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Restructuring & Insolvency 2021

A practical cross-border insight into restructuring and insolvency law

15th Edition

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Preface

Welcome to the 2021 edition of *ICLG – Restructuring & Insolvency*. Macfarlanes is delighted to continue to serve as the Guide's contributing editor.

The detailed content of year's edition is very different from years gone by, primarily as a consequence of the government reactions to the consequences of COVID-19, and I expect that there will be yet more change to reflect in the chapters of this Guide in the years to come. A lot of what we have seen in the past year could be described as 'crisis management'. For example, suspensions of director liability for late insolvency filings and blocks on creditor action to recover unpaid debts in many jurisdictions have helped to ensure that formal insolvencies are much lower than the historic average. However, those types of measures fail to address the massive accrual of liabilities on corporate balance sheets through the deferral of tax payments, the non-payment of rent to landlords and borrowing under government-backed loan schemes. If the post-pandemic economic recovery is not to be drawn out for many years to come, practitioners will need to come up with appropriate solutions – potentially with the assistance of further legal reform. My colleagues Simon Beale and Amy Walker consider this in their Expert Analysis chapter, which I commend to you.

This year's edition contains contributions from many leading practitioners, including an insight into the issues in restructuring and insolvency across 25 jurisdictions. We are very grateful for their support and we trust that you will find it valuable. Please do get in touch with relevant contributors directly, should you need to understand the most recent developments in any particular place.

I hope that you keep well.

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1 Overview

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

England and Wales is traditionally considered a creditor-friendly jurisdiction and remains particularly favourable for secured creditors. However, recent reforms have been designed to make England and Wales more debtor-friendly.

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 procedures available under English law. A 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 three formal restructuring procedures where the company remains under the control of its directors rather than an insolvency practitioner – company voluntary arrangements ("**CVAs**"), schemes of arrangement ("**Schemes**") and, as newly introduced in 2020, restructuring plans ("**Restructuring Plans**"). Whilst there are a number of differences between the three processes, each essentially allows a company to compromise creditor claims (provided that a specific proportion of its creditors vote in favour) and to take other steps to restructure its affairs, which binds all relevant 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 a director who knew, or should have known, that the company of which they are a director had no reasonable prospect of avoiding entering insolvent liquidation or administration, 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 that causes losses to creditors also presents a risk to directors. However, as a result of COVID-19 there is a temporary suspension of liability for wrongful trading until 30 April 2021.

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 also risks a director being personally liable to compensate creditors.

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? Are moratoria and stays on enforcement available?

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 of commercial property are granted certain rights to seize a company's 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 that applies in administrations prevents a landlord from taking any such action without the benefit of a court order or the consent of the administrator. As a temporary provision in relation to COVID-19, a landlord is essentially only able to use this remedy to recover arrears that pre-date the government-imposed lockdown in response to COVID-19; and
- suppliers of goods to a company may include retention of title clauses in the terms of their supply that 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.

A new standalone moratorium has been introduced. This can be used in conjunction with an informal restructuring or a CVA, Scheme or Restructuring Plan. The moratorium lasts initially for 20 business days, but may potentially be extended by various means for up to one year. This standalone moratorium provides a payment holiday for certain pre-moratorium debts. However, the use of the new moratorium may be limited in practice. The company has no payment holiday for debts owed under a financial services contract such as a loan and it is also required to keep current with certain payments such as rent during the moratorium period. A moratorium is not available for parties to a capital market arrangement (e.g. an issuer of a bond) that is in excess of £10m.

A moratorium on creditor action comes into effect upon a company entering administration with a two-week interim moratorium also available when a preceding notice of intention to enter administration is filed at court.

The courts have been willing to use their general case management powers to stay creditor action where preparations for a Scheme are at an advanced stage, which we expect will also be applicable to the new Restructuring Plan.

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 were clawed back), the directors can be ordered to make a compensatory payment to the company's creditors for the losses caused.

The main types of challenge are:

- transactions at an undervalue where the company gifts or disposes of assets for significantly less than their market value. The transaction must have occurred within two years of the commencement of the administration or liquidation and the company must have been insolvent at the time of the transaction or become insolvent as a result;
- preferences where a company does something or allows something to be done that 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, the preference must have occurred within two years (if to a person connected with the company) or six months (if to an unconnected person) prior to the commencement of the liquidation or administration. The company must also have been motivated by the "desire" to prefer the recipient of a preference for the challenge to be successful; and
- invalidation of floating charges (which are a type of security that "floats" over a company's non-fixed, movable assets, such as stock) that are 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. The charges are invalid only 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 who 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. These 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.

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? Can you cram-down dissenting classes of stakeholder?

CVAs, Schemes and Restructuring Plans allow for a range of restructurings to be implemented. This includes extension of the term of debts, debt-for-equity swaps, debt-for-debt swaps and transfers of assets.

Cram down under a CVA

Creditors are not divided into classes for voting purposes, but a CVA cannot bind secured or preferential creditors without their consent. Unsecured creditors will be bound by the CVA so long as the CVA is approved by 75% in value of creditors who vote and not opposed by more than 50% in value of unconnected creditors.

Cram down under a Scheme

Schemes can bind secured and preferential creditors. Creditors vote in classes based on common rights against the company. A dissenting minority can be crammed down so long as 75% by value and a majority in number of creditors in that class approve the Scheme. However, a Scheme cannot be used to cram down an entire dissenting class so all classes of creditors must approve the Scheme. A company need not involve out of the money creditors whose rights are unaffected by the Scheme.

Cram down under a Restructuring Plan

Restructuring Plans can also bind secured and preferential creditors. As in a Scheme, creditors vote in classes. The threshold for approval by a class is 75% in value of creditors voting, with no additional requirement for a majority in number. However, a Restructuring Plan also allows for an entire dissenting class to be crammed down so long as at least one other class with a genuine economic interest in the company approves the Restructuring Plan, the dissenting class is at least as well off in the Restructuring Plan as it would be in the next most likely alternative to the Restructuring Plan and the court considers it fair and just to approve the cross-class cram down.

A Restructuring Plan can bind creditors with no genuine economic interest in the company even if those creditors were not offered the opportunity to vote.

Blocking actions

CVAs, Schemes and Restructuring Plans do not automatically impose a moratorium on creditor action. There is a new standalone moratorium that could be used, though its use so far has been rare because of limitations on its protection (for example, it does not give a payment holiday for rent or interest payments) and the kinds of companies eligible (for example, an issuer of bonds in excess of £10m is ineligible for the moratorium). The court has been willing to use its case management powers to stay creditor actions when a Scheme is sufficiently well advanced, and we expect the same would apply to Restructuring Plans. However, a company will often seek to persuade its key creditors to agree to a consensual standstill on enforcement and to lock-up their support for the restructuring in advance.

Creditors would normally look to challenge a Scheme or a Restructuring Plan at one of the two court hearings that form part of these processes. Creditors who wish to challenge a CVA may do so on the grounds of material irregularity or unfair prejudice, but must apply to court for this purpose within 28 days of the filing of the approval of the CVA.

Pre-packaged sales

Pre-packaged sales as part of an administration are also frequently used as a means to restructure a company's liabilities by transferring the company's business and assets to a newly incorporated subsidiary free of any liabilities that the company is unable to pay in full, or to effect a sale to a third party. A pre-pack involves the terms of the sale and the sale documentation 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 successful rationalisation of a business's liabilities so it can trade on, which reduces the "stigma of insolvency" for the business.

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.

A Restructuring Plan may only be used by a company that has encountered, or will be likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

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

Administration and liquidation

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

CVAs

In a CVA, a qualified insolvency practitioner will act as "supervisor" 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.

A CVA proposal must be filed at court, but a CVA does not generally involve a court hearing unless there is a challenge by creditors. 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 the filing of the creditors' approval at court.

Schemes and Restructuring Plans

There is no requirement for a qualified insolvency practitioner to supervise a Scheme or Restructuring Plan. The directors remain in control of the company proposing a Scheme or Restructuring Plan (unless the company is already in administration or liquidation) and carry out the relevant procedure in accordance with its terms. A Scheme or Restructuring Plan involves (at least) two court hearings. At the first hearing the court considers issues in relation to the composition of the classes of creditors and whether it should order the convening of the creditors' meetings. After the creditors' meetings there will be a second hearing where the court will consider whether it is fair and just to give its sanction to the Scheme or Restructuring, including, in the case of a Restructuring Plan, whether it is fair and just to sanction a cross-class cram down.

3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

A company entering into an insolvency or restructuring process does not automatically cause contracts to which it is a party to terminate. New legislation prevents a contract for the supply of goods or services to an insolvent company being terminated by the supplier for insolvency-related reasons. The supplier may apply to court to have the restriction lifted if the inability to terminate the contract is causing hardship for the supplier. A well-advised supplier should also engage with the administrator or liquidator to ensure that payments for the continued supply rank as an expense of the insolvency and not just an unsecured claim. The restrictions on termination of a contract do not affect a supplier's right to terminate the contract on non-insolvency grounds such as for non-payment.

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 that 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 may also 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 an 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 that the company's shareholders pass a resolution (the exact proportion of those shareholders that are required to pass the resolution will be determined by the company's constitutional documents – usually 75%) to initiate the process and, in an 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, it must 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 a prescribed form of demand (known as a "statutory demand") on the company to pay amounts owed to the petitioning creditor which, if not paid within 21 days, 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 court involvement. 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. Compulsory 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 an 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, amongst other things, to 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?

Claims in an administration or liquidation will rank in the following order:

- claims of creditors holding "fixed" charges over a company's assets (essentially a charge over assets that the company is not able to freely deal with, such as property);
- expenses of the administration or liquidation (including the remuneration of the administrator or liquidator);
- claims of preferential creditors. These includes employees' claims for unpaid wages (up to a maximum of £800 per employee), holiday pay and pension contributions. They also now include certain taxes that the company has collected from customers, employees and contractors on the tax authorities' behalf, including VAT and PAYE income tax and national insurance contributions that have been deducted from employees' wages. Direct taxes owed by the company such as corporation tax remain ordinary unsecured claims;
- a fund of up to £600,000 (if the floating charge was created prior to 6 April 2020) or £800,000 (if the floating charge was created on or after 6 April 2020), known as the "prescribed part", is set aside for unsecured creditors from realisations of floating charge assets;
- claims of creditors with "floating" charges over the company's assets (assets that the company can freely deal with, such as stock);
- claims of unsecured creditors (excluding claims for interest accruing during the period of administration or liquidation); and
- claims by unsecured creditors for interest for the period of administration or liquidation.

Any surplus is distributed to shareholders.

If the company was in a moratorium in the 12 weeks prior to the entry into administration/liquidation, certain debts have super-priority and rank ahead of all claims, except those of fixed charge creditors. The super-priority claims include the moratorium monitor's fees and expenses, payment for goods and supplies supplied during the moratorium and financial indebtedness under a financial services contract or instrument (e.g. a loan) that fell due during the moratorium so long as that financial indebtedness was not accelerated.

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 occurs 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?

CVAs, Schemes and Restructuring Plans

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

Administration and liquidation

Unpaid tax at the commencement of the administration or liquidation is simply an unsecured debt of the company, although certain taxes collected by the company from third parties (for example, VAT) will now rank as preferential claims. Corporation tax on gains that 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? What claims would employees have and where do they rank?

CVAs, Schemes and Restructuring Plans

These procedures 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 that 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 number 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?

We expect that the main consideration for the English courts when deciding whether to accept jurisdiction over the company's insolvency will continue to be whether the company has its centre of main interests ("**COMI**") or an establishment in England and Wales. However, as the EU Insolvency Regulation (re-cast) is no longer applicable to the UK, the English courts will not be prevented from accepting jurisdiction over the insolvency of a company that has its COMI in an EU Member State. Accordingly, the English courts may accept jurisdiction where a company would meet the common law test of having a "sufficient connection" to England and Wales where accepting jurisdiction would be of benefit to the petitioning creditors.

From even before the UK left the EU, the lower bar of the "sufficient connection" test rather than COMI has been the jurisdiction test applied to Schemes. There is an established path of foreign companies using Schemes for restructuring on this basis. 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. We expect that the new Restructuring Plan will also use the sufficient connection test.

However, the English courts may be unwilling to sanction a Scheme or Restructuring Plan if such sanction would be futile due to a lack of recognition in relevant jurisdictions such as the company's home jurisdiction. The availability of English law restructuring procedures may then be interdependent on their recognition outside the UK.

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

The UK no longer recognises EU insolvency processes automatically under the EU Insolvency Regulations. However, recognition of foreign insolvency processes (whether inside or outside of the EU) is provided for in the UNCITRAL Model Law on Cross-Border Insolvency, which has been enacted into English law. English law does not require reciprocal adoption of the UNCITRAL Model Law by the foreign jurisdiction in order for the relevant proceedings to be recognised in the UK.

The English courts will not allow an English law debt to be compromised by a foreign restructuring or insolvency process where the creditors have not submitted to that foreign jurisdiction.

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.

9 COVID-19

9.1 What, if any, measures have been introduced in response to the COVID-19 pandemic?

The UK government has both implemented temporary measures in response to the COVID-19 pandemic as well as accelerated the implementation of permanent measures.

Temporary measures include:

- a suspension of directors' liability for wrongful trading until 30 April 2021;
- a restriction on petitions by a creditor for the compulsory winding-up of a company unless the creditor can show it has reasonable grounds to believe that COVID-19 has not had a financial impact on the company or the company would have been unable to pay its debts regardless of the financial impact of COVID-19; and
- a suspension of creditors' ability to rely on statutory demands (see above) as the basis of a winding-up petition.

Permanent measures include:

- a new standalone moratorium that may be used in conjunction with informal and formal restructuring processes;
- a new Restructuring Plan, which shares many similarities to Schemes but now allows for cross-class cram downs; and
- restrictions preventing suppliers of goods or services from terminating contracts on insolvency-related grounds.

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