The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2018

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A practical cross-border insight into corporate recovery and insolvency work

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1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

The UK is typically considered to be a creditor-friendly jurisdiction and, in particular, friendly towards secured creditors. Enforcement of security in the UK is regularly carried out without the need for any court involvement other than the filing of certain prescribed forms. Notarisation or similar requirements that can sometimes delay enforcements in other jurisdictions are also not required.

Consequently, English law is often chosen as the governing law of contracts and disputes are litigated in the English courts by both local and overseas parties. A number of high profile cross-border restructurings have also been conducted using English law governed documents and the English courts have been flexible in facilitating the use of English law to govern proceedings concerning overseas companies. In the context of restructurings, this is perhaps best demonstrated by the sanctioning of a number of schemes of arrangement proposed by foreign companies in the English courts, even where those companies have a limited connection to the UK (such as English law-governed finance documents which are being amended via the scheme).

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

Informal work-outs without any court involvement or the use of formal insolvency proceedings are common in the English market. Such work-outs can take a variety of forms and range from (for example) amendments to credit agreements to relax covenant testing levels or extend maturity dates to debt-for-equity swaps.

There are also a number of formal insolvency processes available under English law. The most commonly used insolvency process is administration, pursuant to which a licensed professional is appointed to manage a company's affairs in place of its directors. The administrator has extensive powers to trade the company and may also dispose of the company's assets, either after a period of trading or immediately upon his appointment (known as a "pre-pack" sale).

The alternative to administration is liquidation, which is primarily used in respect of companies which have insufficient remaining assets to be traded or sold and whose affairs are therefore being wound down.

English law also provides for two types of court-approved restructuring processes – company voluntary arrangements ("CVA"s) and schemes of arrangement (schemes). Whilst there are a number of differences between the two processes, each essentially allow a company to (provided that a specific amount of its creditors vote in favour) compromise creditor claims and take other steps to restructure its affairs, which binds all creditors (regardless of whether they voted in favour or not).

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

English law does not prescribe a set point in time at which a company's directors must file for insolvency. It is the duty of the directors to decide the appropriate time to file (although secured creditors may, in practice, take the decision to enforce and put the company into an insolvency process prior to the directors taking action).

The main impetus for directors in this respect is that directors of companies who knew, or should have known, that the company of which they are a director had no reasonable prospect of avoiding entering an insolvency process, but caused creditors to incur losses after that point, can be personally liable to compensate creditors for those losses. This is known as "wrongful trading". Consequently, directors are often eager to file for insolvency without too much delay, although a premature filing which causes losses to creditors also presents a risk to directors.

Further, from the point at which a company becomes insolvent under English law (either on a "balance sheet basis" – the company's liabilities exceed the value of its assets – or on a "cash flow basis" – the company owes a liability or liabilities that it is unable to pay when due), the directors of the company must have their primary regard to the interests of the company's creditors. Prior to that point, it is the company's shareholders to whom the directors should have their primary regard. Breaching this duty and causing the company's creditors to incur losses by doing so risks the director being personally liable for the offence of "misfeasance" if the company subsequently enters liquidation.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction?

The "*pari-passu*" principle provides that a company's ordinary, unsecured creditors should be treated the same and without preference between them within an English insolvency process. However, certain types of unsecured creditors are granted certain additional rights and given a different status notwithstanding the application of that principle:

- employees rank ahead of other unsecured creditors to the extent of their "preferential claims" against the company – these are claims for certain liabilities such as wages and unpaid holiday pay owed to the employee up to certain prescribed limits. Claims in excess of those limits rank alongside all other unsecured claims against the company;
- landlords are granted certain rights to "distrain" over a company's assets (i.e. to seize those assets, sell them and apply the proceeds towards unpaid rent due by the company) and to forfeit (i.e. terminate) a lease if it is breached. These rights do not automatically terminate upon a company entering insolvency; however, the moratorium against creditor action which applies in administrations prevents a landlord from taking any such action without the benefit of a court order or the consent of the administrator; and
- suppliers of goods to a company may include retention of title clauses in the terms of their supply which provide that the supplier retains title to the relevant goods until those goods are, either by themselves or along with all other goods supplied by that supplier, sold by the company. Such clauses survive the company entering an insolvency process and therefore mean that the administrator or liquidator either has to set-aside the proceeds of a sale of the relevant goods and pay them to the supplier (rather than distribute them to all creditors equally) or allow the relevant supplier to collect the goods from the company's premises if they are not necessary to the conduct of the proceedings.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

Certain types of transactions entered into by a company prior to its entry into administration or liquidation can be challenged by the administrator or liquidator. If that challenge is successful, the transaction can be unwound or, if that is not possible (for example, because the counterparty to the transaction was dealing with the company in good faith and it would therefore be unfairly detrimental to that counterparty if the transaction was clawed back), the directors can be ordered to make a compensatory payment to the company's creditors for the losses caused.

The two main types of challenge are for transactions at an undervalue (where the company disposes of assets for significantly less than their value) and preferences (where a company does something or causes something to be done which has the effect of putting a creditor in a better position upon the company entering administration or liquidation than it would have otherwise been). In order to be challenged by the administrator or liquidator, the relevant transaction must be entered into within a certain period prior to the administration or liquidation commencing (two years for all transactions at an undervalue and preferences to persons who are connected to the company, and six months for preferences to unconnected persons) and the company must be insolvent at the time of the transaction or become insolvent as a result of it. A company must also have the "desire" to prefer the recipient of a preference in order for such a challenge to be successful.

Floating charges (which are a type of security which "floats" over a company's non-fixed, movable assets, such as stock) entered into by a company within two years (for floating charges granted to connected persons) or one year (for floating charges granted to unconnected persons) prior to it entering administration or liquidation are also invalid to the extent that they secure "old" consideration. This would apply if, for example, no new money was advanced by the recipient of the floating charge when it was granted by the company.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

Yes – there are a number of tools available to companies and creditors which wish to restructure the Company's obligations under English law financing contracts. The Loan Market Association's ("LMA") recommended forms of loan facility documentation contain extensive amendment and waiver provisions which govern, amongst other things, the percentage by face value of a company's lenders (usually a "majority" of lenders holding in aggregate more than two thirds of the participations under the relevant loan, or for certain exceptional changes, all of those lenders) required to vote in favour of steps such as waivers of debt, conversions of debt into equity, re-setting of financial covenants and disposals of assets.

Schemes are often used to push through restructurings where finance documents require the approval of 100% of the company's lenders to amendments and waivers required in connection with the restructuring. If the company cannot secure the consent of all of its lenders, but has the approval of the requisite number of creditors to approve a scheme (see below), the company can use a scheme to effect the relevant amendments and waivers which, if approved, binds all of the company's creditors.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders?

Schemes and CVAs are commonly used for companies looking to restructure their liabilities. Each process causes creditors who vote against (or, in the case of a scheme, creditors who have no economic interest in the scheme and are not being affected by it) to be crammed down provided that a requisite number of creditors vote in favour. In the case of a CVA, 75% by value of the companies' unsecured creditors present or voting by proxy at a meeting convened to vote on the CVA (provided that no that no more than 50% by value of any creditors who vote against the proposal are creditors who are unconnected with the company) must vote in favour of the CVA. If approved, the CVA binds all the companies' unsecured creditors, although it cannot affect the rights of a secured creditor without its consent.

A scheme requires that creditors (both secured and unsecured) are divided into classes, based on commonality of their rights against the company, to vote on the scheme. Each class must then vote on the scheme at a meeting held for that purpose and provided that 75% by value and a majority in number of each class of creditors present (in person or by proxy) at such meetings vote in favour, and the scheme is sanctioned by the Court, the scheme binds all creditors of the company. If a company can demonstrate that a particular class of creditors is not affected by the scheme (usually "out of the money" creditors who have no economic interest in the company), such class will not be required to vote on the scheme.

Creditors are able to challenge schemes and CVAs on the basis of being treated unfairly in comparison to other creditors or that the outcome of the CVA or scheme realises a poorer result than an alternative process. Further, other than in the case of relatively small companies proposing a CVA, there is no moratorium or stay on creditors threatening enforcement prior to the scheme or CVA being approved, which can potentially disrupt the process (although the courts are becoming increasingly willing to stay enforcement action by creditors which would disrupt a scheme which has reached an advanced stage and would produce a more favourable outcome for creditors than if that enforcement action was allowed to proceed).

Pre-packaged sales are also frequently used as a means to restructure a company's liabilities by transferring the company's assets to a newly incorporated subsidiary free of any liabilities which the company is unable to pay in full, or to effect a sale of a company to a third party. A pre-pack involves the documentation and terms of the sale being negotiated and agreed in advance and then completed by the administrator immediately upon, or shortly after, their appointment. This is often preferable to the sale being executed by the company's directors because it is the administrator, rather than those directors, who bears the responsibility of ensuring that the assets are sold for the best possible value. Furthermore, a pre-pack sale is often executed quickly and can be publicised to creditors and third parties as a way of rationalising a company's liabilities so it can trade on successfully, which reduces the "stigma of insolvency" for the company.

3.3 What are the criteria for entry into each restructuring procedure?

A company must be insolvent (on either a balance-sheet or cash flow basis) in order to be placed into administration by its directors. In order for a secured creditor to appoint an administrator to a company the creditor's security must be enforceable in accordance with its terms.

Schemes and CVAs can be initiated by the directors of a company at any time but, as mentioned above, require a certain threshold of creditors to vote in their favour together with, in the case of a CVA, the consent of any affected secured creditors.

3.4 Who manages each process? Is there any court involvement?

Administration and liquidation

A qualified insolvency practitioner must be appointed as an administrator or liquidator of a company and, for all intents and purposes, manage the company in place of its directors (including to effect a pre-pack).

Schemes and CVAs

In a CVA, a qualified insolvency practitioner will act as "supervisor" of the CVA and carry out the steps and actions provided for in the CVA proposal (which sets out the terms of the CVA). The directors remain in control of the company, although they will co-operate with the CVA supervisor in order for it to be properly implemented. There is no requirement for a qualified insolvency practitioner to supervise a scheme, it is simply carried out by the company's directors in accordance with the terms of the scheme.

A CVA proposal must be filed at court and creditors who feel they have been unfairly prejudiced by a CVA or there has been a material irregularity in the CVA process may challenge a CVA via a court application within 28 days of its approval. There is more court involvement in a scheme – the court must, at a first hearing, approve the company's classification of its creditors to vote on the scheme in meetings convened for that purpose, and then, if the requisite number of creditors vote in favour of the scheme at those meetings and assuming that the court is satisfied that the scheme is fair to the company's creditors, "sanction" and approve the scheme at a second hearing.

3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

A company entering into an insolvency process does not automatically cause contracts to which the company is party to terminate, although those contracts may contain terms which allow the counterparty to terminate the contracts upon the process commencing. However, an administrator or liquidator may simply refuse to perform the company's obligations under contracts if doing so is in the best interests of the company's creditors. Creditors are prevented from court action to enforce breaches of contract without the administrator/liquidator's approval or an order of the court and even if action is successfully taken, the counterparty has an unsecured claim against the company which ranks alongside all other unsecured creditors (so effectively is not worth pursuing).

A liquidator has additional powers to "disclaim" unprofitable contracts (including leases) to which the company is party (which has the effect of determining the counterparty's rights under the contract upon the disclaimer becoming effective and entitles the counterparty to an unsecured claim against the company).

3.6 How is each restructuring process funded? Is any protection given to rescue financing?

If an administrator or liquidator trades a business, the costs and expenses of the process (including their fees) will usually be discharged from the receipts of the trading. An administrator or liquidator also may seek additional funding which is then repaid as an "expense of the administration or liquidation" (ranking above ordinary unsecured claims). However, outside of that possibility within a formal insolvency process, there is no statutory mechanism for rescue/debtor in possession financing under English law.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

Companies looking to wind down their affairs, and creditors who wish for a company to be wound up, can initiate a liquidation, whereby a liquidator realises the company's assets, distributes the proceeds to creditors and then winds the company down.

There are two types of liquidation: voluntary liquidation; and compulsory liquidation. Voluntary liquidations can either be made on a "solvent" basis (known as a members' voluntary liquidation) ("MVL") where the company's directors are willing to swear a statement to the effect that the company has sufficient assets to meet its liabilities over the next 12 months, or on an "insolvent" basis (known as a creditors voluntary liquidation) ("CVL") where the directors are unwilling or unable to give that statement. Both types of voluntary liquidation are initiated by a company's shareholders; however, in a MVL the shareholders nominate the liquidator, whereas in a CVL the creditors have the final say in the choice of liquidator.

Compulsory liquidation is made by filing a petition at court, followed by a court hearing. A hearing of the petition is then held at court and if it can be demonstrated to the court that one or more prescribed circumstances applies to the company (usually that the company is insolvent) the company is placed into liquidation.

4.2 On what grounds can a company be placed into each winding up procedure?

Voluntary liquidations require a resolution of the company's shareholders (the exact proportion of those shareholders which are required to pass the resolution will be determined by the company's constitutional documents – usually 75%) to initiate the process and, in a MVL, that the directors swear the declaration of solvency referred to above.

Compulsory liquidation requires that one or more prescribed circumstances apply to the company. Usually this is that it can be proved to the court that the company is "unable to pay its debts" (i.e. is insolvent on either a balance sheet or cash flow basis) which is often demonstrated by serving demand on the company to pay amounts owed to the petitioning creditor which, if not paid, can then be used as evidence that the company is cash-flow insolvent.

4.3 Who manages each winding up process? Is there any court involvement?

There is court involvement in respect of a compulsory liquidation, which requires a court hearing to order that the company enters liquidation. Voluntary liquidations do not usually require any involvement of the court. Once the company has entered liquidation, the liquidation process is managed by the liquidator (with the sanction of shareholders or creditors – see below).

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

Liquidation, unlike administration, does not impose a moratorium on the rights of secured creditors to enforce their security, so a liquidator will either obtain the consent of the relevant secured creditor before dealing with any secured assets or allow that creditor to take its own action in respect of those assets. Liquidation does, however, impose a stay on court proceedings, which can only be lifted with the consent of the liquidator or approval of the court.

Liquidators (also unlike administrators) can only take certain actions if sanctioned to do so. In a MVL, this sanction comes from shareholders. In a CVL sanction must be obtained from creditors. It is also common, at least in larger liquidations, for a committee of three to five creditors to be formed as a representative body and to, amongst other things, scrutinise the steps taken by the liquidator and approve certain actions taken by them.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Termination is covered above. Set-off provisions in contracts are, however, superseded by mandatory set-off rules which apply in liquidations and which provide that amounts owed by a creditor to the company are set-off against amounts that the company owes to the creditor (with only the net balance, if any, being claimable by that creditor).

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

Creditors holding "fixed" charges over a company's assets (essentially a charge over assets which the company is not able to freely deal with, such as property) rank first, followed by the expenses and costs of the liquidation/administration. Creditors with "preferential" claims (usually only employees for unpaid wages, holiday and pension contributions up to certain prescribed limits) rank next, followed by creditors with "floating" charges over the company's assets (assets which the company can freely deal with, such as stock). A fund of up to £600,000 is also set aside for unsecured creditors from realisations of floating charge assets known as the "prescribed part". If there are sufficient funds available after the prior-ranking amounts have been paid in full, a distribution can then be made to unsecured creditors. In the somewhat unlikely scenario that unsecured creditors are paid in full, they are then entitled to claim interest for the period of administration/liquidation on their claims and, in the even more unlikely scenario that all such claims to interest are paid in full, any surplus is distributed to the shareholders.

4.7 Is it possible for the company to be revived in the future?

Yes, in theory, a company that is wound down and dissolved (which is the outcome at the culmination of a liquidation) can be restored for up to six years after it is dissolved by court order, although this is extremely rare.

5 Tax

5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?

<u>CVAs and schemes</u>

A company is taxed in the usual way whilst going through a CVA or scheme. However, releases of debt usually incur a tax charge by the company although this can be avoided if made pursuant to a CVA or scheme (which is an added benefit of the CVA or scheme).

<u>Administration and liquidation</u>

Unpaid tax at the commencement of the administration or liquidation is simply an unsecured debt of the company. Corporation tax on gains which arise from the disposal of assets during the period of the administration or liquidation is paid as an expense of the administration or liquidation.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees?

CVAs and schemes

CVAs and schemes have no direct impact on a company's employees.

Administration

Contracts of employment do not automatically terminate upon the appointment of an administrator. There is a 14-day period which commences upon a company entering into administration during which the administrator can dismiss any employees who are not required for the conduct of the administration. Wages, holiday and sickness pay and pensions contributions due to employees retained after this period are paid as expenses of the administration. If the administrator sells the company as a going concern (either after a period of trading or as a pre-pack) employees, as well as liabilities owed to those employees, automatically transfer to the buyer. Determining the amount of such employees and the sums owed to them is therefore a key area of diligence in sales by administrators.

Liquidation

A company entering compulsory liquidation automatically causes its employees' contracts of employment to terminate. The liquidator then has to re-employ any employees needed for the conduct of the liquidation. Voluntary liquidation does not automatically terminate employment contracts, although the liquidator can simply refuse to perform employment contracts (with the result that the affected employee(s) can then claim as a creditor of the company for amounts owed to them).

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

Yes. The EC Regulation on Insolvency Proceedings (the "EC Reg") provides that companies incorporated in the EU but which have their "centre of main interests" ("COMI") (being their primary place of business activity) in England or Wales can commence administrations, liquidations and CVAs (each of which are governed by the EC Reg) in England or Wales as "main proceedings". EU companies which do not have their COMI in England or Wales but which have a non-transitory "establishment" here may open "secondary" proceedings which are restricted to assets situated in England or Wales.

Schemes are not governed by the EC Reg, so there is no requirement for a company to have its COMI or an establishment in England or Wales in order to propose a scheme. Instead, overseas companies have been able to use schemes where those companies have demonstrated a "sufficient connection" to England and Wales. The existence of such a connection has been interpreted widely by the courts over recent years so that companies have been able to (amongst other things) amend the governing law of finance documents to English law in order to establish such a connection.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

The EC Reg provides for automatic recognition of proceedings commenced in other EU Member States. Recognition of proceedings in jurisdictions outside the EU is also provided for in the UNCITRAL Model Law on Cross-Border Insolvency, which has been enacted into English law.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

Not commonly – because the English system is generally perceived to be creditor-friendly, companies incorporated in England and Wales (and their creditors) will usually want to use English insolvency and restructuring proceedings. The only real exception to this is, whilst also uncommon, companies establishing a link to the USA (which can simply just involve opening a bank account or having a retainer with a law firm) in order to use Chapter 11 bankruptcy and benefit from the extensive automatic stay on proceedings it affords, will generally be recognised by the English courts.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Each company within a group is, for the purposes of English law, treated as distinct so there is no concept of group-wide proceedings. Each company in a group will, therefore, need to go into an insolvency process on an individual basis although it is common for the same administrator or liquidator to be appointed to multiple companies within a group.

This is in contrast to the position in respect of cross-border insolvencies involving companies within the EU (including, as of the time of writing, the UK). A "group coordinator" can be appointed in such proceedings, to coordinate proceedings in a number of jurisdictions and generally preside over them (albeit that the proceedings themselves will still be conducted by the office-holders appointed to the various insolvent companies).

9 Reform

9.1 Have there been any proposals or developments in your jurisdiction regarding the use of technology or reducing the involvement of the courts in the laws of your jurisdiction, which are intended to make insolvency processes more streamlined and efficient?

The Insolvency (England and Wales) Rules 2016, which replaced the Insolvency Rules 1986, contain a number of provisions which are designed to streamline and modernise insolvency proceedings. These include the ability for office-holders to conduct meetings and correspondence with creditors via non-physical, electronic means (such as posting notices on websites and holding meetings virtually) as well as "deemed consent" procedures, where certain matters which previously required a vote from creditors are deemed to be agreed to unless 10% by value of creditors object. By introducing these proposals the hope is that insolvency proceedings can be conducted more cost-efficiently and quickly than under the previous regime.

9.2 Are there any other governmental proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

Yes – please see chapter 1 which addresses these reforms.

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Jat specialises in a range of debt finance transactions, acting for a diverse range of stakeholders including credit and special situations funds, corporate clients, sponsors, bondholders and senior and mezzanine lenders in relation to, amongst other things, workouts and restructurings.

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Paul advises on a broad range of corporate restructuring and recovery issues.

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Paul's experience also includes a secondment to Warwick Capital Partners LLP, a leading distressed credit fund.

Paul is a qualified insolvency practitioner, having passed the Joint Insolvency Examination Board examinations in 2013.

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