

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

James Roome, Tom Bannister, Emma Simmonds and Lauren Pflueger, Akin Gump LLP

global.practicallaw.com/9-501-6812

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: Floating charge*).

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.

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.
- It has also been proposed that, from 6 April 2020, the UK HM Revenue and Customs (HMRC) will be a secondary preferential creditor in respect of certain taxes or deductions (see *below, Crown preference*). This status as secondary preferential creditor will apply in respect of general corporate insolvencies and will not be limited to those of financial institutions.
- **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, currently, to a cap of GBP600,000 (see *below, BEIS Consultation on Corporate Governance and Insolvency*, for a proposal in respect of an increase to this cap). 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.

Cross-border debt recovery

The process to recover cross-border debts is complex and the costs of recovering a debt from a debtor with assets in several member states can often be prohibitive. Regulation EU No. 655/2014 (EAPO Regulation), which entered into force on 18 January 2017, allows creditors to apply to the courts of a participating member state for a European Account Preservation Order (EAPO) to freeze, and/or require disclosure of, a debtor's bank accounts located in other participating member states. These Europe-wide orders are in addition to the remedies available under national law. The UK has chosen not to opt into the EAPO Regulation meaning that EAPOs will not be enforceable against accounts situated in the UK. In addition, EAPOs are only available to creditors domiciled in participating member states. This means that UK creditors will not be able to apply for an EAPO, but that the accounts of UK debtors located in a member state participating in the EAPO Regulation could be subject to an EAPO. The EAPO Regulation does not apply to debtors who are in an insolvency process.

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 six statutory instruments and the Financial Services (Banking Reform) Act 2013 (2013 Act), which amends the 2009 Act.

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 UK Government has established the Enterprise Finance Guarantee (EFG), which 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 (see *Question 13*).

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*. The administration does not prevent trading parties cancelling contracts with the company. It is a typical term of many contracts (including intellectual property licences) that the agreement may be terminated upon the company entering into an insolvency procedure, such as administration. 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*).
- 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: Initiation*).

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*). The moratorium lasts between one and three

months. In relation to company contracts, the default position is that a CVA will not interfere with the contracts of the company.

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 and the procedure does not interfere with 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, which does provide a moratorium (*see above, Administration*). 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. There is no moratorium so creditors can take enforcement action against the company up until the point at which the scheme is sanctioned. In relation to company contracts,

the default position is that a scheme will not interfere with the contracts of the company.

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.

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: Protection from creditors*) in that the appointment of an administrative receiver does not affect company contracts unless provided for in the contract itself.

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 and the procedure does not interfere with 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*).

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.

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* and, 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 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 a MVL.

Company contracts are not automatically terminated but a liquidator 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 or scheme 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.

Influence on outcome of procedure

The 2008 financial crisis had a direct effect on employees and businesses. Since the recession, 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, is a key element in these policy objectives, as borne out by the statutory

measures which have been introduced since 2008 and the 2016 Insolvency Law Consultation (see *Question 14*).

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.

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, although the directors usually remain in place, they cannot exercise any powers in a manner that is inconsistent with the administration (directors can be dismissed by the administrators at any time).

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.

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 and scheme of arrangement. 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 or scheme.

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.

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 and scheme of arrangement

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

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

are the procedures for foreign creditors to submit claims in a local restructuring or insolvency process?

Recognition

Section 426 of the Insolvency Act 1986 provides a statutory framework for the reciprocal co-operation with English courts in relation of a number of former UK colonies and dependencies. 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.

Regulation (EC) 1346/2000 on insolvency proceedings (Insolvency Regulation) and Regulation (EU) 848/2015 on insolvency proceedings (recast) (Recast Insolvency Regulation) require the English courts to automatically recognise insolvency proceedings started in other EU member states. The Insolvency Regulation and the Recast Insolvency Regulation also contain detailed provisions on concurrent proceedings in different member states (*see below*).

For the potential impact of Brexit on recognition of English law insolvency proceedings, *see Question 14, Brexit*.

Directive 2001/24/EC on the reorganisation and winding up of credit institutions (Credit Institutions Directive) provides for a single set of winding-up or reorganisation proceedings to be commenced in the EU member state in which a credit institution has been authorised to take up its business. Subject to certain exceptions, the home member state's insolvency rules apply throughout the EU and any decision relating to the commencement of reorganisation or winding-up procedures is automatically effective in another member state. This directive was implemented in the UK through the Credit Institutions (Reorganisation and Winding Up) Regulations 2004.

Concurrent proceedings

The UNCITRAL Model Law on Cross-Border Insolvency 1997 (Model Law) was implemented in England and Wales by the Cross-Border Insolvency Regulations 2006. The Regulations 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.

International treaties

The following international treaties apply:

- Insolvency Regulation and the Recast Insolvency Regulation.
- Model Law (implemented pursuant to the Cross-Border Insolvency Regulations 2006).

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 reform?

Electronic working

In October 2014, the High Court began a pilot scheme for electronic filing and case management of claims issued in the Rolls Building in London. On 25 April 2017, electronic issue of claims and applications and electronic filing of documents became compulsory during the pilot period in all jurisdictions in the Rolls Building. Therefore, all insolvency applications issued in the Companies Court of the Chancery Division of the High Court and all documents filed in such cases must now be electronically filed. The pilot period was extended in April 2018 until 6 April 2020. It is anticipated that a permanent e-filing practice direction will shortly be issued to replace PD 510, which applied to the pilot scheme.

Brexit

The most significant impact of Brexit on insolvencies and restructurings is likely to flow from the disapplication of the Insolvency Regulation, the Recast Insolvency Regulation and Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) Regulation. It is very possible that the recognition within the EU of English law insolvency proceedings and schemes of arrangement, and therefore the feasibility of using those processes in respect of companies incorporated in other EU member states, may become harder to establish as a result.

The Insolvency Regulation and the Recast Insolvency Regulation provide EU-wide recognition for insolvency proceedings (*see Question 13, Recognition*). Unless alternative arrangements are put in place, these regulations will no longer apply to the UK when it leaves the EU. As a result, the EU-wide automatic recognition currently provided to English law insolvency proceedings would cease to apply. Likewise, the automatic recognition afforded by the English courts to insolvency proceedings opened in another member state would no longer be available.

The Model Law does provide cross-border recognition of insolvency proceedings in a number of countries. However, it has to date only been implemented in five EU member states (UK, Greece, Poland, Romania and Slovenia). The UK will want to agree bilateral recognition agreements with each of the other EU member states (in the absence of some agreement to extend the Insolvency Regulation and the Recast Insolvency Regulation to the UK after it leaves the EU).

English law schemes of arrangement have also been used in recent years to restructure the financial indebtedness of a significant number of companies incorporated in other EU member states. In sanctioning such a scheme, the English courts need to be satisfied that it will be recognised in the jurisdiction of incorporation of the companies whose liabilities are subject to the scheme. In determining whether such recognition will be available, reliance is often placed on the Judgments Regulation. When the UK leaves the EU, the Judgments Regulation will cease to apply to it (absent some alternative arrangement being agreed). The English courts will then need to be satisfied that the scheme will be recognised in the other relevant EU jurisdictions on the basis of private international law which may be much more difficult to establish.

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 and the government published the responses received to it on 28 September 2016. The majority of respondents (which included law firms, turnaround professionals, regulators, trade bodies and academics) approved in principle of creating a restructuring moratorium and introducing a form of binding restructuring plan with a "cram-down" mechanism. As to essential supply contracts, there was support for the principle of helping businesses to continue to trade through the restructuring process. However, there was significant divergence of views on what an essential supply contract is. There was little support for new rescue financing legislation. Most respondents felt that:

- A lack of finance rarely prevents the rescue of viable businesses
- The existing framework does permit rescue financing
- That there is currently a market for rescue finance.

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). The main changes proposed to the UK insolvency framework, and which are considered in the response, are as follows:

- **A new pre-insolvency moratorium.** It is proposed that a pre-insolvency moratorium, which would prevent creditors taking enforcement action against a company while it considers its rescue options, be introduced. To access the moratorium, a company would need to demonstrate prospective, but not actual, insolvency, and would need to have legitimate reasons for seeking its protection. Companies that are already insolvent would not be eligible to access the moratorium. A moratorium would be triggered by filing papers at court (similar to the current process for appointing an out-of-court administrator). A moratorium would initially last for 28 days, with the possibility of extension.
- **A new cross-class standalone rescue plan.** It is also proposed that a new cross-class standalone restructuring procedure would be introduced, which would be available to solvent and insolvent companies (including those in formal insolvency processes), without financial entry criteria. The voting threshold would require 75% in value of the creditors who vote in each class to vote in favour of the plan. Dissenting classes of creditors would be bound by the plan if it is in the best interests of all stakeholders. The rescue plan legislation would provide that a dissenting class must be satisfied in full before a more junior class can receive any distribution ("absolute priority rule"), although it is also proposed that the court could confirm a plan even if this requirement is not met, if non-compliance is required to achieve the aim of the restructuring and it is just and equitable to do so in the circumstances.
- ***Ipsa facto* clauses to be unenforceable.** The government has indicated in the Response that it will legislate to make contractual clauses which allow suppliers of goods and services to terminate those contracts on counterparty insolvency unenforceable. This prohibition would prevent third parties from terminating their contracts solely as a result of a company seeking the protection of the new moratorium, or on its entry into a formal insolvency procedure or proposal of a new "rescue plan". Certain exceptions to this general rule remain under consideration by the government.
- **Prescribed Part increase.** Currently, the amount which can be set aside as the Prescribed Part is capped at GBP600,000. The government proposes to increase that cap to GBP800,000 (that increase being determined by reference to the inflationary increase between 2003 (when the existing cap took effect) and 31 March 2018).

The Response outlines views received on the ways in which the likelihood and impact of major corporate failure may be mitigated. The government has indicated that the above suggested changes to the insolvency framework will be legislated for, although the precise timing is currently unknown.

There are other aspects of the reforms which may require further consultation and deliberation. As a result, their implementation is likely to be even more delayed. These other aspects relate to the following:

- **Reduction in valuation extraction schemes.** The government wants to ensure that those who attempt to unfairly extract value

from distressed companies are deterred from doing so. To deter value extraction, the government intends to enhance the existing recovery powers of insolvency practitioners. The government also intends to extend existing powers to allow former directors of dissolved companies to be investigated, with the aim of ensuring that directors of distressed, or potentially distressed, companies, properly consider their actions.

- **Enhanced director accountability.** It is proposed that measures will be introduced to ensure greater accountability of directors of companies which are selling distressed subsidiaries. When selling a distressed subsidiary, directors would need to have a reasonable belief that the sale would likely deliver a no worse outcome for the stakeholders of the subsidiary than placing it into a formal insolvency.

The government continues to consider the proposals and the responses received to each of the 2016 Consultation and 2018 Consultation, and it is expected that further publications, or legislation, will follow (although precisely when is unclear).

Crown preference

In October 2018, as part of the Chancellor of the Exchequer's Budget, it was announced that the government would introduce legislation to make HMRC, upon a business entering an insolvency process, a secondary preferential creditor in respect of certain taxes. The key principle behind the proposed change was that taxes paid by a person to a debtor company (where such amount is held by the company on behalf of HMRC) should remain payable to HMRC, rather than to creditors of the company.

On 11 July 2019, HMRC released draft legislation, amending the Insolvency Act 1986 and providing HMRC, from 6 April 2020, with secondary preferential creditor status in respect of certain taxes. This enhanced preferential creditor status is limited to VAT and "relevant deductions", which, broadly, are deductions in respect of which:

- The debtor was required to make from a payment to another person and account to HMRC.
- That payment is creditable against the other person's tax liability.
- The deduction is of a kind specified in the regulations (see *below*).

The regulations have not yet been published, although it is anticipated that the scope of the taxes (in addition to VAT) will be extended to PAYE, employee National Insurance Contributions (NICs), student loan deductions and Construction Industry Scheme deductions. It is not expected that this new regime will extend to corporation tax and employer NICs, such that HMRC will remain an unsecured creditor in respect of those amounts, unless the relevant tax liability is claimed as an expense of the insolvent estate. It is also expected that interest and penalties arising on any taxes due will remain as unsecured liabilities of the business (including interest and penalties on taxes in respect of which HMRC will have preferential status). The government entered into consultation on these proposed new rules earlier this year.

Practical Law Contributor profiles

James Roome, Partner

Akin Gump LLP

T +44 20 7661 5317
F +44 20 7012 9601
E james.roome@akingump.com
W www.akingump.com

Tom Bannister, Partner

Akin Gump LLP

T +44 20 7661 5319
F +44 20 7012 9601
E tom.bannister@akingump.com
W www.akingump.com

Professional qualifications. Solicitor, England and Wales, 1984; Hong Kong, 1985

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.

Professional qualifications. Solicitor, England and Wales, 2005

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.
- 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.

Emma Simmonds, Partner

Akin Gump LLP

T +44 20 7661 5420

F +44 20 7012 9601

E emma.simmonds@akingump.com

W www.akingump.com

Lauren Pflueger, Counsel

Akin Gump LLP

T +44 20 7012 9692

F +44 20 7012 9601

E lauren.pflueger@akingump.com

W www.akingump.com

Professional qualifications. Solicitor, England and Wales, 2003

Areas of practice. Financial restructuring.

Recent transactions

- 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.

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).

Professional qualifications. Solicitor, England and Wales, 2011

Areas of practice. Financial restructuring.

Recent transactions.

- Represented the private placement noteholders in the financial restructurings of Interserve plc, a UK-based support services and construction company.
- 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.
- Acted for the Travelodge group in relation to the implementation of its simultaneous financial and operational restructuring of its hotel portfolio.
- Assisted the board of directors of New World Resources, the Czech mining company, in relation to the group's successful restructuring, including the implementation of an English law scheme of arrangement of its debt.
- 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).