator or administrator can apply to the court for an order to avoid or unwind certain transactions that took place before the insolvency. The court has wide discretion to grant these orders if it determines that a pre-insolvency transaction should be avoided or unwound. The overriding principle is to restore the company to the position it would have been in if the improper transaction had not occurred.

The transactions that can be set aside are as follows:

- **Transactions at an undervalue.** The court can set aside a transaction entered into by a company for no consideration, or for significantly less consideration than the value of the transaction, unless both:
  - the company enters into the transaction in good faith and for the purpose of carrying on its business;
  - at the time, there were reasonable grounds for believing that the transaction would benefit the company.
- The vulnerable period is two years before the start of liquidation or administration.
- **Preferences.** A preference is a transaction by a company that prefers a creditor, surety or guarantor by putting that party (in a hypothetical insolvent liquidation of the company) into a better position than that party would have been in if the transaction had not taken place. The court can set aside a preference if there is evidence that the company was influenced by a desire to prefer the creditor. If the preferred creditor is connected to the company (for example, the company's directors), it is presumed, unless the contrary can be shown by the creditor, that the company was influenced by a desire to prefer. The vulnerable period is six months before liquidation or administration starts, unless the preferred creditors are connected to the company, in which case the period is two years.
- **Avoidance of floating charges.** Floating charges created by an insolvent company in the year before the insolvency are invalid, except to the extent of the value of the consideration given to the company by the lender when the charge was created. This period is extended to two years, and there is no need to show that the company was insolvent, where the charge was created in favour of a "connected person" (*see above, Preferences*).
- Generally, a transaction is only a transaction at an undervalue (*see above, Transactions at an undervalue*) or a preference, and a floating charge is only avoided, if at the time the company enters into the transaction or creates the charge, it is unable to pay its debts or becomes unable to do so as a consequence of the transaction or preference. Where the transaction is with, or

the preference given in favour of, a connected person, it is presumed, unless the contrary can be shown by the connected person, that the company was insolvent at the time of the transaction or preference.

- **Transactions defrauding creditors.** This is similar to a transaction at an undervalue (*see above, Transactions at an undervalue*), but the court only makes an order to unwind a transaction if it is satisfied the transaction was entered into to defraud creditors by putting assets beyond the reach of claimants against the company. No time limit applies for unwinding the transaction.
- **Dispositions after the start of winding-up.** Any disposition of a company's property made after winding-up has started is void, unless the court orders otherwise. This provision can cause difficulties, as a compulsory winding-up is deemed to start when the petition is presented, rather than on the date of the court order.

Claims to set aside a transaction at an undervalue and claims to challenge a preference (or the proceeds of those claims) will not form part of the assets available to meet the claims of holders of floating charge security. Such claims can be assigned by a liquidator or administrator to third parties.

Third party rights

The rules concerning third party rights in pre-insolvency transactions are complex. Although third party rights may be affected, there is generally protection for bona fide purchasers acquiring property or benefits for value without notice of the relevant circumstances. Persons who are not direct recipients, parties to the transaction, or connected with the company or the parties to the transaction, are usually accorded a broad defence.

CARRYING ON BUSINESS DURING INSOLVENCY

11. In what circumstances can a debtor continue to carry on business during rescue or insolvency proceedings? In particular, who has the authority to supervise or carry on the debtor's business during the process and what restrictions apply?

Administration. On appointment, an administrator assumes management of a company and may dismiss the company's directors at any time. While the directors usually remain in place, they cannot exercise any powers in a manner that is inconsistent with the administration without the administrator's prior consent.

The administrator can do anything necessary or expedient for the management of the company's affairs, business or property, such as:

- Sell the company's assets.
- Borrow money on behalf of the company.
- Bring or defend proceedings.

More recently there has been a focus on the use of so-called "light touch" administrations, whereby an administrator is appointed but the company's directors (with the administrator's consent) retain day-to-day control of the business. The Insolvency Lawyers Association (ILA) and the City of London Law Society (CLLS) have published a template consent protocol to facilitate "light touch" administration appointments during COVID 19.

During the administration, the administrator must report to creditors and seek approval for its proposals. If a creditor believes that the administration is not being conducted properly, he/she can apply to court for the removal of the administrator.

CVA, scheme of arrangement and restructuring plan. The directors remain in control of the company, continue to trade and undertake the company's business, unless otherwise provided by the terms of the CVA, scheme or restructuring plan.

Liquidation. Once the court makes a winding-up order, the company's directors are automatically dismissed and replaced by the liquidator who is vested with extensive powers to act on the company's behalf. The liquidator can continue to operate the company's business if this achieves better realisation of the assets than an immediate liquidation, but it is rare for a liquidator to do so.

Part A1 moratorium. The directors remain in place and in control of the company. The directors must provide the appointed monitor with any information that the monitor requires in order to carry out his/her functions, and the consent of the monitor (or the court) must be sought in relation to certain corporate actions and decisions.

ADDITIONAL FINANCE

12. Can a debtor that is subject to insolvency proceedings obtain additional finance both as a legal and as a practical matter (for example, debtor-in-possession financing or equivalent)? Is special priority given to the repayment of this finance?

Administration and liquidation

An administrator or liquidator can raise money on the security of the unencumbered assets of the company. Such additional funding has priority over all claims (other than those secured by a fixed charge) as an expense of the administration or liquidation.

CVA, scheme of arrangement and restructuring plan

The raising of finance and the use of assets as security tends to be a matter for agreement between the company and its creditors. Typically, the company will look to its existing lenders to provide additional funding.

MULTINATIONAL CASES WHERE THERE ARE NO APPLICABLE EU OR INTERNATIONAL FRAMEWORKS

13. What are the rules that govern a local court's recognition of concurrent foreign restructuring or insolvency procedures for a local debtor? Are there any international treaties or EU legislation governing this situation? What is the process for applying for local recognition where there are no applicable EU or international frameworks? What are the procedures for foreign creditors to submit claims in a local restructuring or insolvency process?

Recognition

Brexit and the EU. Following the end of the Brexit transition period on 31 December 2020, the UK is no longer within the scope of the following:

- Regulation (EC) 1346/2000 on insolvency proceedings (Insolvency Regulation).
- Recast Insolvency Regulation ((EU) 2015/848).
- Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation).

As a result, there is no automatic recognition in the English courts of insolvency proceedings started in EU member states, and vice versa.

Recognition of foreign insolvency or restructuring procedures in the UK. Recognition in the English courts of insolvency proceedings started in an EU member state will now most likely be sought under the Cross-Border Insolvency Regulations 2006 (CBIR) (which implement the UNCITRAL Model Insolvency Law into domestic legislation), as is the case for other foreign insolvency proceedings. Under the CBIR, the foreign representative of the debtor (which may be the debtor itself or one of its directors) can apply for recognition in the UK of foreign proceedings as either foreign main proceedings (if the proceedings are taking place in the state where the debtor's COMI is) or foreign non-main proceedings (if the debtor has an establishment within the state where the proceedings have commenced). The difference between foreign main proceedings and foreign non-main proceedings is that in relation to the former, an automatic stay on individual actions or proceedings concerning the debtor's assets will apply whereas in relation to the latter, the foreign representative of the debtor must apply for discretionary relief.

In general, the CBIR provide uniform legislative provisions to deal with cross-border insolvency and promote:

- Co-operation between the courts and competent authorities involved in cases of cross-border insolvency.
- Fair and efficient administration of cross-border insolvencies that protect the interests of all creditors and other interested persons, including debtors.
- The protection and maximisation of the value of the debtors' assets.
- The rescue of financially troubled businesses.

However, English case-law has held that relief under CBIR is a procedural mechanism only, and should not be used to provide recognition of the substantive aspects of a foreign insolvency proceeding. This has been recently confirmed by the Court of Appeal (*Bakhshiyeva v Sberbank of Russia and others [2018] EWCA Civ* 2802), which declined to grant discretionary relief under CBIR and recognise, with respect to English law debts, a stay commenced under foreign insolvency proceedings. It held that the provision of such relief would offend the "rule in Gibbs" (an English common law rule that a debt governed by English law cannot be discharged by a foreign insolvency proceeding without agreement of the relevant creditor (including submission to the foreign proceeding)). The rule in Gibbs may gain further prominence as a method for creditors of English law-governed debt to block foreign insolvency and restructuring proceedings that seek to vary or discharge that debt. It may also cause an increase in debtors using foreign insolvency and restructuring proceedings to launch parallel proceedings in the UK with respect to the same debt if that debt is governed by English law.

Additionally, section 426 of the Insolvency Act 1986 provides a statutory framework for the reciprocal co-operation with English courts in relation to a number of former UK colonies and dependencies. The procedure to obtain recognition under section 426, involves an application to the local court for a letter of request of assistance from the English court, and an application to the English court to obtain such assistance. When considering whether to provide assistance, the court can apply substantive English insolvency law or the law of the foreign jurisdiction if it is consistent with English law.

Finally, under the common law principle of comity, the court has the power to recognise and grant assistance to foreign insolvency proceedings.

Recognition of UK insolvency proceedings in the EU. From 1 January 2021 the recognition of, and assistance with, UK insolvency proceedings in EU member states will be determined by the domestic rules governing cross-border insolvencies in each EU member state. For all EU member states except for Denmark, this means that the EU Insolvency Regulation will continue to determine how those member states deal with insolvencies falling within the scope of that Regulation. If a member state's court finds a debtor's COMI to be in an EU jurisdiction, insolvency proceedings commenced in that jurisdiction would be recognised across the EU irrespective of any insolvency proceedings commenced in the UK and regardless of whether a UK court had determined that the debtor's COMI is in the UK.

The UNCITRAL Model Law provides recognition of UK insolvency proceedings in a number of countries. However, it has to date only been implemented in five EU member states (Poland, Slovenia, Romania, Serbia and Greece). There is currently no other legislative basis for recognition of UK insolvency proceedings in other EU member states.

Where the facts allow it, an alternative route to automatic recognition in the EU may be the initiation of parallel proceedings in an EU jurisdiction although this may add complexity and cost.

Recognition of UK schemes of arrangement and restructuring plans in the EU. A scheme is not an insolvency proceeding. Pre-Brexit, the English courts typically relied on the Recast Brussels Regulation to satisfy the requirement that English schemes will be recognised in the jurisdiction of incorporation of the companies whose liabilities are subject to the scheme.

As the UK has now left the EU, the Recast Brussels Regulation has ceased to apply to it. The English courts will now need to be satisfied that the relevant scheme (or restructuring plan) will be recognised in EU jurisdictions on the basis of private international law, unless the:

- Governing law of the contract is English law, in which case it is expected that the contractual effect of an English scheme or restructuring plan to vary or discharge English law-governed debt will continue to be recognised across the EU under the Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I).
- Contract contains an exclusive jurisdiction clause in favour of the UK courts, in which case recognition may be available under the:
  - HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 (Hague Foreign Judgments Convention);
  - Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (New Lugano Convention) (if and when the UK's accession to it is confirmed).

Concurrent proceedings

Recognition and assistance with concurrent rescue or insolvency proceedings in other jurisdictions is primarily provided for under the CBIR (*see above*).

International treaties

The following international treaties apply:

- UNCITRAL Model Law (implemented under the CBIR).
- HCCH Convention on Choice of Court Agreements 2005 (Hague Choice of Court Convention) to which the UK acceded in its own right with effect from 1 January 2021.
- This has an insolvency exclusion provision but may prove helpful in the recognition of English schemes and restructuring plans.

On 8 April 2020, the UK deposited an application to re-accede to the New Lugano Convention in order to fill the gap left by the outgoing the Recast Brussels Regulation regime post-Brexit. The UK's re-accession is pending until all parties to the Convention have provided their consent to the application. At present, the EU and Denmark have yet to provide their consent.

Procedures for foreign creditors

Generally, foreign creditors can file claims for debts due to them in UK insolvency proceedings in the same manner as local creditors. Foreign currency debts are converted into sterling. However, to ensure that local creditors are not prejudiced, if there are concurrent proceedings abroad, any recovery made in the foreign insolvency proceedings will be taken into account.

REFORM

14. Are there any proposals for new legislation or other reform in the context of restructuring and insolvency processes?

Insolvency Law Consultation

In May 2016, the Insolvency Service launched a consultation entitled "A Review of the Corporate Insolvency Framework: A consultation on options for reform" (the 2016 Consultation). The 2016 Consultation consulted on four proposals:

- Creating a restructuring moratorium.
- Helping businesses to continue trading through the restructuring process by allowing them to maintain essential supply contracts.
- Developing a flexible restructuring plan which will bind secured and unsecured creditors and will introduce a "cram-down" mechanism.
- Exploring options for rescue financing.

The 2016 Consultation closed on 6 July 2016.

BEIS Consultation on Corporate Governance and Insolvency

On 20 March 2018, the Department for Business, Energy and Industrial Strategy (BEIS) launched a consultation entitled "Insolvency and Corporate Governance" (the 2018 Consultation). The objective of the 2018 Consultation was to seek views on proposals intended to:

- Lessen the risk of large corporate insolvencies happening due to poor governance or supervision.
- Place greater legal responsibility on directors of firms that are insolvent or on the verge of insolvency and strengthening the government's powers to investigate when things go wrong.

BEIS sought responses to proposals in the following areas:

- **Director accountability for sales of insolvent subsidiaries**. The government proposed changes to the law to:
  - hold parent company directors financially accountable;
  - subject parent company directors to director disqualification if they agree to sell a large private or unlisted company outside a formal insolvency, where the subsidiary subsequently enters into insolvency proceedings within a specified time period and, as a result of the sale, the subsidiary's creditors are harmed.
- **Reverse value extraction schemes**. The government proposed changes to allow insolvency officeholders to reverse value-stripping transactions between the insolvent company and connected parties. The powers would apply if the company has received new investment, value has been extracted in a transaction designed to benefit the investor (without benefitting the company) and the company enters into insolvency proceedings within a specified time period.
- **New powers to investigate conduct of directors of dissolved companies**. Currently, the government has no power to investigate the conduct of directors of companies that are dissolved without having entered insolvency proceedings. If implemented, the proposals would allow the government to seek disqualification orders and creditor compensation orders against such directors, as well as to seek prosecution where there is evidence of criminal behaviour.
- **Improving pre-insolvency corporate governance**. Themes include oversight of complex group structures, improving investor engagement, payment of dividends and the impact of professional advisers on directors' exercise of their duties.
- **Protection of companies in the supply chain**. The paper considers ways to protect suppliers in the event of customer insolvency, including amending insolvency legislation to increase or remove the GBP600,000 cap on funds that may be set aside for unsecured creditors.

The 2018 Consultation closed on 11 June 2018.

On 28 August 2018, the government published its responses to both the 2016 and 2018 Consultations (the Response).

A number of the main changes proposed to the UK insolvency framework in the 2016 and 2018 Consultations were implemented by the introduction into law of the CIGA. However, certain elements of the Responses were not addressed under the CIGA, and it remains to be seen whether the government will further consult or deliberate on those elements.

Pre-Pack Transactions with Connected Persons

Briefly, a "pre-pack" sale is a pre-arranged sale by a company of its assets that is implemented upon or shortly following the appointment of an administrator.

In November 2015, following the "Graham review", voluntary industry measures were introduced to improve the transparency of, and stakeholder confidence in, pre-pack transactions. On 8 October 2020, the government issued a report that sets out findings and recommendations following a review of those voluntary industry measures.

The purpose of this latest review was to assess whether the government should use a power under the Insolvency Act 1986 (inserted by the SBEEA) to further regulate or prohibit pre-pack transactions with connected persons. That power under the Insolvency Act 1986 had expired at the end of May 2020, but was revived until the end of June 2021 under the CIGA.

The government has concluded that further regulation of pre-pack transactions with connected persons is justified to ensure that these transactions are subject to a sufficient measure of independent scrutiny. On 24 February 2021, the government laid draft regulations before Parliament. The regulations are to come into force on 30 April 2021.

A summary of the proposed regulatory framework is below:

- The regulations will apply where there is a disposal in administration of all or a substantial part of a company's assets.
- An administrator will be unable to dispose of property of a company to a person connected with the company within the first eight weeks of the administration without either the approval of creditors or an independent written opinion. The connected party purchaser will be required to obtain the written opinion.
- The provider of the opinion must be independent of the connected party purchaser, the company and the administrator and must meet certain eligibility requirements.
- The administrator must have no reason to believe that the opinion provider is not independent of the connected party or does not meet the eligibility requirements.
- The opinion provider will provide a written report to state that either the case is made for the disposal or that the case is not made.
- A connected party purchaser may obtain more than one report.
- An administrator must consider a report from an opinion provider:
  - where a report states that the case is not made for the disposal, an administrator can still proceed with the disposal

- but will be required to provide a statement setting out the reasons for doing so;
- an administrator will be required to send a copy of the report(s) to creditors of the company and to Companies House.

The government has said that it will also work with the industry and recognised professional bodies to prepare guidance to accompany the regulations and to ensure SIP16 is compatible with the legislation. It will also look to strengthen the existing regulatory requirements in SIP16 to improve the quality of information provided to creditors in connection with pre-pack transactions. The government will, in particular, work with the regulators to ensure:

- There is greater adherence to the principles of marketing.
- Where no marketing has been undertaken that this is fully explained by the administrator and any explanation probed by the regulator where necessary.
- There is a continued increase in compliance with the reporting requirements under SIP16.
- It understands why viability reports are not being completed and how this could be improved.

Should these non-legislative measures be unsuccessful in improving regulatory compliance, the quality of the information provided to creditors and the transparency of pre-pack sales in administration, the government has said that it will consider whether supplementary legislative changes are necessary.

Pension Schemes Bill

The Pension Schemes Bill was brought before the UK Parliament in January 2020. On 19 January 2021 the Pension Schemes Bill completed the final stage of the parliamentary process and the Bill will proceed to Royal Asset.

The Pension Schemes Bill is set to introduce, among other reforms, enhanced powers for the Pensions Regulator. These include (in summary):

- Two new grounds on which the Pensions Regulator can issue a contribution notice where, in relation to an act or failure to act, the Pensions Regulator is of the opinion that:
  - at the time of an act, the scheme was in deficit and if a section 75 debt had immediately fallen due, the act or failure to act would have materially reduced the amount that could be recovered had the employer become insolvent;
  - the act or failure to act reduced the resources of the employer, and that reduction was material relative to the amount of the estimated section 75 deficit in relation to the scheme.
- New criminal offences that relate to the avoidance of employer debt and conduct risking accrued scheme benefits. These offences include two new offences that relate to the acts or conduct of any person (that is, not just the employer) that acts without "reasonable excuse".

There is concern in the restructuring industry as to the breadth of the Pension Schemes Bill. In particular, the new criminal offences may have far-reaching consequences for how directors and other stakeholders approach the restructuring of a group with a UK pension scheme.

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Areas of practice. Financial restructuring.

Recent transactions.

- Leading the team acting as independent international legal counsel in connection with the negotiation, agreement and implementation of the settlement plan in relation to Agrokor d.d. and its subsidiaries, under the Law on the Procedure of Extraordinary Administration in Companies of Systemic Importance for the Republic of Croatia. This process was a first for Croatia and involved a company of significant importance to Croatia and the Balkans.
- Represented the mezzanine lenders on the USD2.5 billion debt restructuring of Expro Holdings, an oil-and-gas-well services provider.
- Advised Brunswick Rail Limited, the Bermudan holding company of a Russian railcar leasing business, on the successful financial restructuring of the group's capital structure, including its USD600 million high-yield bonds.
- Represented an ad hoc group of subordinated debtholders on the settlement of EUR1.2 billion Tier 1 securities of DEPFA Bank.
- Represented the mezzanine lenders of Vivacom, a Bulgarian telecoms company, on a EUR1.6 billion financial restructuring.
- Represented the noteholders of Wind Hellas, a Greek telecommunications operator, on a EUR3.2 billion debt restructuring via a prepackaged administration sale and on a EUR1.8 billion mezzanine debt-equity swap.

Professional associations/memberships. The Law Society of England and Wales; City of London Law Society (Insolvency Committee); Association of Business Recovery Professionals (R3); INSOL Europe; INSOL International; Insolvency Lawyers' Association; European Insolvency Practitioners Association.

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Areas of practice. Financial restructuring.

Recent transactions.

- Advised the private placement noteholders on the restructuring of Interserve plc, a UK-based support services and construction company.
- Advised the private placement noteholders on the amendment to financial covenants of Premier Oil, an independent British UK oil company with worldwide oil and gas interests.
- Advised the private placement noteholders of Carillion plc in amendment negotiations to address liquidity problems and in efforts to restructure the group's balance sheet.
- Advising holders of private placement notes on the restructuring and subsequent insolvency of Royal Imtech NV, a Dutch technical services provider.
- Represented the private placement noteholders on the financial restructuring of Fagron NV, a Belgian pharmaceuticals manufacturer. Advice included amendments to the Notes and Revolving Credit Facility.
- Negotiated on behalf of the private placement noteholders on the administration sale of Tensator Group, a manufacturer of queueing barriers and systems.
- Assisted the joint provisional liquidators of the ARM estate, a Luxembourg securitisation vehicle, in relation to a Company Voluntary Arrangement.

Professional associations/memberships. The Law Society of England and Wales; Association of Business Recovery Professionals (R3); American College of Investment Counsel (ACIC) Communications Committee.

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Professional qualifications. Solicitor, England and Wales, 2003

Areas of practice. Financial restructuring.

Recent transactions

- Advising an ad hoc committee of holders of securitised bonds issued by intu Metrocentre Finance plc, in relation to the Metrocentre shopping centre in Gateshead.
- Advising holders of private placement notes issued by Nordic Aviation Company 29, an aircraft leasing business, in respect of an Irish scheme of arrangement.
- Advising the second lien lenders to Curaeos B.V., a Dutch dental business, on its financial restructuring and recapitalisation.
- Advising the sole senior lender in respect of its loans to a cruise line business.
- Advising Strategic Value Partners, the largest lender to Dolphin Drilling ASA (formerly known as Fred. Olsen Energy ASA), on a restructuring pursuant to which it become the majority owner of the Dolphin Drilling business.
- Advising on the refinancing in 2019 of Terreal Holding SAS, a French roof tile manufacturer. Emma also advised on the 2013 restructuring of Terreal, which was the first lender-led restructuring in France.
- Advising an ad hoc committee of holders on exchange offers made in respect of bonds issued by Digicel Group Limited, a mobile phone network provider operating across the Caribbean, Central America and Oceania regions.
- Advising key stakeholders on the restructuring of the syncreon group, a US-headquartered logistics business which elected to use an English scheme of arrangement rather than Chapter 11 proceedings to restructure its financial indebtedness.
- Representing the mezzanine lenders on the USD2.5 billion debt restructuring of Expro Holdings, an oil and gas well services provider.
- Advising Nordic Trustee on behalf of holders of USD600 million of Norwegian law bonds on the successful financial restructuring of the Sea Trucks Group, a provider of offshore installation, accommodation, and marine support services to the oil and gas industry. Ownership of the business (now known as Telford Offshore) was successfully transferred to bondholders as part of the restructuring.
- Advising Oaktree Capital as the principal new investor and contributor of a vessel fleet on the financial restructuring of Torm A/S, which was implemented through a scheme of arrangement.
- Advising holders of private placement notes on the restructuring and subsequent insolvency of Royal Imtech NV, a Dutch technical services provider.
- Advising Brunswick Rail Limited, the Bermudian holding company of a Russian railcar leasing business, on the successful financial restructuring of the group's capital structure, including its USD600 million high-yield bonds.

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Professional qualifications. Solicitor, England and Wales, 2011

Areas of practice. Financial restructuring.

Recent transactions.

- Represented the private placement noteholders and lenders in the financial restructurings of the Interserve group, a UK-based support services and construction provider.
- Advised the syndicate of secured lenders to Endeavour Energy (UK) Limited, an oil and gas company, on the restructuring of its debt liabilities.
- Advised Codere, the Spanish headquartered gaming business, in its financial restructuring discussions with a committee of its bondholders, including specifically advising on the implementation of an English scheme of arrangement and Chapter 15 recognition.
- Acted for the Travelodge group in relation to the implementation of its simultaneous financial and operational restructuring of its hotel portfolio.
- Counseled the co-ordinating committee to the Danish Vestas group on a refinancing of the group's facilities.

Professional associations/memberships. The Law Society of England and Wales; Insolvency Lawyers' Association; International Women's Insolvency & Restructuring Confederation (IWIRC); Association of Business Recovery Professionals (R3).

Professional associations/memberships. The Law Society of England and Wales; Association of Business Recovery Professionals (R3); Insolvency Lawyers' Association; American College of Investment Counsel (ACIC); International Women's Insolvency & Restructuring Confederation (IWIRC).