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United Kingdom

RESTRUCTURING & INSOLVENCY

Contributor

Kirkland & Ellis International LLP

Partha Kar

Partner | partha.kar@kirkland.com

Kate Stephenson

Partner | kate.stephenson @kirkland.com

Zoe Stembridge

Associate - Restructuring | zoe.stembridge@kirkland.com

This country-specific Q&A provides an overview of restructuring & insolvency laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
RESTRUCTURING & INSOLVENCY

1. What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

The type of security granted over an asset in England and Wales largely depends on whether legal title (i.e. ownership in the ordinary sense) to the secured asset is intended to be transferred to the secured party. Security can be in the form of a mortgage or security assignment (transfer of title, security provider retains possession) or a charge (no transfer of title, security provider retains possession). There are also other types of security which apply where the secured party is in possession of the secured asset, e.g. liens and pledges.

Mortgages: To create a mortgage, the legal or beneficial title to the secured asset must be transferred to the security-holder. Mortgages are most commonly granted over real estate, but are also seen in movable property such as ships and airplanes. Legal mortgages must be in writing and executed as a deed by the security provider (the mortgagor). To take effect as a legal mortgage, a mortgage over registered title must be registered at the Land Registry. If the security is not registered, it will usually take effect as an equitable mortgage, which can undermine the strength of the security in the case of competing claims.

Charges: A charge may be either “fixed” or “floating”; secured lenders will usually aim to ensure that as much of their security is fixed as possible. A fixed charge requires the security provider (the chargor) to hold the charged asset (e.g. shares) to the order of the secured party (the chargee); while a floating charge permits the chargor to deal with the asset in the ordinary course of business (the floating charge hovers above a shifting pool of assets such as cash, stock and inventory). Charges are easier to grant than legal mortgages as there are fewer formalities involved. Charges must be in writing and signed by the security provider.

Registration and formalities: Security granted by an English company or LLP must be registered at Companies House within 21 days of creation or it may be void on insolvency and against third parties. Other types of security, e.g. over intellectual property, require further formalities; certain mortgages and charges over interests in land must be executed as a deed.

2. What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

Enforcement options depend on the nature of the security and the provisions of the security document, amongst other matters.

Receivership: A secured creditor may enforce its security by appointing a receiver (usually an insolvency practitioner) over the specific secured asset(s), in accordance with the terms of the security document. The appointment can be made without court involvement. Following the appointment, the receiver will have broad powers specified in the security document, including to collect in any income from the asset and to sell it. (Administrative receivership – which involves the appointment of an insolvency practitioner over the whole of the company’s property – is now available in only limited circumstances.)

Power of sale: A creditor may also exercise its power of sale under the security document (if they have a legal mortgage or if the terms of the security document otherwise permit). This permits the creditor to sell the secured asset, without needing to apply to court, and use the proceeds to settle the secured liabilities. A receiver or a creditor selling secured assets is obliged to get the best price reasonably obtainable in the circumstances; no public auction is required unless required by the security document. One advantage of appointing a receiver is that the lender is not usually responsible for the receiver’s conduct.

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Administration: If a creditor has security over all or substantially all of the company's assets (including a floating charge), the creditor would usually have a "qualifying floating charge" (or QFC). Once their security becomes enforceable, a QFC holder may appoint an administrator (a licensed insolvency practitioner) over the company quickly and easily without going to court. This is a popular enforcement option as it creates a moratorium on other enforcement action against the company (see also Question 7.) and potentially allows a sale of the business as a going concern, thereby maximising value.

Appropriation: Where the security constitutes a "financial collateral arrangement", under the Financial Collateral Arrangements (No. 2) Regulations 2003, the enforcement option of appropriation is available. "Financial collateral" includes cash and financial instruments (including shares); the security arrangement must constitute the requisite degree of "possession or control" to qualify as a "financial collateral arrangement". The remedy of appropriation permits the secured creditor to appropriate (essentially, take possession of) the financial collateral, without applying to court. The power depends on the terms of the security document. If the value of the financial collateral appropriated exceeds the secured debt, the secured creditor must account to the security provider for the excess.

Foreclosure: In theory, the possibility of foreclosure constitutes an additional enforcement option, but this is uncommon in practice for various reasons.

3. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

Test for insolvency: "Insolvency" is not expressly defined under English law but can generally be demonstrated if (1) a debtor is unable to pay its debts as they fall due (the "cash flow" test); or (2) its liabilities (including contingent and prospective liabilities) exceed its assets (the "balance sheet" test). A company will also be insolvent if it fails to comply with a statutory demand for a debt of over £750 or it fails to satisfy enforcement of a judgment debt.

Filing obligations: There is no obligation on directors to commence insolvency proceedings when a company is insolvent. However, directors may be personally liable if they breach certain duties, as set out in Question 14 below. For example, directors can be liable for wrongful trading if they knew or ought to have known that there was no reasonable prospect of the company avoiding insolvent liquidation or administration and, from that point, failed to take every step to minimise potential losses to creditors. There are also potential criminal sanctions for fraudulent trading (which includes where the business was carried on with the intent to defraud creditors).

Covid-19-related adjustments: To provide breathing space for directors to trade through the Covid-19 crisis, when assessing liability for wrongful trading the courts will assume directors are not responsible for any worsening of a company's financial position in the periods between 1 March and 30 September 2020 and 26 November 2020 to 30 June 2021. This applies to directors of most companies, though notably not banks, insurance companies or where the company is party to certain capital market arrangements.

Use of insolvency tests: The insolvency tests are used to establish whether:

- there are grounds for the company to enter liquidation or administration;
- a company was "insolvent" for the purpose of antecedent transaction claims subsequently brought by an insolvency officeholder; and
- there has been an event of default under the company's finance documents.

4. What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

The key insolvency procedures are administration, liquidation (also known as winding up) and company voluntary arrangement. Outside formal insolvency proceedings, schemes of arrangement have also been used to effect restructurings. A new restructuring plan procedure was introduced in June 2020; although it is a Companies Act procedure, the English court has held that the restructuring plan procedure constitutes a bankruptcy/insolvency proceeding for the purposes of the bankruptcy exclusion to the Lugano Convention; see further Question 8.

Administration: This is the key insolvency procedure with a view to company rescue. Similar to the U.S. Chapter 11 regime, a company that files for

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administration has the protection of a statutory moratorium to allow it to be rescued or reorganised or its assets realised. Unlike in Chapter 11, management lose control of the company to an administrator (who is a licensed insolvency practitioner and an officer of the court). However, 2020 saw a few high-profile "light touch" administrations, in which administrators consented to the continued exercise of management powers by the directors, subject to certain restrictions.

The administrator will seek to rescue the company as going concern in the first instance, but if that is not possible, the goal of the administration is to achieve a better result for creditors than in a liquidation (or, failing that, a realisation of the company's assets). The administrator's duties are owed to the creditors as a whole. If the administration has not come to an end within a year, the administration will end automatically unless its term is extended in advance.

"Pre-pack" administrations are particularly prevalent in the UK: an arrangement under which the sale of all or part of the company's business or assets is negotiated with a purchaser (by putative administrators) prior to the appointment of administrators. Historically, the administrators have effected the sale almost immediately after appointment, without the sanction of the court or creditors. However, from 30 April 2021, substantial disposals by administrators of the company's business or assets to connected party purchasers (defined broadly and including by reference to certain former connections) within the first 8 weeks of an administration require advance approval from either the creditors or an independent evaluator.

Liquidation: This is a dissolution procedure involving the termination of the company (and, ultimately, its removal from the register). It involves the appointment of liquidators who collect and sell the company's assets and distribute the proceeds to creditors (and members, in the unlikely event of a surplus); directors lose control.

Company voluntary arrangement: This insolvency procedure permits a company to make a binding compromise with its creditors. A CVA cannot compromise secured creditors without their consent. A CVA is implemented out of court unless it is challenged. A CVA requires the consent of at least 75% in value of unsecured creditors; the CVA will not be approved if more than half of the total value of unconnected creditors vote against the CVA. In recent years, CVAs have been used extensively to compromise companies' leasehold obligations to landlords, especially in the retail and casual dining sector.

Special regimes apply for certain types of companies such as financial institutions, certain regulated entities and charities.

5. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?

General ranking: On the insolvency of a debtor, proceeds from the realisation of assets must be distributed by an insolvency practitioner, in simple terms, as follows: fixed charge holders; expenses in the insolvency proceedings; preferential creditors; prescribed part creditors; floating charge holders; unsecured creditors; statutory interest on provable debts; subordinated creditors (where appropriately worded); and finally, shareholders. Where winding-up/administration proceedings are begun within 12 weeks following the end of any new, standalone, moratorium, unpaid moratorium debts and unpaid priority pre-moratorium debts (see question 7.) are paid after fixed charge holders but in priority to all other categories.

Preferential creditors: Preferential creditors include certain (limited) employee remuneration claims and, since 1 December 2020, HMRC (the UK tax authority) in respect of certain tax debts, including VAT and PAYE. In addition, a "prescribed part" is carved out of the proceeds of floating charge realizations, which is made available to satisfy unsecured debts, up to a cap of £600,000 (or, where the relevant floating charge was created on or after 6 April 2020, £800,000); the increased cap also applies where the relevant floating charge was created before 6 April 2020 if a later floating charge (over any of the company's assets) ranks equally or in priority.

Equitable subordination: There is no concept of equitable subordination in England and Wales.

6. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Certain pre-insolvency transactions may be challenged under the Insolvency Act 1986.

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Grounds of challenge: Possible grounds for challenge include transactions at an undervalue, preferences, extortionate credit transactions, avoidance of floating charges, transactions defrauding creditors and property dispositions after the commencement of a winding up. Each of these grounds essentially aims to unwind transactions that would otherwise have frustrated or allowed the company to avoid the payment of creditors on insolvency in accordance with the statutory priority of claims. In most cases, only an administrator or liquidator of a company may bring a claim challenging a reviewable transaction (although claims for transactions at an undervalue and preferences can be assigned by the officeholder to any third party). However, where there is fraud, any party that is a victim of the transaction may make a challenge.

Look-back period: The look-back period ranges between two years prior to the commencement of insolvency proceedings where the transaction was with a connected party (including directors, shadow directors, and associated persons and companies) to six months for other parties.

Court order / impact on third parties: The court generally has a wide discretion to make any order it thinks fit for restoring the position to what it would have been but for the relevant antecedent transaction. There are protections for third parties who acted in good faith, for value and without notice of the relevant circumstances.

7. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

Stand-alone moratorium: The Corporate Insolvency and Governance Act 2020 introduced a new, stand-alone, moratorium to temporarily prevent creditors taking enforcement action in order to allow an eligible company a formal breathing space to propose and pursue a rescue plan. A company is only eligible for the moratorium where it is (and remains) likely that the moratorium will result in the rescue of the company as a going concern. However, broad capital markets exclusions render most bond issuers/guarantors (which includes many businesses in the retail, hospitality & consumer-facing sectors) ineligible for the moratorium.

Under the standalone moratorium (subject to certain exceptions):

- restrictions apply to the payment or enforcement of certain "pre-moratorium debts" for which a company has a payment holiday during the moratorium and "moratorium debts";
- no winding-up petition may be presented or winding-up order made;
- no administration may be commenced; and
- except with court permission (which cannot be sought to enforce a pre-moratorium debt for which the company has a payment holiday):
  - no steps may be taken to enforce security — with an important exception for the enforcement of financial collateral arrangements, such as security over shares;
  - no proceedings / legal process may be commenced or continued against the company or its property;
  - most floating charges may not be crystallized by the floating charge-holder;
  - no landlord may exercise any forfeiture rights; and
  - no steps may be taken to repossess goods under any hire-purchase agreement.

A notable exception is that payments falling due under a contract involving financial services (among other excluded categories) do not benefit from the payment holiday; if they are not paid, the moratorium cannot continue.

During the moratorium, a company is required to pay new debts/liabilities to which it becomes subject during the moratorium (moratorium debts) and certain pre-moratorium debts which do not benefit from a payment holiday (including accelerated financial debt, rent in respect of the moratorium period and wages and redundancy payments). If these amounts (other than accelerated financial debt) are not paid, they will get super-priority if the company enters administration or liquidation within 12 weeks following the end of the moratorium. Any scheme, CVA or restructuring plan in that 12 week period cannot compromise such liabilities without consent (and such creditors are prohibited from voting on such a scheme or restructuring plan, although not a CVA).

The moratorium generally prohibits secured creditors

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from appointing an administrator and enforcing their security (subject to certain exceptions, including enforcement of financial collateral arrangements).

Moratorium in administration: An automatic and wider moratorium applies when a company is in administration (and, in some circumstances, an interim moratorium pending appointment of administrators). The administration moratorium prohibits any steps/actions from being commenced or continued against the company and its property, except with the administrator's consent or the permission of the court. This includes preventing any secured creditor from enforcing its security interest (unless the security constitutes a financial collateral arrangement – see Question 2. above regarding the remedy of appropriation, which is exempt from the moratorium in administration).

Liquidation: In a compulsory liquidation, no action or proceedings can be continued or raised except with the leave of the court. Creditors may however take steps to enforce their security or repossess assets which are not actually owned by the company (such as goods subject to a retention of title clause). In a voluntary liquidation, there is no moratorium on legal proceedings against the company.

None of a scheme of arrangement, restructuring plan nor a CVA offers a moratorium (unless combined with the standalone moratorium or an administration). However, English courts have a general case management power to stay proceedings, which they may use e.g. to stay a winding up petition or enforcement of security where a company is in the process of a restructuring – as in the cases of Vietnam Shipbuilding (2013), Travelodge (2020) and Virgin Active (2021).

Extra-territorial effect of moratorium: Unlike in the U.S., a moratorium under English law does not purport to have extraterritorial effect. Its recognition under the laws of another jurisdiction will depend on applicable national law.

8. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?

In addition to administration and company voluntary arrangements, discussed at Question 4. above (insolvency proceedings which can also be considered restructuring/rescue procedures), a company may utilize a scheme of arrangement or a restructuring plan to reach a compromise agreement with its creditors whilst the existing management continue to operate the business. The new restructuring plan procedure was introduced in June 2020 via the Corporate Insolvency and Governance Act 2020. The key difference between schemes and restructuring plans is that cross-class cram-down is possible in the latter, as explained below.

Schemes have proven effective to implement a variety of restructurings, including amends-and-extends, standstills, debt-to-equity swaps and other comprehensive reorganizations. Given the possibility of binding a dissenting class, the restructuring plan procedure increases the possibility of compromising operational as well as financial creditors.

As at the date of publication, 10 restructuring plans have been sanctioned by the court: Virgin Atlantic Airways, PizzaExpress, DeepOcean, Premier Oil, Smile Telecoms (two plans), gategroup, Virgin Active, Amicus Finance and ED&F Man. Of these, DeepOcean, Smile Telecoms, Virgin Active, Amicus Finance and ED&F Man involved binding a dissenting class. The English court declined to sanction the restructuring plan of Hurricane Energy – the only restructuring plan yet to be refused approval by the English court.

Entry requirements and court involvement: Both schemes of arrangement and restructuring plans are Companies Act processes, which require two court hearings, including court sanction. (The availability of restructuring plans is restricted to companies in some present or prospective financial difficulties affecting the company's ability to carry on business as a going concern, which the plan must be intended to eliminate or reduce. No such requirement applies for a scheme of arrangement; it is possible to have a fully solvent scheme of arrangement.)

The company must have a "sufficient connection" to the UK in order to propose a scheme or plan. There is significant precedent for companies taking steps to establish a "sufficient connection" specifically to be able to propose a scheme or plan, and a variety of ways of doing so.

Approval threshold: Stakeholders vote in classes according to their rights both before and following the scheme/plan.

For a scheme: the court has discretion to sanction the scheme (and thereby bind all affected stakeholders, whether secured or unsecured and whether or not they consented or voted) if the scheme has been approved by

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at least 75% in value and over 50% by number of those voting, **in each class**.

For a restructuring plan: every creditor or shareholder whose rights are affected by the plan must be permitted to vote. However, an application can be made to exclude classes of creditors / shareholders from voting where the court is satisfied that "none of the members of that class has a genuine economic interest in the company". The court has discretion to sanction the plan (and thereby bind all affected stakeholders, whether secured or unsecured and whether or not they consented or voted) if the scheme has been approved by at least 75% in value of those voting, **in at least one class** who would receive a payment, or have a genuine economic interest in the company, in the event of the "relevant alternative", provided the court is satisfied that none of the members of any dissenting class(es) would be any worse off under the plan than they would be in the event of the "relevant alternative". The "relevant alternative" is whatever the court considers would be most likely to occur if the plan were not confirmed. The court's discretion as to whether to sanction a plan gains even greater importance given the possibility that not every class may have approved the plan; the court may decline to sanction a plan if it does not consider it would be "just and equitable" to do so.

9. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

There is no express provision for super-priority rescue financing in an insolvency process, such as the DIP financing regime available under the U.S. Bankruptcy Code. However, credit extended to a company in administration may be given priority over unsecured claims by virtue of classification as an administration expense.

Additionally, new debts and liabilities to which a company becomes subject during a standalone moratorium are given super priority (ranking only behind fixed charge creditors) if unpaid and if the company enters administration or liquidation within 12 weeks following the end of the moratorium. Any scheme, CVA or restructuring plan in that 12 week period cannot compromise such liabilities without consent (and such creditors are prohibited from voting on such a scheme or restructuring plan, although not a CVA).

To grant new financing super-priority, an intercreditor agreement is the simplest option. Where it is not possible to reach agreement with existing creditors, a scheme of arrangement or restructuring plan may be used in certain circumstances to 'cram-down' a proposal on a dissenting minority; this could include an offer of new financing to the debtor on a super-priority basis.

We understand the introduction of a specific DIP financing regime remains under consideration by the UK Government.

10. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

Yes, in certain circumstances; historically most commonly seen in schemes of arrangement and now also in restructuring plans. Claims against third party guarantors may be released or amended by the scheme/plan if necessary for the successful operation of the scheme/plan (to avoid ricochet claims against the principal debtor). A release of claims against persons involved in the preparation, negotiation or implementation of a scheme/plan, and their legal advisors, is also permissible. Issues might, however, arise where a scheme/plan creditor has a more tangential claim against a third party.

11. Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities do they have? Are they permitted to retain advisers and, if so, how are they funded?

Since the financial crisis of 2007-2008, we have seen a rise in ad hoc creditor committees over formal co-ordination or steering committees. Ad hoc committees are self-formed groups of creditors that will co-ordinate among themselves and the debtor on the implementation of the workout. Although the size of these groups can vary (from a minority ad hoc committee to one that holds substantially all the liabilities of a debtor), the crucial difference between an ad hoc committee and a more formal co-ordination or steering committee is that the former may act unilaterally, and is not necessarily representative of the wider stakeholder classes. Within this reduced scope, ad hoc committees can often act more quickly and more flexibly (but may only speak for one part of the capital structure).

An ad hoc committee will usually need to engage legal and financial advisers. It is a market custom (and often required in bank facility documentation) that the debtor

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pays the costs of creditors in connection with an event of default or in connection with any protection or enforcement of the security. This is usually memorialized in any waiver or new documentation entered into with the debtor for the workout.

12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

The general rule is that a company's contracts remain enforceable upon insolvency. Properly drafted, a retention of title clause will survive an insolvency filing.

Reliance by suppliers on *ipso facto* clauses – clauses that allow one party to a contract to terminate, or impose altered terms, solely on the basis of the insolvency of the counterparty – in contracts for the supply of goods and services is prohibited where the counterparty becomes subject to a relevant insolvency procedure (including the restructuring plan and the moratorium, but not including a scheme of arrangement). Furthermore, the supplier may not make payment of outstanding amounts (in respect of supplies made prior to the insolvency trigger) a condition of continuing supply. (Certain exceptions apply e.g. for financial services contracts and contracts related to aircraft equipment.)

There is also an 'anti-deprivation' principle which prohibits any contract from providing that property will transfer to another on the occurrence of an insolvency event.

In a liquidation or a distributing administration, statutory set-off applies where a creditor of the insolvent company is also a debtor of the company. Set-off is mandatory and automatic, and the relevant rules supersede all other contractual rights of set-off that are inconsistent with them.

A liquidator (but not an administrator) has the power to unilaterally disclaim onerous executory contracts to avoid incurring future liabilities.

13. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

An administrator can sell assets free and clear of security either with the relevant security-holder's consent or with a court order (provided that the proceeds are used to discharge the sums secured by the security).

Unlike in a solvent sale, a buyer from an administrator will generally be expected to acknowledge that it enters into the agreement without reliance on any warranties or representations. A buyer may also be expected to provide wide ranging indemnities to the administrator.

Credit bidding in an administration sale process is permitted (including where the credit bidder is an assignee of the original creditor, and whether or not the administration is a pre- pack administration). However, there is no specific legislation on this point. It will be up to the administrator to decide whether a particular deal is in the best interests of the creditors and should therefore be implemented.

The administrators must comply with relevant legislation, including "Statement of Insolvency Practice 16" in the case of pre-pack administrations (which are possible and common), which include certain marketing / valuation requirements. Greater protections/constraints apply in sales to connected parties (widely defined); in particular, administrators cannot make a substantial disposal of a company's property to a person connected with the company (defined broadly and including by reference to certain former connections) within the first 8 weeks of the administration, without either:

- the approval of creditors; or
- an independent written opinion obtained by the connected party purchaser; the opinion must meet certain qualifying conditions.

14. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?

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Directors of an English company owe fiduciary duties to the company itself. In the case of a healthy company, directors have a duty to act in a way most likely to promote the company's success for the benefit of its shareholders as a whole. However, in the zone of insolvency – when the directors know or should know that the company is or is likely (i.e. probable) to become insolvent – this duty shifts to the creditors of the company.

A breach of these duties may lead to directors incurring personal liability or being disqualified from acting as a director or from being involved in the management of a company for a specified period. In some instances, it may lead to a criminal prosecution.

The principal potential causes of action are: wrongful trading, fraudulent trading, and a claim for misapplication of company property / misfeasance. Directors are generally most cognizant of the wrongful trading offence. Wrongful trading is established where a director knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvent liquidation or administration, and the director failed to take every step to minimise potential losses for creditors.

In addition to financial penalties, these offences can lead to a disqualification order for future directorships.

Liability may extend to third parties in certain, fairly limited, circumstances. TUPE regulations may apply when assets are purchased out of an administration: where the business is being carried on is substantially the same as before, all liabilities of employment transfer to the purchaser. This will include redundancy costs and unfair dismissal claims.

The Pensions Regulator can exercise moral hazard powers over a connected third party that has acted in a way that has been materially detrimental to a defined benefit pension scheme of the debtor. The Regulator can currently issue a contribution notice against employers and their connected persons where relevant, demanding payment to remedy any shortfall in the pension scheme. Additional potential civil and criminal penalties were introduced in October 2021 under the Pension Schemes Act 2021.

Further, the European Commission and the Competition and Markets Authority have the power to reach behind the corporate veil when fines they have issued are left unpaid by an insolvent debtor and where there is a structural link with an economic successor entity.

15. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?

There is no automatic release for directors or other stakeholders when a company enters an insolvency or restructuring process. Directors may often want to conduct sales through an administrator if they are concerned about breaching director's duties, though this does not provide absolute protection as the courts have confirmed that directors' duties survive insolvency. Alternatively, directors or other stakeholders may be able to negotiate a release of liability contractually (e.g. within a restructuring agreement).

16. Will a local court recognise foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Does recognition depend on the COMI of the debtor and/or the governing law of the debt to be compromised? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

The UK has adopted the UNCITRAL Model Law on Cross Border Insolvency, via the Cross Border Insolvency Regulations 2006. This permits recognition of the foreign proceedings, and assistance for the foreign insolvency officeholder (including a moratorium), upon application to the court – usually a fairly predictable court procedure. The consequences of such recognition depends on the COMI of the debtor. Proceedings will only be recognised as "foreign main proceedings", for which there is an automatic stay, where the proceedings are opened in the jurisdiction where the debtor has its COMI.

However – critically – such recognition does not necessarily extend to recognition/enforcement of the plan of reorganization with the foreign proceedings. In essence:

- If debt (or shareholder rights) compromised under the plan are governed by English law, the English court will only recognize/enforce the compromise in respect of creditors(/shareholders) subject to the foreign proceedings – owing to the so-called "rule in

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Gibbs".

- For these purposes, creditors will be subject to the foreign proceedings if they were present in the foreign jurisdiction when the proceedings commenced, submitted a proof of debt or voted in the proceedings (among other things).
- A parallel UK process may therefore be required to compromise the English law debt, if not all creditors are subject to the foreign proceedings and if parties require certainty.

We understand the UK may issue a public consultation as to whether to adopt the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, to address the above concerns.

17. For EU countries only: Have there been any challenges to the recognition of English proceedings in your jurisdiction following the Brexit implementation date? If yes, please provide details.

N/A

18. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction? What are the eligibility requirements? Are there any restrictions?

Yes; the jurisdictional threshold varies according to the relevant procedure, and has fairly recently expanded following the end of the Brexit transition period. There are a variety of ways for a foreign debtor to access the jurisdiction, including e.g. by shifting the company's center of main interests (COMI) to the UK.

19. How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

Under English law, each company in a corporate group is treated as a single entity and its directors are required to consider the interests of creditors in relation to that particular company (rather than the group as a whole). Unlike in Chapter 11, we do not have a formal concept of group proceedings / joint debtors, or substantive consolidation. However, the commercial reality is that what is beneficial for a group is often beneficial for each individual company, and there is scope for co-ordination between affiliated entities.

20. Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

We understand the UK may issue a public consultation as to whether to adopt the UNCITRAL Model Law on Enterprise Group Insolvency. However, this has been planned for some time and there is no timescale for its publication.

If the UK adopts the UNCITRAL Model Law on Enterprise Group Insolvency, we would expect to see the introduction of a group insolvency solution to provide for the co-ordination of multiple insolvency proceedings across a group of companies (both domestically and cross-border).

21. Did your country make any changes to its restructuring or insolvency laws in response to the Covid-19 pandemic? If so, what changes were made, what was/is their effect and were/are they temporary or permanent?

Yes – the UK made significant changes to its restructuring and insolvency laws in response to the pandemic, certain of which are permanent and certain of which are temporary.

Permanent measures: The Corporate Insolvency and Governance Act 2020, enacted on 25 June 2020, introduced the following permanent reforms to the UK restructuring framework:

- a new flexible "restructuring plan" procedure modelled on the existing scheme of arrangement but with the key addition of cross-class cram-down;
- a new stand-alone moratorium to help business rescue by preventing creditors from taking enforcement action during the moratorium period; and
- measures to extend the UK's existing "essential supplies" regime to all contracts for the supply of goods and services (subject to a carve-out for financial service contracts) to prevent suppliers from relying on termination clauses solely by reason of the counterparty's insolvency.

Temporary measures: The Corporate Insolvency and

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Governance Act 2020 also included a number of temporary measures to alleviate pressure arising from the Covid-19 crisis:

- temporary restrictions on statutory demands and winding-up petitions where a company's inability to pay was the result of Covid-19 (extended several times, to 30 September 2021);
- temporary increase of the threshold for a winding-up petition to £10,000 or more (up from £750), until 31 March 2022;
- prohibition on winding-up petitions based on unpaid rent under a business tenancy which is unpaid by reason of a financial effect of coronavirus, until 31 March 2022;
- temporary amendments to wrongful trading provisions to discount potential liability for directors for any worsening of the company's financial position in the periods 1 March to 30 September 2020 and 26 November 2020 to 30 June 2021;
- temporary provisions for virtual AGMs and general meetings;
- temporary provision for extensions to filing deadlines at Companies House;
- a temporary exemption from the prohibition on enforcement of ipso facto clauses for small business suppliers (i.e. small business suppliers were still allowed to terminate contracts solely on the basis of the insolvency of the counterparty, until 30 June 2021); and
- temporary easing of certain of the conditions to the commencement of a moratorium, until 30 September 2021.

The Act also provided the Secretary of State with a general power to make temporary amendments or modifications to the effect of specified insolvency and governance legislation through regulations, in response to the pandemic. This power has now expired.

Separately, measures were introduced to prevent landlords using commercial rent arrears recovery (i.e. seizing goods where rent is unpaid) or forfeiting commercial leases for non-payment of rent. These measures have largely ended, except that the Commercial Rent (Coronavirus) Act 2022 provides for a new temporary arbitration regime in respect of residual Covid-related rent arrears where tenants and landlords have not yet reached consensual settlement.

22. Are there any proposed or upcoming changes to the restructuring / insolvency regime in your country?

As noted above, the Government plans to consult on the implementation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and the UNCITRAL Model Law on Enterprise Group Insolvency. No timescale has been given.

23. Is it a debtor or creditor friendly jurisdiction?

The UK has historically been perceived as a creditor-friendly jurisdiction (in particular for senior secured creditors), but it is extremely effective for both creditors and debtors. The Covid-19 crisis prompted a move towards a more debtor-friendly restructuring regime, with the fast-tracking of the introduction of the restructuring plan (offering cross-class cram-down to facilitate rescue), the moratorium and the restrictions on the exercise of ipso facto clauses in certain cases, in addition to temporary safeguards including a temporary ban on statutory demands and winding-up orders where a company could not pay its bills owing to Covid-19.

The English courts are the forum of choice for major international financial and other contracts, because the system is seen as flexible and commercially-oriented whilst also offering certainty and predictability – with considerable deference to the commercial terms agreed by the parties – and the highest possible reputation for independence / lack of corruption.

Overseas debtors have increasingly looked to take advantage of the English restructuring and insolvency framework, including taking steps to establish jurisdiction here e.g. by moving the debtor's COMI, amending the governing law of their debt documents, or otherwise. However, given restructuring procedures are now being introduced across Europe, there may be less need for European debtors to avail themselves of English proceedings in future.

24. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

Generally, the UK does not have the major sociopolitical factors impacting restructurings that exist in certain other jurisdictions. State involvement in distressed

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businesses is generally limited to non-existent, although there has been a recent trend for certain very large UK companies to be liquidated with the Official Receiver acting as liquidator (British Steel and Carillion in 2018 and Thomas Cook in 2019).

Certain unpaid contributions into occupational pension schemes and employee remuneration and accrued holiday entitlements are categorized as preferential debts and will rank ahead of floating charge holders in the event of a company's insolvency. In December 2020, the Government reformed the preferential creditor regime, to make the UK tax authority, HMRC, a "secondary preferential creditor" for certain tax debts, including VAT and PAYE.

The Pension Protection Fund provides compensation for defined benefit occupational pension scheme members on an employer's insolvency. The Pensions Regulator has very wide 'moral hazard' or 'anti avoidance' powers to make third parties liable to provide support or funding to a defined benefit occupational pension scheme in certain circumstances. Additional civil and criminal penalties for conduct putting accrued benefit schemes at risk or preventing the recovery of pension scheme debt became effective in autumn 2021.

Large pension schemes of debtors in difficulty will attract greater public attention and government intervention is more likely, e.g. by seeking to facilitate a deal between the debtor, the Pensions Regulator and unions (if any). Aside from these considerations, state involvement is generally limited.

25. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

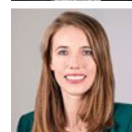
There are three, in our view: the scope of the moratorium, questions of UK recognition of foreign plans of reorganization, and questions of EU recognition of UK proceedings following Brexit.

- Scope of the moratorium: various aspects of the new moratorium render the breathing space it offers only limited in scope.
- UK recognition of foreign plans of reorganization: See Question 16. above. The UK plans to consult as to whether to implement the new UNCITRAL Model Law on Insolvency-Related Judgments, but the timing and outcome of that consultation remain uncertain.
- Post-Brexit limitations on European recognition of UK proceedings: as of 1 January 2021, EU member states no longer automatically recognize UK insolvency proceedings. Recognition is a matter of the private international law regimes in each Member State. The loss of automatic recognition of UK proceedings across the EU may make it more complex, lengthy and expensive to resolve cross-border mandates, raising the prospect that parallel proceedings may be necessary if certainty is required. To date, the English courts have taken a pragmatic approach to sanctioning schemes of arrangement and restructuring plans unless there is "no reasonable prospect of the scheme having substantial effect", especially where there is very substantial support for the scheme or plan. However, the acid test for recognition will occur if a dissenting creditor seeks to pursue remedies and / or challenge the effectiveness of a UK restructuring elsewhere. This has yet to occur in a post-Brexit context, so far as the authors are aware.

Contributors

Partha Kar
Partner
partha.kar@kirkland.com

Kate Stephenson
Partner
kate.stephenson @kirkland.com



Zoe Stembridge
Associate - Restructuring
zoe.stembridge@kirkland.com

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