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United Kingdom
Lending & Secured Finance

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in United Kingdom.

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United Kingdom: Lending & Secured Finance

The United Kingdom (**UK**) is comprised of three separate legal jurisdictions comprising (1) England and Wales, (2) Scotland and (3) Northern Ireland (NI). This guide has been prepared based on the laws of England and Wales, as it is the largest of the three jurisdictions. However, most of the responses apply equally to Scotland and NI with minimal material modification although there can be significant differences in respect of laws relating to real estate and security. We recommend that local advice is taken if a transaction involves an entity that is incorporated, established, resident and/or domiciled in Scotland or NI or if the lender is taking security over assets located in either jurisdiction.

1. Do foreign lenders (including non-bank foreign lenders) require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Generally, no banking licence or regulatory approval is required for commercial lending to businesses that are incorporated or tax-resident in the UK, nor are they required for a lender to benefit from guarantees from a UK business or security over assets situated in the UK.

There are authorisations required under the Financial Services and Markets Act 2000 (FSMA) for certain specified regulated activities (including accepting deposits and managing investments). Most notably, authorisation is required from the Financial Conduct Authority under FSMA for making regulated mortgage loans and for consumer credit lending. For these purposes, a "consumer" extends to sole traders and small partnerships.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

Generally, economic terms are freely agreeable between a lender and a borrower.

However, if any provision for the payment of default interest or similar amounts triggered by breach of contract is out of all proportion to any legitimate interest the lender may have in performance, then it might be held to be unenforceable as a penalty.

Further, where any fee or interest could be considered as an unconscionable bargain in equity, or as extortionate within the meaning of section 244(3) of the Insolvency Act 1986, it may not be enforceable or recoverable and the Court has the power to set extortionate credit transactions aside.

Interest and default interest are common in UK transactions and the above does not generally prevent them being charged.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

No, although there may be tax implications for corporate borrowers or lenders as a result of accounting profits and losses derived from forex fluctuations.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

Security can take a number of different forms, however the security interests most commonly encountered are:

- **Mortgages**, whereby the security provider's interest in an asset passes to the lender on the proviso that it will pass back on final payment of the debt. Mortgages may be **legal** (where legal title to the asset transfers to the lender) or **equitable** (where only the equitable interest in the asset transfers to the lender). Equitable mortgages often arise where not all the steps required to create a legal mortgage have been taken, or in respect of future assets not yet owned by the security provider.
- **Charges,** whereby the lender has certain rights over the asset but there is no transfer of the security provider's interest in it. On non-payment, the lender may sell the asset to satisfy the secured debt. Charges may be **fixed** or **floating**. The holders of fixed charges rank above the holders of floating charges, and several other classes of creditors, upon the insolvency of a company. To achieve a fixed charge, the lender must have a high degree of control over the asset. Therefore, charges over fluctuating assets such as inventory, receivables, or money in bank accounts which the security provider is free to access are usually subject to floating charges. A floating charge can be granted by a company or LLP, but not an individual, because of prescriptive statutory provisions contained in the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882.
- **Assignments by way of security,** whereby a lender obtains a mortgage over a legal right against someone else (a chose in action), be it a counterparty to a contract, an insurance company or a tenant paying rent. Assignments can be legal or equitable, and there are statutory requirements to create a legal assignment. One of the main differences between a legal and equitable assignment is that a legal assignee can bring an action against the other contracting party in its own name, while an equitable assignee is normally (but not always) required to join the assignor (i.e. the security provider) as a party in any action the assignee brings against the other party to the agreement.

Security can be taken over each type of asset listed. Taking each one in turn:

i. Security over **real property (land)** in England and Wales can take a number of different forms, but the most common (and strongest) type of security taken is a charge by way of legal mortgage (sometimes referred to as a legal charge). Although title is not transferred to the lender as it is with a mortgage of other assets, this type of security interest gives the lender equivalent rights. In the case of registered land, a legal charge must be registered at the Land Registry. Alternatively, security over real property can be taken by way of an equitable mortgage, or a fixed or floating charge; these types of security would typically be used for less valuable property. Plant and machinery on the land would be secured in the same way as equipment (see below).
ii. **Equipment** can be subject to a chattel mortgage or fixed charge, provided that it will not be regularly disposed of in the course of business. A chattel mortgage would have the effect of transferring title to the equipment to the lender, making it very difficult to sell the equipment, and is therefore a very effective form of security. A lender with a fixed charge may opt to attach a plaque to the equipment stating that the asset is subject to a fixed charge in favour of the lender, to make it more difficult to sell the equipment without the lender's consent. If the charge allows the equipment to be sold in the ordinary course of business it will be a floating charge.
iii. **Inventory** would usually be subject to a floating charge, because the security provider will need the ability to dispose of it in the ordinary course of business, meaning that a lender cannot exercise sufficient control to achieve a fixed charge.
iv. Security over **receivables** can be taken in the form of an assignment by way of security or a charge. Most security assignments tend to be equitable rather than legal, because the statutory requirements for a legal assignment under s136 of Law Property Act 1925, including that the assignment be "absolute", can be difficult to meet unless the lender is willing to step into the shoes of the security provider under the contract. A charge over receivables will be categorised as floating rather than fixed unless the lender has sufficient control over the receivables. Security over receivables is usually perfected by giving notice to the contract counterparty (in addition to the registration requirements set out in the answer to question 8 below). To improve the prospects of the security interest being characterised as a fixed (rather than floating) security interest, a lender can require receivables to be collected into a blocked bank account. Receivables finance is also raised in the UK by companies selling their book debts and other receivables due from their customers at a discount to a lender, a process known as factoring or invoice discounting.
v. **Shares** are generally secured by way of a mortgage or charge. To create a legal mortgage over shares, the lender would need to be registered as the shareholder of the relevant company. As most lenders do not wish to be registered in this way (which can carry with it certain liabilities, notably environmental liabilities), most security over shares will be by way of equitable

mortgage or charge. For charges over certificated shares (as opposed to uncertificated shares held within a clearing system such as CREST), a lender will typically require the security provider to deliver a signed blank stock transfer form and the certificates for the secured shares, alongside the mortgage or charge. This gives the lender the option to upgrade its security to a legal mortgage by completing the stock transfer form at a later date. In addition to a blank stock transfer form and share certificate, some lenders will require the board of directors to pre-sign resignation letters, which the lender is authorised to date and bring into effect at any time any time after the security becomes enforceable.

vi. A pledge, whereby the lender takes possession of the secured asset, is not generally used in respect of shares in England and Wales, or Northern Ireland, except in the case of bearer shares (shares where ownership is evidenced by possession of the relevant share certificate), which are uncommon in UK companies.

As a general rule, the security document should be governed by the laws of the jurisdiction in which the secured asset is situated (*lex situs*) although specific advice should be taken on this.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

A **legal mortgage** cannot be taken over **future assets**, but an **equitable mortgage** or a **fixed** or **floating charge** can be. Under the terms of a security document, a lender may require a borrower to perfect existing security or grant supplementary security over future assets once acquired (further assurance). That may require serving a notice of charge/assignment on third parties in the case of contracts and bank accounts, depositing share certificates and stock transfer forms in the case of shares and executing a supplemental legal mortgage deed in the case of real property.

Security can be created over **future obligations**, however where there is a material variation to secured or guaranteed obligations there is a risk that the security or guarantee will be discharged unless the security provider or guarantor consents to it. In addition, where a variation to secured or guaranteed obligations is found not to have been in the contemplation of the parties when they entered into the security or guarantee, such security or a guarantee may be discharged or may not extend to the amended obligation. For these reasons, caution should be exercised and legal advice sought when amending the terms of a secured or guaranteed transaction.

It may be that on consideration the provisions of the security or guarantee are sufficiently widely drafted to extend to the variation, or that a written confirmation from the security provider or guarantor is regarded as effective to ensure that the amendments remain secured or guaranteed. However, where amendments are sufficiently material, new security or guarantees may be required.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

A **single security agreement**, most commonly known as a debenture, can in most cases be used to take security over all of a company's assets. The debenture will typically include (amongst other things) a legal mortgage over material real property, fixed charges over other asset classes including real property, plant and machinery, equipment, receivables and shares, an assignment of insurances and a floating charge over all other assets not effectively mortgaged, charged or assigned under the debenture by fixed mortgage, fixed charge or assignment.

Local law advice should be obtained if a lender requires security over assets which are situated outside England and Wales (including assets situated in Scotland and NI).

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

Notarisation and/or **legalisation** are not required for English law finance documents.

Certain finance documents, including security documents, are typically executed as deeds, either due to legal requirements (for example, a legal mortgage is required to be executed as a deed under statute to obtain the benefit of certain statutory powers), or because deeds have certain advantages over simple contracts (for example there is no requirement for consideration for a deed, and deeds benefit from longer limitation periods). Execution of a deed requires a greater degree of formality compared with execution of a simple contract. The exact formalities required depend on the nature of the person or entity executing the deed (individual, company, LLP, etc.). Care should also be taken to ensure that the execution formalities for deeds creating security over land comply with the applicable Land Registry rules and practice directions issued from time to time.

8. Are there any security registration requirements in your jurisdiction?

Any company or LLP registered in the UK must register any charge (including any mortgage) created on or after 6 April 2013 at **Companies House** within 21 days of creation of the charge. If a charge is not registered within this period it will be void against a liquidator, administrator or other creditor of the company/LLP, therefore in practice it is vital for a lender that the charge is registered. The 21-day period can only be extended by court order. Company charges created before 6 April 2013 were also required to be registered at Companies House within 21 days of creation, but were subject to a slightly different statutory regime.

As well as charges, lawyers will take a cautious approach about and should also register other security interests which are of a similar nature, including foreign law security interests created by a company or LLP registered in the UK. An overseas company does not have to register a charge over UK assets created on or after 1 October 2011 at Companies House.

As well as registration at Companies House, security over certain assets including land, intellectual property, ships and aircraft is required to be registered at **asset-specific registries**. The effect of registration at an asset-specific registry is normally to give the lender priority over other creditors in respect of the asset in question. For registered land, registration at the Land Registry is required in order to create an effective legal charge; certain other security interests over registered land can be protected by registration of a notice at the Land Registry. In addition, individuals granting security over personal chattels and receivables may be required to register such security under the Bills of Sale Act 1878.

There are other security registration requirements in respect of assets located in Scotland.

Under the Economic Crime (Transparency and Enforcement) Act 2022, overseas companies and other entities that have acquired real property in the UK since 1 January 1999 are required to register and declare their beneficial ownership on the Register of Overseas Entities maintained at Companies House. If they fail to register and maintain their status as “registered” for the purposes of the legislation (for example by failing to comply with an annual duty to update the register or by failing to provide certain information required by the Registrar of Companies), a restriction will be entered on the title register at the Land Registry which will prohibit the registration of any disposition of land owned by that overseas entity, including a legal charge.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

The charges payable on taking security in England and Wales are not material and consist only of minimal registration fees. For example, the fee to file a charge at Companies House is £15 if filed electronically. Fees are also payable at the asset-specific registries although are generally not material. For example, the fee to register a legal charge at Land Registry in respect of property in England and Wales may be up to £305 depending on the value of the charge.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

A company can guarantee or secure the obligations of another group company, however **commercial benefit** is a concern. Under the Companies Act 2006, directors must act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. If a corporate guarantor receives insufficient benefit, the directors may have exceeded or abused their powers by acting in breach of their duty to promote the success of the company. If a lender has actual or constructive notice of this, the transaction could be set aside at the instance of the shareholders and the lender may be required to hold any proceeds as constructive trustee for the company. To address this risk, the benefit to the company of granting the guarantee and security should be clearly documented in the board resolutions approving the transaction, and a unanimous shareholder resolution should be passed approving the giving of the guarantee or security.

If there are solvency concerns about the guarantor or security provider however, the duty to promote the success of the company must be assessed by reference to the interests of the creditors of the company as well as the shareholders. Where an insolvent liquidation or administration is inevitable, creditors' interests are paramount. A shareholder resolution will not be sufficient to overcome any issues of commercial benefit in this situation. Lenders may require a solvency certificate from a director of the guarantor/security provider, and for its board resolutions to record that it is fully solvent.

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

UK public companies and their subsidiaries

Subject to limited exceptions, it is unlawful for a UK public company to provide **financial assistance** for the acquisition of shares in itself; nor is it lawful for its UK subsidiary, whether that subsidiary be a private or public company, to provide credit support for such an acquisition. It is also illegal for a UK public company to give financial assistance with the acquisition of shares in its private holding company.

UK private companies

Save as set out above, a private company incorporated in the UK may provide guarantees and security to support borrowings for the purposes set out at (i) to (iii) above.

Guarantees and security from the target are a core part of the security package in UK acquisition finance transactions, particularly as the acquiring entity is often a special purpose vehicle with no valuable assets other than its shareholding in the target.

While the financial assistance prohibition has been repealed in the UK for private companies the normal company law maintenance of capital rules remain relevant. In that regard, the company's board must form the view that the grant of security or guarantee in connection with the acquisition of its shares does not reduce the net assets of the company or, to the extent it does so, the company must have sufficient distributable reserves to cover the deficiency. If there are any concerns around maintenance of capital, legal advice should be obtained.

12. Can lenders in a syndicate (or, with respect to private credit deals, lenders in a club) appoint a trustee or agent to (i) hold security on the lenders's behalf, (ii) enforce the lenders' rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Yes – lenders typically appoint a **security trustee** or **agent** to fulfil these roles.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

Not applicable.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

In general, and subject to certain exceptions, English courts will respect a contractual choice of law clause.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

The UK has bi-lateral or multi-lateral agreements with many countries that govern the recognition and enforcement of foreign judgments. Where an agreement or convention exists (and has application to the foreign judgment in question), recognition and enforcement of the foreign judgment will be subject to the terms of that particular agreement or convention.

In respect of EU member states, as of 1 January 2021, Regulation (EU) 1215/2012 (the **Recast Regulation**) and the 2007 Lugano Convention no longer apply in England and Wales except in relation to judgments obtained in certain proceedings instituted before 1 January 2021.

The Hague Convention on Choice of Court Agreements

2005 ("2005 Hague Convention") currently governs the UK's approach to enforcing judgments obtained in the domestic courts of the contracting states.. However, the 2005 Hague Convention only applies to proceedings issued pursuant to an exclusive jurisdiction clause entered into after 1 October 2015 (or later where the relevant contracting state acceded to the 2005 Hague Convention after this date). The 2005 Hague Convention does not apply to contracts that adopt non-exclusive jurisdiction clauses and may not apply to contracts that include asymmetric jurisdiction clauses.

Judgments arising from certain Commonwealth and other limited jurisdictions may be enforceable in the UK pursuant to the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933. Those statutes prescribe their own conditions and requirements for the recognition and enforcement of judgments from those jurisdictions in England and Wales. It is unclear if those statutes can be revived to apply to judgments now arising from certain EU member states which were historically subject to them.

The UK ratified the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 2 July 2019 ("**2019 Hague Convention**") on 27 June 2024. It will become law in the UK on 1 July 2025. It will only apply to judgments given in proceedings started after that date. The ratification also limits the 2019 Hague Convention's application to England and Wales. The Convention covers judgments in civil and commercial matters, with certain exceptions. Contracting states, which include the EU member states (but excluding Denmark), must recognise and enforce judgments from other contracting states. There are certain exceptions relating to public policy, fraud, insufficient notice of the proceedings and other matters. Judgments will be eligible for recognition and enforcement if the original court had jurisdiction on the grounds set out in Articles 5 and 6. These include jurisdiction on a territorial or consensual basis, and jurisdiction based on certain connections of the subject matter with the state where the judgment was issued. Of note, a judgment will be caught by the 2019 Hague Convention if it ruled on a contractual obligation and was given in the state in which performance of that obligation took place.

Countries with whom the UK does not have a bilateral or multi-lateral agreement

Where no bi-lateral or multi-lateral agreement exists regulating the enforcement of judgments, English common law will govern the recognition and enforcement of foreign judgments.

In order to follow the common law route, the beneficiary of the judgment must issue new proceedings in the UK courts for payment of a debt. Where it is necessary to serve these UK proceedings on the debtor outside of the UK, the UK court's permission may first need to be obtained. In general, to be enforceable under common law the foreign judgment must be final and conclusive, for a definite sum of money and have been given by a court of competent jurisdiction (where the foreign court had jurisdiction on a territorial or consensual basis). UK courts will only refuse to recognise and enforce foreign judgments in limited circumstances. These include where the judgment was: (1) obtained by fraud, (2) contrary to public policy or (3) handed down in proceedings conducted in a manner contrary to principles of natural justice.

Most notably, the UK does not have a reciprocal arrangement with the USA (including the state of New York) so US judgments must meet the common law requirements to be enforceable in the UK.

New York Arbitration Convention

The UK is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

16. What (briefly) is the insolvency process in your jurisdiction?

A range of corporate insolvency and restructuring processes are available in England and Wales and may be used separately or in conjunction with one another depending on the circumstances of the company, the stakeholders and the intended outcome. Liquidation, administration, company voluntary arrangement (**CVA**) and the standalone moratorium are processes governed by the Insolvency Act 1986, whereas a Scheme of Arrangement and Part 26A Restructuring Plan are governed by the Companies Act 2006. In addition, receivership may be available, including administrative receivership under the Insolvency Act 1986 for a limited number of companies operating in the structured finance and capital markets sector. In addition, various special administration regimes exist for certain regulated industries, for example banks and investment firms, utility suppliers and education.

Liquidation (winding up)

Insolvent liquidation is a collective insolvency proceeding that ends with the dissolution of the corporate entity. Liquidation involves the appointment of one or more insolvency practitioners who act as liquidators, realise the assets of the company and distribute the available proceeds to creditors in a prescribed order or waterfall. With some exceptions, a company that goes into liquidation usually ceases trading immediately. Liquidation may be compulsory, commenced by the court on the petition of a creditor, or voluntary, in which case the procedure is commenced by a resolution of the shareholders and not the court.

Administration

Administration is also a collective insolvency proceeding which may be used as a rescue or restructuring tool, but is more typically used as a better means of realising assets than a winding up/liquidation proceeding. It can also be used by certain secured creditors as an effective and efficient enforcement procedure, including over companies that are not actually insolvent.

Administration can be commenced voluntarily by the company or its directors filing papers with the court. It may also be commenced involuntarily by application to court by one or more creditors, or out of court by creditors who hold security over substantially all of the company's assets that includes a qualifying floating charge.

One or more insolvency practitioners are usually appointed as administrators of the company and they displace the directors and manage the business during the administration process. A statutory moratorium applies during administration, and in some cases prior to its commencement (see response to question 17). The administrators must consider whether they can rescue the company as a going concern. If (as is usually the case) this cannot be achieved, the administrators must consider if they can instead achieve a better result for the creditors of the company as a whole than the result that would likely be achieved in a liquidation. If that cannot be achieved, the third and final possible objective is to realise the company's property for distribution to secured and preferential creditors.

Administrators often sell the business of the company as a going concern, thereby realising more value, particularly for its goodwill, than would be the case in a liquidation. A going concern sale also usually helps enhance debtor realisations. In some cases, the sale is achieved in an accelerated timeframe, which in appropriate instances may be on the same day or even simultaneously as the administrators are appointed (a so called "prepackaged" sale). In this situation the sale of the business is agreed and terms are negotiated and documented before the administrators are appointed with the sale taking place immediately or shortly after appointment.

The administration ends when the company is either rescued and returned to solvency, often following some sort of restructuring, or when the assets have been realised and either the administrators have (i) made a distribution to creditors or (ii) placed the company into liquidation in order that the liquidators can make a distribution to creditors. In either of the latter cases the company is subsequently dissolved.

Company voluntary arrangement

A CVA is a statutory process by which a company may bind all of its unsecured creditors into a compromise or arrangement provided that it is approved by 75% of creditors in value voting on the proposal as a single class, and that no more than 50% of unconnected creditors vote against it. A CVA may be used to implement arrangements with any unsecured creditors, but has been most frequently (and effectively) used in recent years to restructure a portfolio of real estate leases, providing for reductions in rent or surrender of unwanted leases. It may not affect the rights of secured creditors without their consent.

Unlike in liquidation and administration, the directors of the company remain in active office in a CVA and the business will typically continue to operate under the directors' control while the CVA is proposed and implemented. Unlike a Scheme of Arrangement or Part 26A Restructuring Plan, there is no court hearing to approve a CVA. The court will only become involved if one or more creditors seek to challenge the CVA after its approval.

The CVA process may be combined with administration or the standalone moratorium (see response to question 17).

Scheme of Arrangement

A Scheme of Arrangement is a statutory process by which a company may bind a minority of its creditors into a compromise or arrangement approved by a larger majority, but unlike a CVA it involves at least two court hearings and may affect the rights of secured creditors.

A Scheme is available to solvent and insolvent companies and is not exclusively used in restructuring situations. However due to its flexibility and reputation for legal certainty, it had, prior to introduction of the Restructuring Plan, become the primary restructuring process for companies with medium to large balance sheets involving secured debt and, often, complex capital structures. This flexibility partly derives from the ability to divide creditors into separate classes for the purposes of voting. Only those classes of creditors whose rights are affected by the Scheme are required to be consulted. The composition of the classes proposed is considered by the court at the first of two hearings, known as the "convening" hearing, at which the court will direct meetings to be convened to approve the Scheme. Following the convening hearing, the company will circulate an explanatory document to its creditors explaining the proposed Scheme and providing sufficient information to enable the creditors to consider it and vote.

Class meetings are held and in order to proceed further the Scheme must be approved by 75% in value and a majority in number of those voting at each class meeting. Once voting has taken place at each of the class meetings, the Scheme returns to court for a further hearing at which, assuming each class voted in favour, the court will consider whether or not to exercise its discretion to sanction the Scheme. If the court does sanction the Scheme, the compromise or arrangement will become binding on all affected creditors.

A Scheme of Arrangement does not benefit from its own moratorium but may be combined with administration or the standalone moratorium (see response to question 17).

Schemes of Arrangement are available to non-UK companies if they have a sufficient connection with the UK. A sufficient connection might exist if, for example, the company has significant assets within the jurisdiction, or debts governed by English law, and foreign companies may engage in "forum shopping" and can create a connection to the UK to bring it within the jurisdiction of the UK courts in order to take advantage of the Scheme of Arrangement procedure.

Part 26A Restructuring Plan

The Restructuring Plan was introduced in June 2020 and is similar to a Scheme of Arrangement in both form and procedure, but with certain important differences. A Restructuring Plan is only available to companies facing (or who are likely to face) financial difficulties. Dissenting creditors can be subject to "cross-class cram down" by the court. Subject to the Plan being approved by 75% in value (with no requirement for there also to be a majority by number) of creditors in any one class that has a genuine economic interest in the company in the "relevant alternative" (being whatever the court considers is most likely to occur if the Plan were not sanctioned), it may be sanctioned by the court even if another class of creditors does not achieve a 75% majority in favour. This is subject to any dissenting class or classes being considered to be no worse off under the Plan than they would be in the relevant alternative.

Like a Scheme there must be an initial court hearing, an explanatory statement, a set of class meetings to vote on the Plan, and a final court hearing to sanction the Plan.

Restructuring Plans have been used effectively in a number of significant restructurings across a range of sectors. The ability to seek cross-class cram down has enabled the Restructuring Plan to be used to implement restructurings in cases where a Scheme of Arrangement or CVA would not have been possible. To obtain an order from the court to cram-down one or more class of creditors the proponents of the Plan must establish what the relevant alternative is and provide valuation and other evidence to convince the court that its view of that relevant alternative is the most likely consequence if the Plan is not approved. They must also demonstrate that the dissenting class or classes would be no worse off under the Plan than they would be in that alternative. In many cases, the relevant alternative would be a liquidation or administration of the company, but the court will need to be persuaded and satisfied that the company would be most likely to go into liquidation or administration absent a successful Plan. The law in this area and the court's approach to exercising its discretion to sanction a Restructuring Plan, with or without cross-class cram down, is developing rapidly as more Plans come before it.

Like a Scheme, the Restructuring Plan does not benefit from its own moratorium but may be combined with administration or the standalone moratorium (see response to question 17).

The Restructuring Plan is also available to non-UK companies if they have a sufficient connection with the UK and again there may be forum shopping and steps taken to bring a foreign company within the jurisdiction of the UK courts.

Standalone Moratorium

Also introduced in June 2020, a company may apply for a standalone moratorium to provide it with time to implement a rescue, including, but not necessarily, through the implementation of another restructuring procedure such as a Restructuring Plan, Scheme of Arrangement or CVA.

This is available where (i) a company is, or is likely to become, unable to pay its debts; and (ii) it is likely that the moratorium would result in the rescue of the company as a going concern. However, the moratorium is limited by not being available to certain companies, including insurers, banks, investment firms, parties to 'capital markets arrangements' and certain other financial services. The capital market exception will exclude many companies that have issued bonds in excess of £10 million in value.

If the company is eligible, in most cases the moratorium can be commenced by the directors filing certain documents with the court. A licensed insolvency practitioner is appointed as "monitor", who supervises the moratorium, but unlike an administrator does not take control of the company in place of the directors. The directors remain in control of the company but must seek the consent of the monitor before causing the company to enter into certain transactions.

The moratorium restricts the enforcement of 'pre-moratorium debts' (indebtedness incurred by the company prior to moratorium) and 'moratorium debts' (indebtedness incurred by the company during the moratorium).

Pre-moratorium debts are subject to a payment holiday, other than certain significant exceptions, namely capital markets arrangements, bank debt and certain other financial obligations, contracts secured by a financial collateral arrangement, rent, goods and services, salary payments, and expenses of the monitor.

Unpaid moratorium debts and, with certain exceptions and exclusions, 'priority pre-moratorium debts' are granted super-priority status or protection from being compromised in subsequent insolvency or restructuring proceedings commenced within 12 weeks of the end of the moratorium.

The moratorium prohibits:

- involuntary commencement of administration or winding up/liquidation
- forfeiture or re-entry of leaseholds
- commencement or continuation of legal process
- enforcement of most security interests (including the crystallisation of floating charges)

A moratorium initially lasts 20 business days but may be extended by the directors by another 20 business days provided that certain conditions are satisfied (including paying the debts that the company is required to pay during the moratorium). If a further extension is required, the directors must obtain the consent of the pre-moratorium creditors or an order from the court.

The maximum duration of a moratorium is one year but it must be terminated early by the monitor in certain circumstances including where the monitor forms the view that it either has succeeded in rescuing the company or that is no longer likely to succeed. It may also be terminated by the court.

Receivership and administrative receivership

Receivership is not an insolvency proceeding in itself but is frequently used as an enforcement process in a distressed or insolvency context, in particular where a secured creditor holds a mortgage or fixed charge over real estate assets or shares. A receiver can sometimes be appointed by a secured creditor over a single asset as an alternative to commencing administration, and in some instances this will be more cost-effective and efficient. There are various types of receivers, including statutory ("LPA Receivers"), contractual ("Fixed Charge Receivers") and those appointed by the court ("Court Appointed Receivers"). The process of administrative receivership now has a very limited role, but remains available in some circumstances, for example to certain secured parties in structured finance transactions. Where it is available, the administrative receiver displaces the directors, has additional statutory powers to a typical receiver, and their appointment may prevent the appointment of an administrator.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

Liquidation

In a compulsory winding up creditors may not commence or continue legal action against the company except with leave of the court but may enforce security interests. In voluntary winding up there is no automatic restriction on enforcement action, but the court may grant a stay on the application of the liquidator in appropriate cases.

Administration

Creditors are prohibited from enforcing most types of security against a company in administration, except with the consent of the administrator or the permission of the court. In addition, legal actions may not be commenced or continued against the company while it is in administration. An interim moratorium may also begin prior to the commencement of administration proceedings if either a "notice of intention to appoint administrators" or an administration application is filed or presented at the court. Certain security interests over financial collateral may be enforced during an administration moratorium (including where neither party to the transaction is a bank).

An administrator may deal with floating charge assets during the administration without consent of the secured creditor and may apply to the court to deal with fixed charge assets should the secured creditor not agree to provide a release on any sale. An administrator may also require a receiver appointed by secured creditors prior to the commencement of administration to vacate office.

Standalone Moratorium

A standalone moratorium also prohibits the enforcement of most security interests for the duration of the moratorium, except where the court grants permission to do so. Certain security interests over financial collateral may be enforced during the standalone moratorium (including where neither party to the transaction is a bank).

CVA

A CVA does not of itself prevent enforcement of security but it may be combined with a stand-alone moratorium or proposed as an exit to an administration proceeding in which case the moratorium arising in those procedures will apply.

Schemes of Arrangement and Restructuring Plans

Neither a Scheme of Arrangement nor a Restructuring Plan has the benefit of an automatic moratorium but may be combined with a stand-alone moratorium or proposed as an exit to an administration proceeding.

In some cases, a Scheme may impose an effective moratorium on creditors by its terms, for example while a restructuring is implemented. A company proposing a Scheme of Arrangement or a Restructuring Plan could also apply to the court on a case-by-case basis to invite the court to stay individual legal actions by creditors in circumstances where a proposed restructuring has received widespread approval (for example through a restructuring support agreement or lock-up agreement) but has not yet progressed all the way through the Scheme or Plan process.

The lack of any automatic moratorium has not prevented Schemes and Plans from effectively restricting enforcement rights. One of the reasons is that Schemes and Plans tend to affect groups of creditors that are governed by contractual intercreditor, loan or bond provisions, such as majority-rule provisions and contractual standstills and these tend to limit the ability of minority creditors within such groups to take action that would circumvent the proposed Scheme or Plan. They are often proposed with the agreement of major creditors who will enter into lock-up agreements.

Receivership

The appointment of a receiver in relation to one or more assets of a company does not prevent another creditor with security over other assets of the company from enforcing that security. However, the appointment of an administrative receiver, in the limited circumstances where that is possible, would affect the enforcement of security by other creditors.

18. Please comment on transactions voidable upon insolvency.

There are a number of provisions under English law by which a transaction could be set aside in insolvency proceedings. The most relevant to creditors taking security are the provisions of the Insolvency Act 1986 that concern void floating charges, transactions at an undervalue and preferences.

Void floating charges

If a company creates a floating charge within a specified period ending with the “onset of insolvency”, it will be invalid except to the extent that new money or other value is provided at the time or after creation of the floating charge. The relevant “look back” period is one year for floating charges granted to persons who are not connected with the company, and two years for connected persons. The “onset of insolvency” refers to the commencement of insolvency proceedings being, in broad terms, the earliest of the date of initiation of administration, liquidation or winding-up via the court or the date of the company entering administration or liquidation.

A floating charge granted to an unconnected person will not be invalid under this provision unless the company created it at a time when it was unable to pay its debts (on a cash-flow or balance sheet basis) or if it became unable to pay its debts in consequence of the transaction.

A floating charge that comes within this provision is void rather than voidable, and a court order is not required to render it ineffective.

Transactions at an undervalue

A liquidator or administrator may apply to court for an order to set aside as a “transaction at an undervalue” any transaction entered into by a company within a two-year period ending with the onset of insolvency on terms that provide for the company to receive either no consideration, or a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by it.

A transaction cannot be set aside under this provision unless at the time it is entered into the company was unable to pay its debts or became unable to pay its debts (on a cash-flow or balance sheet basis) in consequence of the transaction. A court would not set aside such a transaction if it were satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business and that at the time it did so there were reasonable grounds for the belief that it would benefit the company.

A third party who was not a party to the transaction with the company and who acquired an interest in the transferred property in good faith and for value cannot be prejudiced by any order made by the court.

Preferences

A liquidator or administrator may apply to court for an order to set aside as a preference anything done or suffered to be done by a company within a specified period ending with the onset of insolvency that has the effect of putting a creditor or guarantor in a better position, in the event of that company going into insolvent liquidation, than that person would have been in if the transaction had not occurred. The relevant period is six months in the case of a person who is not connected with the company, and two years where the person is connected. The transaction may not be set aside unless the company was unable to pay its debts or became unable to pay its debts (on a cash-flow or balance sheet basis) in consequence of the transaction. However, the court would not make such an order if it was satisfied that the company which gave the preference was not influenced to give it by a desire to put that person in such better position. Such an influence is presumed to be present if the relevant person is connected with the company (but this presumption may be rebutted with evidence).

Granting security to a previously unsecured creditor may be a preference if the desire to prefer is present.

A third party who was not a party to the transaction with the company and who acquired an interest in the transferred property in good faith and for value cannot be prejudiced by any order made by the court.

Transactions defrauding creditors

A transaction at an undervalue can be set aside by the court if the purpose of the transaction was to put assets beyond the reach of a person who is making, or may make, a claim against the company. The company does not need to be insolvent at the time of the transaction.

An application can be made by a liquidator of the company, an administrator or, with leave of the court, any victim prejudiced by the transaction.

Extortionate credit transactions

A liquidator or administrator of a company can apply to court to set aside an extortionate credit transaction entered into by the company within three years of the onset of insolvency. A transaction is extortionate if, having regard to the risk accepted by the person giving credit, its terms require grossly exorbitant payments to be made in respect of the provision of credit or it otherwise grossly contravenes ordinary principles of fair dealing. This is unlikely to be relevant for normal lending or credit type transactions but has been added for completeness.

19. Is set off recognised on insolvency?

In liquidations and administration proceedings where the administrator makes a distribution to creditors, set-off is automatic and self-executing as at the commencement of the liquidation or, in administration, the date the administrator gives notice of intention to declare a dividend. At such date, a mandatory account is taken of mutual dealings between the company and its creditors, which, with some exceptions, are automatically reduced to net claims against either the company or the relevant creditor. If the resulting net balance is owed by the company, the creditor will typically have a claim in the insolvency for the net amount. If the net balance is due to the company it will have a claim against the creditor for payment of the net balance only.

To the extent that contractual set-off and netting provisions operate and are completed before the mandatory account is taken, or are consistent with the outcome of mandatory set-off, they will generally be recognised by the liquidator or administrator. An example of where contractual set-off provisions might not be consistent with mandatory insolvency set-off is where the contractual provision requires multi-party or set-off across group companies. This could produce a result that is inconsistent with the entity-by-entity account taken by the liquidator or administrator, and in such a case the mandatory insolvency set-off would prevail.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

Goods that are subject to effective retention of title are unlikely to be assets of the company and, if so, would not fall within the scope of a lender's floating charge when it crystallises on insolvency. The party with a valid retention of title claim would therefore take priority. Similarly other assets held but not owned by the company would fall outside the scope of a floating charge, such as assets subject to hire agreements or held on trust. Rights for retention of title are usually considered by English courts according to the laws of the jurisdiction where they are located (lex situs).

A creditor holding an effective first-ranking fixed charge security interest would generally rank ahead of any statutory or other claims that might otherwise have priority. Creditors with second or lower ranking fixed charges would rank next in the waterfall after payment of the first fixed charge holder.

A floating charge that crystallises on or before insolvency will continue to be treated as a floating charge for the purpose of determining distributions in an insolvency proceeding.

Distributions made to a creditor holding a floating charge are subject to a number of claims having statutory priority, and would also rank after the holders of fixed charge security or prior floating charges. A floating charge ranks after, among other claims:

- certain debts of a standalone moratorium where liquidation or administration takes place within 12 weeks of the moratorium coming to an end;
- certain preferential debts, including some tax claims (e.g. VAT, PAYE, National Insurance and Construction Industry Scheme deductions) and employee liabilities (up to £800 arrears of wages per employee plus holiday pay), contributions to occupational and state pension schemes and certain depositors and deposit compensation schemes in bank insolvencies;
- a "prescribed part" of the company's assets set aside for unsecured creditors on a sliding scale up to a maximum of £800,000; and
- the costs and expenses of the administration or liquidation, including the remuneration of the office holders.

UK law also generally respects the freedom of creditors to voluntarily, by agreement, subordinate their claims to the claims of other creditors. Intercreditor or subordination agreements are not considered to be contrary to public policy and will generally be recognised and applied by liquidators and administrators.

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

The Economic Crime and Corporate Transparency Act (ECCTA) 2023 was passed on 26 October 2023 and is in the process of coming into force. ECCTA is part of a wider package of legislative reform aimed at preventing abuse of UK corporate structures and tackling economic crime. One of the main concerns for lenders (foreign or otherwise) lending into the UK will be the changes to the role of Companies House. Changes will include new identity verification for company directors, persons with significant control, and those delivering documents to the Registrar of Companies; this is expected to come into effect in 2025/2026. These requirements are likely to impact the process for registration of security at Companies House.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

Alternative credit providers (in particular credit funds) have become an increasingly popular source of funding in the UK in the years after the 2008 financial crisis, which led to traditional banks becoming increasingly constrained in the way they lend. A report by the Alternative Credit Council in 2020 found that private credit managers were providing an estimated £100bn of funding to 2,000 UK firms.[1]

Private credit lenders are a type of alternative credit provider that is particularly prevalent in the leveraged/acquisition finance market but are now increasingly being seen in the corporate lending and real estate finance sectors. In the UK, a large number of these transactions are executed via a unitranche structure, being a single tranche term loan with a blended senior and junior interest rate, usually documented under a single set of loan documents. Typically a private credit lender will provide the term debt and a clearing bank will provide a revolving credit facility. Private credit lending typically allows for greater flexibility in lending terms (for example greater initial leverage, fewer financial covenants, more room for negotiation of those covenants and considerable freedom for adaptation of the terms of the other terms). We anticipate that debt funds will continue to grow their share of the UK lending market.

Footnote(s):

[1] Alternative Credit Council. 2020. Financing the Economy 2020

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

2019 Hague Convention

Importantly for lenders, under the 2019 Hague Convention, subject to certain exceptions, contracting states must recognise and enforce judgments including those given by a court designated under an asymmetric jurisdiction clause (for example where the lender can bring proceedings in any jurisdiction of its choice, but the obligors can only bring proceedings in the English courts). Asymmetric jurisdiction clauses are beneficial to lenders as they provide flexibility as to where to bring proceedings and have historically been common in finance documents.

Prior to entry into force of the 2019 Hague Convention, lenders could seek to have judgments given in relation to disputes arising out of English law finance documents enforced in the EU under the 2005 Hague Convention, however this only applies to judgments given by a court designated under an exclusive jurisdiction clause (for example where both parties can only bring proceedings in the English courts) and does not apply to contracts that include asymmetric jurisdiction clauses, meaning less flexibility for the lender.

It is worth noting that once in force, the 2019 Hague Convention will not have retrospective effect. It will apply only where the convention was in force as between the relevant states when the proceedings that resulted in the judgment were commenced.

Environmental, Social and Governance (ESG)

ESG is becoming increasingly important to borrowers and lenders and a focus on ESG has become an expectation for consumers, businesses and society as a whole. Consequently, this has become a key consideration for the structuring of deals and when drafting secured lending documentation. The focus on ESG has led to the development of three types of ESG lending products in the UK loan market:

- Green loans – loans where the proceeds are used for environmental benefit, such as mitigating climate change or preventing the loss of biodiversity;
- Social loans – loans where the proceeds are used for social benefit, such as fair access to opportunities for disadvantaged groups;
- Sustainability-linked loans – loans which aim to incentivise the borrower's achievement of sustainability objectives typically through a margin reduction

It is likely that we will see an increase in the use of these type of loans because meeting ESG requirements is a major business opportunity for lenders and borrowers, due to increased investor demand for such imperatives. There are also reduced risks associated with ESG, as sustainable businesses are less likely to default, due to reduced environmental, social and governance risks. In particular, sustainability-linked provisions are now becoming fairly commonplace in leveraged/acquisition finance transactions.

Moveable Transactions (Scotland) Act 2023

The Moveable Transactions (Scotland) Act 2023 (**MTSA**) came into force on 1 April 2025. Although this is a Scots law development, MTSA constitutes a major overhaul of secured transactions law in Scotland and will therefore impact lending transactions with a Scottish element.

MTSA creates a new form of fixed security known as a statutory pledge, which can be granted over moveable assets such as equipment and goods and also over shares and intellectual property. A statutory pledge can be granted by a company, LLP, limited partnership, general partnership or sole trader (with some restrictions and in respect of assets used for the purpose of the sole trader's business). MTSA establishes a new online and searchable Register of Statutory Pledges (**RSP**). For a statutory pledge to take effect, it must be effectively registered at the RSP.

The statutory pledge has been designed to enable a pledge to be created without delivery of the relevant asset to the lender, which has been required under Scots law before now. It will therefore allow borrowers to continue to use such assets whilst pledged, and for future acquired property to be covered under the pledge provided it is properly described in the pledge document.

MTSA removes the need for the lender (or its nominee) to be registered as a shareholder in the company's register of members. This has been a cause for concern for lenders, who are anxious to avoid triggering legislation that relates to control of companies based on share ownership.

MTSA also makes significant changes to Scots law regarding assignation of claims (transfers of contractual rights or debts). Under the previous law, where a lender took an assignation in security, notice must be given to the contract counterparty (unlike in English law where it is possible to take an equitable assignment without giving notice). It was also not possible to take an assignation of future assets. It is therefore expected that the changes will have a significant impact on invoice finance transactions in particular. MTSA provides for the creation of a new searchable Register of Assignations (**RoA**), and assignations will now be capable of being electronically registered as an alternative to giving notice (intimation) to the counterparty. It should be noted that the RoA does not replace the need for registration at Companies House.

Building Safety Act 2022 (BSA)

Following the Grenfell Tower fire in June 2017, the government commissioned an independent review of building regulations resulting in the passing of the BSA. The BSA implements a comprehensive overhaul of building safety legislation with a particular emphasis on tall buildings. Lenders involved in funding these buildings may wish to carry out due diligence and include specific provisions in lending and security documents to mitigate and regulate the risks (including the consequences of enforcing security).

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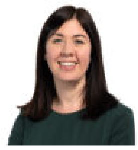

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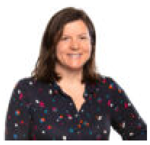

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