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Corporate Recovery & Insolvency 2017

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

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Chapter 13

England & Wales


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1 Overview

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

The restructuring and insolvency regime in England & Wales is perceived as extremely effective, by both creditors and debtors.

English law has historically been senior secured creditor-friendly, and despite some slight erosion of the position, this remains the case. There is no prohibition on enforcing security or terminating contracts when a debtor is in distress. The holder of a comprehensive security package has various enforcement options which give them significant leverage in restructuring negotiations, as does their position at the top of the waterfall of payments that applies in a formal insolvency process.

The procedures available are extremely flexible. Consequently, England & Wales is also an attractive restructuring and insolvency jurisdiction for debtors. So much so, that it has become common practice for companies incorporated elsewhere to seek to restructure here.

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

Informal workouts are often achieved in England & Wales on a consensual basis. Inevitably there are situations in which this will not be possible, for example in the face of significant opposition, or where one or more creditors cannot be identified. In such cases, a number of formal procedures may be used, either to rescue the company/its business or to wind up its affairs.

There is no specific restructuring procedure in England & Wales. However, schemes of arrangement ("schemes") and pre-packaged administration sales ("pre-packs") have proved effective tools to restructure viable distressed companies in recent years.

When rescue is not possible, liquidation and administration are the procedures used to wind up a company.

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?

When a company's financial situation deteriorates, the focus of the directors' duties shifts away from shareholders and towards creditors. There is no bright line test to determine the precise point at which the interests of creditors take precedence. However, it is clear that once the company is of doubtful solvency, the directors have a duty to consider the interests of creditors as a whole.

This does not necessarily equate to a decision to cease trading: English law does not fix a specific point at which that must happen. The timing of the decision will largely be driven by the "wrongful trading test", which applies when the directors know, or ought reasonably to have concluded, that there is no reasonable prospect that the company will avoid going into insolvent liquidation or administration. At that point, a director must take every step with a view to minimising the potential loss to the company's creditors. What these steps will be will depend on the particular circumstances. In some cases, the directors may conclude that continuing to trade is the best way to minimise losses, even though the company is insolvent.

Prudent directors will seek advice on these and other potential types of liability (such as claims for fraudulent trading, or breach of other duties) at the earliest possible opportunity. Breach by a director of their duties can lead to personal liability and possible disqualification from being able to act as a director.

Successful claims against directors are rare, but delinquent directors are currently in the spotlight. The regime has been bolstered recently, including by expanding the grounds for disqualification and allowing for wrongful and fraudulent trading claims to be assigned to third parties. It has yet to be seen whether a market in claims against directors will develop, and what effect this will have on their behaviour.

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?

Preserving security rights and freedom of contract are central to the legal framework in England & Wales. There is currently no moratorium preventing counterparties from seeking to recover debts, enforce security or terminate contracts before a company enters an insolvency process. Contractual arrangements often provide for such rights to be exercisable well before entry into a formal process and this allows creditors to use the threat of action to exert pressure on the directors to take a particular course.

Secured creditors are in a particularly strong position because they are able to exercise (or threaten to exercise) significant rights once their charge has become enforceable, which could be well before the company is insolvent. Where a creditor has a fixed charge over certain assets it should be possible to appoint a receiver to sell those assets. Creditors with a comprehensive security package, including a floating charge over substantially all of the debtor's assets, have the right to place the company into a formal procedure (typically administration).

If a distressed company operates a defined benefit pension scheme that is in deficit, the occurrence of certain insolvency-related events can have a profound effect: a debt will be created from the company to the scheme; employees may be entitled to claim from the Pensions Protection Fund (the "PPF"); and the Pensions Regulator ("tPR") may exercise wide powers to seek financial support for the scheme from companies and individuals connected with the company. Consequently, the trustees of that scheme and the PPF and tPR will expect to be involved in any restructuring negotiations.

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

When a company is in distress, the directors will likely come under pressure to dispose of non-core assets, adjust payment terms, repay loans and/or renegotiate contractual arrangements. Such transactions may be vulnerable to challenge. For example, an administrator or liquidator may be able to apply to the court for an order to effectively unwind certain types of transaction, or require some other appropriate remedy if:

- the transaction occurred within specified periods before the company entered administration or liquidation (between six months and two years, depending on the type of transaction); and
- the company was insolvent (on a cash flow or balance sheet basis) at the time, or became insolvent as a result of the transaction.

This will be a matter for counterparties to consider. It will also be relevant to the directors because entry into such a transaction could be treated as a breach of duty, in particular if the transaction is at an undervalue or is a preference.

Preferences. A preference is given if the company does anything, or allows anything to be done, that has the effect of putting a creditor or a guarantor of the company's debts in a better position than they would otherwise have been in if the company went into insolvent liquidation. The repayment of an unsecured debt at maturity could fall within this wide definition. However, the company must also have been influenced by a desire to produce the preferential effect in order for the transaction to be vulnerable. This is presumed to be the case if the transaction was with a connected person.

Transactions at an undervalue. If a company enters into a transaction where it receives no consideration, or consideration that is of significantly less value than the consideration that it provides, this is a transaction at an undervalue. A useful defence is available where the transaction was entered into in good faith, to carry on the company's business and there were reasonable grounds for believing that it would benefit the company.

The same undervalue definition applies in respect of transactions defrauding creditors, but there is no prescribed period within which a challenge must be mounted and the company does not have to be subject to an insolvency process. However, such a claim is harder to establish because the transaction must have been entered into to put the assets beyond the reach of the claimant, or of otherwise prejudicing their interests.

3 Restructuring Options

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

Informal workouts in England & Wales usually take the form of entirely consensual deals. It is possible for senior secured creditors to exercise their rights under increasingly sophisticated intercreditor agreements to implement a restructuring, but in practice this usually happens as part of a pre-pack.

Even when it is not necessary to resort to a formal procedure, the possibility of doing so will likely have been considered as part of the contingency planning process and is often used as a stick to encourage agreement to be reached.

Informal arrangements such as lock-up and standstill agreements are often used to provide breathing space while the restructuring is negotiated.

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?

A number of restructuring tools are available in the UK, but the two that have been used most effectively in recent years are schemes and pre-packs.

Schemes. A scheme is an extremely flexible tool, which can be used to implement a variety of arrangements between a company and its creditors or its shareholders. In essence, all that is required is some element of give and take. This means that schemes can be used to simply amend and extend debt facilities while a wider restructuring is agreed, or to implement a complex restructuring, involving debt transfers and debt for debt/equity swaps.

Pre-packs. Where a pre-pack is proposed, the sale of a distressed company's business is negotiated before it enters administration, and executed shortly after an administrator is appointed. The aim is to minimise the delay, costs and destruction of value often associated with entry into an insolvency process. The other key advantage is that debts owing to out-of-the-money junior creditors can be left behind in the insolvent company, as long as provision was made for the release of guarantees and/or security.

Company voluntary arrangements. Company voluntary arrangements are another way of implementing an arrangement between a company and its creditors and shareholders. They have enjoyed some success, particularly in the retail sector. However, they have been less popular than schemes and pre-packs in practice, largely because they cannot be used to bind secured creditors without their consent.

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

Schemes. Schemes are a feature of company law. Insolvency is not a pre-requisite for their use, which allows for restructuring at an earlier stage. The state of the company's finances may nonetheless be relevant, for example when considering the classes in which creditors should vote.

Pre-packs. The rules governing the commencement of administration (whether for a pre-pack or otherwise) are more prescriptive. An administrator may be appointed:

- by a qualifying floating charge holder when the charge has become enforceable (which could be well before the company is insolvent); or
- by the company, the directors or a creditor, when the company is, or is likely to become, insolvent (on a cash flow or balance sheet basis).

In either case, the administrator-in-waiting must be satisfied that one of three statutory objectives is achievable. The primary objective is the rescue of the company as a going concern. In practice, it is far more common for the administrator to sell the company's business or assets, whether by way of pre-pack or otherwise, than to see "trading" administrations in which the primary objective of company rescue is being pursued.

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

Schemes. A scheme is usually proposed by the company itself. This happens after a number of weeks, or months, have been spent negotiating with key creditors, and confirming their support in the form of lock-up agreements. Two court hearings are required. At the first hearing, the judge will consider whether to grant permission for meetings of creditors to be convened to vote on the scheme. After those meetings have taken place, the judge will consider whether to sanction the scheme, having taken account of a number of factors, including fairness. Once sanctioned and delivered to the Registrar of Companies, the scheme is binding on all scheme creditors, with limited scope for appeal. A sophisticated judiciary and growing body of case law allow for a relatively fast and predictable process in many cases.

Pre-packs. In the case of a pre-pack it will also be necessary to secure the support of secured creditors in advance. The administrator-in-waiting will also be involved in negotiations. He/she is subject to a number of duties (most notably to act in the interests of creditors as a whole) and will therefore need to be entirely comfortable with the proposal. Additionally, if the pre-pack involves connected parties, the prospective purchaser may choose to make an application to the 'pre-pack pool', an independent body of experienced business people, who will consider whether the proposed transaction is reasonable. The pool was introduced to address concerns about fairness and transparency in connected party pre-packs, but applications are not compulsory and uptake has not been particularly high. The administration appointment itself can either be made on application to the court or by filing the relevant appointment papers with the court to document an out-of-court appointment. In complex cases and/or those with a cross-border element, it may be preferable to seek a court appointment. Once appointed, the administrator has wide-reaching powers to manage the administration process, but may seek directions from the court.

3.5 How are creditors and/or shareholders able to influence each restructuring process? Are there any restrictions on the action that they can take (including the enforcement of security)? Can they be crammed down?

Schemes. For a scheme to succeed, it needs the support of the requisite number of affected creditors. Those creditors vote on the scheme in classes defined by reference to the similarity of their legal rights. A majority in number, representing 75% in value of those present and voting in each class, must vote in favour of the scheme. This is lower than the threshold for consent prescribed in many financing documents (which often require unanimous or near unanimous consent for modifications to the most fundamental terms of the contract, such as pricing, maturity and amount), which is one of the reasons why schemes are used in practice. It is not possible to cram down an entire class (unless a scheme is combined with a pre-pack), which may be a limitation in some cases. Although a scheme is not an insolvency process, it will often trigger termination or enforcement rights. This can give dissentient creditors leverage because there is no moratorium, although a court may be prepared to stay specific hostile action where a scheme is well advanced and has reasonable prospects of success.

Pre-packs. In the case of a pre-pack it will usually be necessary to obtain the support of secured creditors in order for the administrator to be able to deal with any secured assets. However, the administrator is not otherwise required to notify creditors in advance, and unsecured creditors are unlikely to have been informed of the transaction before it takes place. Their only opportunity to influence the restructuring will be to challenge the administrator's decision after the sale. Industry standards encourage administrators to market the business, to obtain robust valuations where possible, and to furnish creditors with details after the event. However, successful challenges are rare.

Combination. When used in combination, the scheme and pre-pack become an even more powerful restructuring tool, which can be used to cram down a class of dissentient junior creditors by stranding them in an insolvent company and transferring its business to a newco, usually owned by the senior lenders.

3.6 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?

Contractual provisions allowing a party to terminate if the other party enters into a restructuring or insolvency process will be upheld in all but exceptional cases (such as contracts relating to essential supplies). Set-off provisions also usually remain enforceable until a company has entered into a winding up process (see question 4.5 below).

Where a scheme is proposed, there is no effect on existing contracts until it has been sanctioned and delivered to the Registrar of Companies. At that point, it is binding on all scheme creditors and operates to amend their contracts according to the terms of the scheme.

In contrast, the appointment of an administrator gives rise to a moratorium, which broadly prohibits the commencement of legal action or the enforcement of security against the company (but not the exercise of contractual termination or set-off rights; see question 4.5 below). This gives an administrator time to get to grips with the business and provides breathing space to try to trade the company out of difficulties, but is of less importance in a pre-pack, given that the company's assets are sold immediately.

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

A restructuring will inevitably give rise to significant costs. Where possible these will be met out of the company's existing funds, but there will often be a need for new financing. There is no specific provision which gives new financing super priority status in

England & Wales. In the case of informal workouts or schemes, it may be possible to achieve this contractually. If a company enters administration, new funding may be afforded priority over other claims as an expense of the administration. However, if the lender is to have priority over existing fixed charge holders, the consent of any other lenders with comprehensive security packages is required.

4 Insolvency Procedures

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

Liquidation. Liquidation is the primary procedure used to wind up companies in England & Wales. It can take a number of forms, but in each case the liquidator is under a duty to collect in and realise the assets of the company for distribution to its creditors, and once this has been done, the company will be dissolved.

Administration. Administration is also frequently used as a type of winding up procedure. It is possible for an administrator to make distributions to creditors, in broadly the same way as a liquidator would do. Where there are no assets available for distribution, a company may move straight from administration to dissolution.

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

Liquidation. A liquidator can be appointed where the company is, or will become, unable to pay its debts, but is not restricted to cases of insolvency. A solvent liquidation may be commenced to wind up a company's affairs if the directors are able to make a declaration confirming the company's solvency. It may also be possible for a solvent company to be wound up if it can be shown to the court that it would be just and equitable to do so.

Administration. In the case of administration, the entry criteria are the same, regardless of whether it is being used as a rescue or winding up procedure (see question 3.3 above).

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

In liquidation, one or more liquidators are appointed and take over the management of the company to realise its assets for distribution. The powers of a liquidator are narrower than those of an administrator (see question 3.4 above); for instance, a liquidator can only trade the business in very limited circumstances because rescue is not the objective.

Liquidation can take a number of forms. The level of court involvement varies, particularly in relation to the appointment process.

Compulsory liquidation. A compulsory liquidation is commenced by the court if it is satisfied that the company is unable to pay its debts, or that it would be just and equitable to do so. A petition to court can be made by the company, the directors, any creditor or any person liable to contribute to the assets of the company in the event of a winding up.

Voluntary liquidation. In contrast, a voluntary liquidation is commenced out of court, by resolution of the company's shareholders. However, the process will only be controlled by the shareholders if the company is solvent and this is confirmed by the directors in a declaration. If no such declaration can be made, it will become a creditors' voluntary liquidation in which the creditors confirm the appointment and may be able to influence the liquidator's actions (see question 4.4 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)?

Secured creditors. Unlike in an administration (see question 3.5 above), the rights of secured creditors are largely unaffected by any liquidation process. They are free to enforce their security, including by appointing a receiver. They also have the option to vote on and prove in the winding up if they choose to do so (for example, if they are undersecured). In terms of priority on insolvency, there is an important distinction between the holders of fixed charges, who sit at the top of the waterfall, and the holders of floating charges, whose claims are postponed to a number of prior ranking claims (see question 4.6 below).

Unsecured creditors. There is a stay on bringing or continuing legal proceedings against a company that is in liquidation. In a compulsory liquidation this is automatic, but the liquidator in a creditors' voluntary liquidation must apply to the court for protection. This is likely to have the greatest effect on creditors who do not have recourse to secured assets. The options open to such unsecured creditors are relatively limited. Once appointed, the liquidator is able to exercise his powers without their sanction. The key role of unsecured creditors is to prove for their debts in the liquidation (if there are sufficient assets for a distribution to be made). However, the liquidator may seek the views of creditors, particularly given that they have the right to challenge his remuneration.

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?

Parties generally remain free to exercise termination rights that are triggered by a counterparty's entry into winding up proceedings, except in relation to certain essential supplies (such as IT, water, gas, electricity and communications). However, there are a number of ways in which the commencement of winding up proceedings may have an effect on contracts, including:

Disclaimer. A liquidator has the power to unilaterally terminate, or disclaim, onerous contracts to avoid incurring future liabilities. This has no effect on liabilities that have already accrued and if the counterparty suffers loss as a result of a disclaimer, it may claim in the winding up.

Non-performance. An administrator does not have a power of disclaimer, but may delay, or decide not to perform a contract if performance would not be in the interests of the creditors and would impede him from achieving the objective of the administration. The counterparty may seek an order for specific performance, but in many cases this will not be appropriate and they will simply have an unsecured claim against the company for any loss incurred.

Set-off. In a liquidation, or in an administration in which the administrator has given notice that distributions are to be made to creditors, mandatory insolvency set-off applies if there have been mutual dealings between the company and a creditor. Amounts due from each party are set off against each other and the creditor can only prove for the balance (if any). In certain circumstances the creditor will lose the ability to take sums into account in this way; for example, if he had notice that particular steps had been taken to commence a liquidation or administration.

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

The key principle underlying insolvency law in England & Wales is that debts should rank *pari passu* – or equally among themselves, according to their priority. Inevitably, a number of policy decisions overlay this simple tenet, including the desire to preserve the pre-eminent position of secured creditors, and also to protect employees.

The order of priorities that applies in administration or liquidation is broadly as follows:

(1) the liquidator's/administrator's costs and expenses of realising fixed charge assets;

(2) fixed charge holders (to the extent of their security);

(3) obligations incurred under "new" contracts and the pay of employees whose contracts have been adopted (see section 6 below);

(4) the general expenses and costs of administration;

(5) preferential debts (these relate almost exclusively to employees' rights; see section 6 below);

(6) the "prescribed part" (this is a certain amount of the proceeds of realising assets subject to any floating charge which must be set aside to settle the claims of unsecured creditors; currently set at 50% of the first £10,000, plus 20% of anything thereafter, subject to a cap of £600,000);

(7) floating charge holders (to the extent of their security);

(8) claims of unsecured creditors (that remain after payment of the prescribed part);

(9) interest accrued on unsecured debts since the commencement of the process; and

(10) claims of shareholders.

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

A company is automatically dissolved three months after its liquidation has been finalised, or three months after an administrator has notified the Registrar of Companies that the company has no property, which might permit a distribution to its creditors.

After dissolution, the company ceases to exist. In certain circumstances, it is possible for a company to be restored to the register; for example, so that an asset can be recovered by members or creditors or where a former employee wishes to bring a personal injury claim. If the company is restored to the register, it is treated as though it was never dissolved.

5 Tax

5.1 Does a restructuring or insolvency procedure give rise to tax liabilities?

A company subject to an insolvency or restructuring procedure continues to be subject to tax on profits or gains. Tax liabilities are not given preferential status in England & Wales, although tax liabilities arising during the appointment of an administrator or liquidator will rank as expenses (see question 4.6 above). However, different procedures may have different tax implications. The tax analysis is often complex and could have a significant impact on the amounts available for distribution to creditors. For example, the commencement of administration or liquidation ends the company's accounting period for tax purposes, which has an impact on the timing of submission of tax returns and the payment of tax. The end of the accounting period may also adversely affect the company's ability to use or surrender losses incurred in the previous accounting period. In some circumstances, tax grouping arrangements may be adversely affected. Consequently, when a company is in distress, a tax analysis of the various options should be considered carefully.

6 Employees

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

The impact that a restructuring or insolvency has on employees of the company will depend, to an extent, on which procedure is used. An informal work-out amongst financial creditors may well have no direct impact on employees. By contrast, in the case of liquidation, redundancies are inevitable because the company is being wound up. A compulsory liquidation automatically terminates employees' contracts of employment and, in a creditors' voluntary liquidation, redundancies are likely to occur relatively early in the process. Administration does not necessarily lead to the termination of all employment contracts. However, certain claims in relation to employees' pay and pension contributions will be given priority status as an expense of the administration unless their employment is terminated within 14 days of an administrator's appointment. Consequently, an administrator will likely consider whether to make an initial round of redundancies. Neither administrators nor liquidators are automatically exempt from the obligation to consult where collective redundancies are proposed. There is often tension between the obligation to consult and their duties under insolvency law generally.

In all cases where a company enters liquidation or administration, employees will have certain (limited) preferential claims in relation to accrued pay and pension contributions, and will be entitled to prove for the remainder as unsecured creditors. Certain of these debts may also be guaranteed by the National Insurance Fund.

In any case where a transfer of the business is proposed, it will be necessary to consider whether any employees and the employer's liabilities in respect of those employees will be automatically transferred. The relevant legislation makes certain, limited, special provision for insolvency proceedings. There is some uncertainty as to the application of these provisions. However, the key exemption from automatic transfer does not apply to sales by administrators (including pre-packs) and so this will be a key concern for any potential purchaser.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere restructure or enter into insolvency proceedings in your jurisdiction?

It has become common practice for companies incorporated elsewhere to seek to restructure in England & Wales, particularly in order to use a scheme or pre-pack, because equivalent procedures are not available in many other jurisdictions.

Administration and liquidation. Administration and liquidation proceedings fall within the scope of the EU Insolvency Regulation, which imposes limits on the jurisdiction of the courts in each Member State. So-called "main" insolvency proceedings can only be opened in a Member State where a debtor has its centre of main interests ("COMI"). This means that any company which has its COMI in

England & Wales, even if it is incorporated elsewhere, will be able to enter liquidation or administration. A number of companies have moved their COMI for this purpose, particularly to use the pre-pack procedure. Companies whose COMI is not located within the EU will only be able to enter into administration if they are incorporated in an EEA state. Such companies may enter liquidation regardless of their place of incorporation, as long as they meet certain criteria, most notably a "sufficient connection" to England & Wales (often this is demonstrated by the presence of assets in the jurisdiction).

Schemes. Schemes are not within the scope of the EU Insolvency Regulation and so there is no COMI constraint. A modified version of the sufficient connection test provides the jurisdictional threshold in all cases where a foreign company seeks to use a scheme of arrangement. In recent years, this has most commonly been achieved on the basis of the inclusion of an English governing law and jurisdiction clause in the relevant finance documents, but the presence of assets and/or operations may also suffice. There is an open question about whether the jurisdictional limits imposed by the EU Judgments Regulation apply to schemes. Thus far, the English courts have not yet needed to decide the point and foreign companies have continued to find ever more innovative ways to use schemes.

When the UK exits the European Union, it is likely that the EU Insolvency Regulation and the Judgments Regulation will cease to apply. It is not yet clear whether alternative arrangements concerning jurisdiction and recognition will be negotiated (at EU level or bilaterally), or whether changes will be made to UK domestic legislation.

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

There are a number of ways in which insolvency procedures commenced elsewhere may be recognised (and/or other relief or assistance provided) in England & Wales. The key routes are:

EU legislation. Proceedings to which the EU Insolvency Regulation applies (i.e. all collective insolvency proceedings and some restructuring proceedings relating to a company with its COMI in the EU) will automatically be recognised in England & Wales. As mentioned in question 7.1, this may change when the UK leaves the European Union.

UNCITRAL Model Law on Cross-Border Insolvency. Where proceedings are commenced outside the EU, it may be possible for the insolvency officeholder to apply for recognition in England & Wales under the Cross Border Insolvency Regulations 2006, which give effect to the UNCITRAL Model Law on Cross-Border Insolvency, if the proceedings are main insolvency proceedings (defined by reference to a concept of COMI, which is very similar to that found in the EU Insolvency Regulation).

Domestic legislation. Under the Insolvency Act 1986, it is possible for insolvency officeholders in a limited number of designated jurisdictions (mainly Commonwealth countries) to apply to the courts of England & Wales for certain relief and assistance.

Common law. In circumstances where the EU Regulation, the Model Law and national legislation are not applicable, it may still be possible for the insolvency officeholder to apply for relief in England & Wales on the basis of common law principles developed by the courts.

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

In theory, it is possible for companies incorporated in England & Wales to restructure or enter into insolvency proceedings elsewhere, for example by shifting their COMI to another jurisdiction. However, this is much less common in practice than inbound COMI shifting by companies incorporated elsewhere.

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?

Intra-group relationships will inevitably have a bearing on an insolvency or restructuring process. Under English law, each company is treated as a separate legal entity. The directors of a company are obliged to consider the interests of its creditors and insolvency proceedings are commenced in relation to that particular company rather than the group. However, there is scope for co-operation and co-ordination between insolvency officeholders where a number of companies in a group have entered into an insolvency process. Thus far, this has been done informally, through the use of agreed protocols, but the recast EU Insolvency Regulation (which will apply from June 2017) makes specific legislative provision to facilitate co-ordination between officeholders (albeit on a voluntary basis).

Where a scheme is contemplated, the release of any guarantees and security provided by other group entities will be critical to its success. In many cases it will possible to provide for this as part of the principal debtor's scheme, rather than commencing a parallel scheme for the guarantor.

9 Reform

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

In May 2016, the Government launched a consultation seeking views on proposals for reform of the corporate restructuring and insolvency regime in England & Wales. It outlined four proposals: (i) the introduction of a stand-alone restructuring moratorium; (ii) widening the scope of existing legislative provisions that prohibit the termination of essential contracts when a company enters a formal process; (iii) the introduction of a new restructuring procedure (with the ability to bind creditors to a restructuring plan, including provision for cross-class cram-down); and (iv) a number of options to encourage the provision of rescue finance. The consultation closed in July 2016, and the Government has indicated that it is considering the responses.

The proposals in the consultation foreshadowed key aspects of the 'preventative restructuring regime' set out in the EU Commission's draft 'harmonisation directive' which came out in November 2016.

It remains to be seen whether the Government will bring forth proposals based on the consultation, and how it will respond to the draft harmonisation directive in light of the UK's decision to leave the EU (which could happen before compliance with the directive becomes mandatory). It may be that there is insufficient parliamentary time to devote to these reforms in the near term.

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