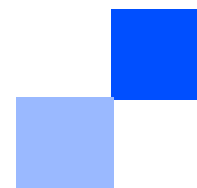


# UK (England and Wales)

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## SECURITY AND PRIORITIES

1. **What are the most common forms of security taken in relation to immovable and movable property? Are any specific formalities required for the creation of security by companies?**

### Immovable property

The most common types of security for immovable property are:

- **Mortgage.** A legal mortgage is the main form of security interest over real property. It historically involved legal title to a debtor's property being transferred to the creditor as security for a claim. The debtor retained possession of the property, but only recovered legal ownership when it repaid the secured debt in full. However, if a mortgage is taken over registered land, the legal title is not transferred to the creditor. Instead, the legal mortgage takes effect as a fixed charge (*see below*) over the registered land (*Land Registration Acts 1925 and 2002*).

Alternatively, an equitable mortgage can be created where only the beneficial interest in the property, and not the legal title, is transferred to the creditor (for example, if a mortgage is not created by deed). However, this security interest does not take priority over a third party who, without notice of the equitable mortgage, subsequently acquires legal title to the property in good faith and for value.

- **Fixed charge.** This type of security does not involve legal title to a debtor's property being transferred to the creditor. Instead, the creditor is given a right to take possession of the charged property and to sell it if a specified default occurs. The creditor can then use the sale proceeds to recover its money in priority to other creditors.

If property is subject to a fixed charge, the debtor cannot dispose of it without the creditor's consent. The fixed charge is released once the debt has been paid in full.

### Movable property

The most common types of security for movable property are:

- **Mortgages and fixed charges.** *See above, Immovable property.*

- **Floating charge.** A floating charge can be taken over a variety of assets (both existing and future), which fluctuate from day to day. It is usually taken over a debtor's whole business and undertaking.

Unlike a fixed charge, a floating charge does not attach to a particular asset, but rather "floats" above one or more assets. During this time, the debtor is free to sell or dispose of the assets without the creditor's consent. However, if a default specified in the charge document occurs, the floating charge will "crystallise" into a fixed charge, which attaches to and encumbers specific assets.

If a floating charge over all or substantially all of a company's assets has been created before 15 September 2003, it can be enforced by appointing an administrative receiver. On default, the administrative receiver takes control of the company and realises the charged assets for the floating charge holder's benefit. However, the holder of such a charge created after 15 September 2003 can no longer appoint an administrative receiver (*Enterprise Act 2002*). There are some limited exceptions to this rule, which apply to large capital markets and project finance transactions. However, in most cases, a floating charge is now enforced by appointing an administrator (*see Question 5, Administration*). The aim of this change introduced by the Enterprise Act is to promote a rescue culture in which companies can be rehabilitated.

Debentures have traditionally been drafted in a way that purports to create a fixed charge over present and future book debts. However, courts have debated whether this type of charge is in fact fixed or floating for the last 25 years. In June 2005, the House of Lords held that whether a debenture creates a fixed or floating charge depends on whether the proceeds of the book debts are paid into a blocked account controlled by the creditor (*National Westminster Bank plc v Spectrum Plus Limited and others (2005) UKHL 41*). If so, a fixed charge is created but if not, the charge is only floating. This decision is important because on insolvency, debts secured by a fixed charge are paid in priority to those protected by a floating charge (*see Question 2*).

- **Pledge.** A pledge gives a creditor the right to possess the pledged asset and to sell it if the debtor defaults. It is perfected by the actual or constructive delivery of the pledged asset to the creditor (for example, certificates can be delivered to transfer possession of shares).

- **Lien.** A lien gives a creditor the right to retain possession of an asset until the debt is paid. However, the creditor cannot sell the asset if the debtor defaults. This type of security can be created by contract or, for certain categories of creditors such as repairers and solicitors, by statute.

### Formalities

Security interests are generally created in a deed. A witness must be present at signature and there should be two authorised signatories for each corporate party.

Security taken over a company's assets or undertaking must be registered at Companies House within 21 days of its creation by filing a Form 395 on the company's behalf. If the security interest is not registered within this time limit, it may not be enforceable.

There are also specific registration requirements for certain classes of assets, such as land, shares and intellectual property rights.

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## 2. Where do creditors and shareholders rank on the insolvency of a company?

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The order of priority is usually:

- Debts secured by a mortgage or fixed charge. These are paid from the sale proceeds of the property subject to this security.
- The costs of the insolvency proceedings, in the following order (*Insolvency Act 1986*):
  - sums due under any contracts entered into or adopted by the insolvency practitioner, including amounts of "wages or salary" due under employment contracts. However, this category does not cover all payments owed under employment contracts. For example, it does not extend to redundancy and unfair dismissal payments (*Re Allders Department Stores Ltd (2005) EWCH 171 (Ch.)*) or most payments in lieu of notice and protective awards (*Re Huddersfield Fine Worsteds Ltd (2005) EWCA Civ 1072*);
  - fees and expenses of the insolvency practitioner(s).
- Preferential debts (unpaid contributions to occupational pension schemes, arrears of employees' wages up to a cap of GBE800 (about US\$1,379) for each employee, redundancy payments, and certain levies on coal and steel production).
- Debts secured by a floating charge. These are paid from the sale proceeds of the assets secured by the floating charge. However, if the floating charge is created after 15 September 2003, a prescribed part of the proceeds must be ring-fenced to be made available to unsecured creditors (*Enterprise Act*). The prescribed part is calculated as 50% of the floating charge proceeds up to a cap of GBE10,000 (about US\$17,238). If the floating charge proceeds are greater

than GBE10,000, the prescribed part is calculated as GBE5,000 (about US\$8,619) plus 20% of the proceeds in excess of GBE10,000 up to a maximum value of GBE600,000 (about US\$1,034,304).

- Unsecured debts. This usually includes any loans payable to shareholders because there is no concept of equitable subordination whereby any debts owed to shareholders are automatically treated as equity.
- Shareholders' equity. Any residual value after all creditors have been paid in full is returned to shareholders.

Each category of creditors must be paid in full before creditors in the category below can be paid. Creditors in the same category rank equally among themselves. A company can also make a contractual agreement with its creditors to subordinate certain debts.

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## 3. Are there any mechanisms used by trade creditors to secure unpaid debts?

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Trade creditors can use the following mechanisms to secure unpaid debts:

- **Retention of title.** This is the main mechanism used by trade creditors to secure their debts. A retention of title clause in a contract allows a creditor to retain legal title to goods supplied to the debtor until payment has been received. This payment may be for the specific goods or, more commonly, for all outstanding amounts due to the creditor (an "all monies" clause). While in the debtor's possession, the goods must remain capable of accurate identification and must not be transformed into other property or sold to a third party.
- **Lien.** See *Question 1, Movable property*.

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## 4. Are there any procedures (other than the formal rescue or insolvency procedures described in Question 5) that can be invoked by creditors to recover their debt?

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A creditor who is owed an undisputed sum can apply for summary judgment against the debtor. This is a quick, court-based recovery process. In the meantime, if the creditor can show that assets are likely to be dissipated by the debtor, it can also apply for a freezing order over the assets (up to the value of the claim). This is an emergency remedy to prevent the debtor from disposing of its assets.

A judgment creditor (a creditor who has successfully applied for judgment in respect of a debt) has various methods of enforcement available. For example, officials appointed by the court can seize the debtor's assets. Alternatively, the judgment creditor can obtain a garnishee order, which attaches to a source of funds available to the debtor, such as a bank account or income stream. The order diverts a fixed amount of these funds to the judgment creditor on a regular basis.

The holder of a floating charge created before 15 September 2003 can still enforce that charge by appointing an administrative receiver (*see Question 1, Movable property*). The role of an administrative receiver is to realise the charged property for the charge holder's sole benefit. In addition, administrative receivership continues to be an enforcement option in certain specialised areas, including capital markets and project finance transactions where the debts exceed GBE50 million (about US\$86 million). Administrative receivership now only applies to these limited categories because it is out of place in the rescue culture that currently pervades English insolvency law.

However, the holder of a "qualifying floating charge" (a charge over all or substantially all of the company's assets, whether created before or after 15 September 2003) is compensated for no longer being able to appoint an administrative receiver. The holder of such a charge can now appoint an administrator under a streamlined out-of-court administration procedure (*see Question 5, Administration*).

## RESCUE AND INSOLVENCY PROCEDURES

5. Please briefly describe rescue and insolvency procedures that are available in your jurisdiction. In each case, please state:

- The objective of the procedure and, where relevant, prospects for recovery.
- Companies to which it can potentially apply.
- How it is initiated, when and by whom.
- Substantive tests that apply (where relevant).
- How long it takes.
- The consents and approvals that are required.
- The effect on the company, shareholders and creditors.
- How the procedure is formally concluded.

### Administration

- **Objective.** Administration involves a statutory moratorium, which creates a "breathing space" for the company to restructure its business while enjoying a respite from creditor action. The primary aim of an administration is defined by statute as being the rescue of a company as a going concern. If such a rescue is not reasonably achievable (which is often the case), the administrator must concentrate on the secondary aim of achieving a better result for creditors as a whole than would be possible if the company was wound up. If this aim is in turn not reasonably achievable, the administrator must focus on the goal of realising property to make a distribution to one or more secured or preferential creditors. Whichever aim is ultimately pursued, the administrator must take into account the interests of all creditors.

- **Companies.** An administration order can be made over any company with its centre of main interests (COMI) in the UK as main proceedings under Regulation (EC) No.1346/2000 on insolvency proceedings (Insolvency Regulation). This is the case regardless of where the company was incorporated. For example, in July 2005, 24 European subsidiaries of the Collins & Aikman group, incorporated in ten different jurisdictions, all successfully filed for administration in the UK. (*Collins & Aikman Corporation Group (2005) EWHC 1754 (Ch)*). The courts have also decided in recent years that unincorporated associations fall within the wide statutory definition of a company and can therefore be put into administration.

- **How, when and by whom.** Unlike in some other European jurisdictions, there is no duty on the directors to file for insolvency in particular circumstances. However, they may feel compelled to do so because of the risk of liability for wrongful trading (*see Question 6*).

Traditionally, the company, its directors or a creditor have initiated administration by making an application to court. However, since 2003, there is a new streamlined out-of-court route to administration. This is available to a company (through its shareholders or directors) or a qualifying floating charge holder, but not to any other creditor. The new procedure is straightforward, simply requiring that one or more statutory forms be filed at court. For floating charge holders, the availability of this procedure compensates for the fact that they can no longer usually appoint an administrative receiver (*see Question 1, Movable property and Question 4*).

- **Substantive tests.** The court can only make an administration order if the company is, or is likely to become, unable to pay its debts when due. This test of insolvency can be satisfied on either a cash flow or balance sheet basis. A company can also be deemed insolvent if it has not paid:

- a judgment debt; or
- a statutory demand for a sum above GBE750 (about US\$1,329).

If a qualifying floating charge holder is to appoint an administrator, the charge must have become enforceable following a default by the company.

- **How long.** An administration order lasts for a maximum of 12 months. The administrator can apply to court for this period to be extended.

A creditors' meeting must be called within eight weeks, and held within ten weeks, of the date on which the administration order is made.

- **Consents and approvals.** If a company is to use the out-of-court appointment procedure, the consent or deemed consent of any qualifying floating charge holder is required. Deemed consent arises if a charge holder fails to object to the appointment within five working days of receiving notice of the intent to appoint an administrator.

Once an administrator is appointed, the creditors must vote on and approve his proposals for the company.

- **Effect.** As soon as they are appointed, one or more administrators take over the day-to-day running of the company and the directors' management powers are suspended. A company in administration benefits from a wide-ranging statutory moratorium against all types of creditor action. No such action can be brought without the court's permission or the administrator's consent.
- **Conclusion.** If the administration procedure succeeds in the objective of rescuing the company as a going concern, the company is returned at the end of the procedure to the control of its directors and shareholders. However, in general, the company is dissolved after a distribution is made to its creditors. Such distributions can either be made directly by the administrators or through a company voluntary arrangement (CVA), scheme of arrangement or liquidation.

### Company voluntary arrangement (CVA)

- **Objective.** The aim of a CVA is for a company in financial difficulty to avoid liquidation by making a contractual compromise or arrangement with its creditors and shareholders.
- **Companies.** The CVA procedure is available to any company whose COMI under the Insolvency Regulation is in the UK. This means that it can potentially be used by both companies incorporated in the UK and foreign-registered companies administered from the UK.
- **How, when and by whom.** The directors or an insolvency practitioner already appointed to the company can propose a CVA. The proposal must put forward the name of a nominee responsible for implementing the CVA. Although the proposal is filed at court, the court is not directly involved in the procedure. Instead, a supervisor is given the power to put the terms of the CVA into effect. The supervisor of a CVA must be a licensed insolvency practitioner and is generally the same person as the nominee.
- **Substantive tests.** It is not necessary to show that the company is unable to pay its debts when due. As a result, both solvent and insolvent companies can enter into a CVA.
- **How long.** The duration of a CVA depends entirely on its contractual terms.
- **Consents and approvals.** A CVA must be approved by:
  - a majority of creditors voting and representing more than 75% in value of a company's total debt; and
  - a majority of its shareholders voting and representing more than 50% in value of the company's equity.

However, if the decision made by the shareholders differs from that made by the creditors, the creditors' decision prevails (subject to challenge within 28 days by the shareholders).

- **Effect.** The directors or insolvency practitioner who proposed the CVA continue in office after it is approved. However, the supervisor is responsible for implementing the CVA.

The terms of a CVA bind all parties who were eligible to vote on the proposal. These parties usually include all unsecured creditors, even those who were not notified of the CVA. However, creditors who were not notified can challenge the CVA on certain limited grounds, such as unfair prejudice or material irregularity.

A CVA does not bind secured or preferential creditors. The rights of these parties cannot be varied without their consent.

A company can benefit from a limited statutory moratorium if it qualifies as a small company (*section 247, Companies Act 1985*). This classification applies if a company meets two of the following three characteristics:

- it has 50 employees or fewer;
- its turnover is limited to GB£5.6 million (about US\$10 million);
- its balance sheet total is limited to GB£2.8 million (about US\$5 million).

The moratorium lasts for 28 days after the CVA proposal has been filed at court and can then be extended for a further period of up to two months. However, this moratorium is unavailable if a company does not qualify as a small company. As a result, larger companies often couple a CVA with an administration procedure.

- **Conclusion.** A company reverts to its former status once the terms of a CVA (which generally include a distribution of funds to creditors) have been implemented.

### Scheme of arrangement

Sections 425 to 427 of the Companies Act 1985 set out the scope of a scheme of arrangement, which is a reorganisation mechanism available to both solvent and insolvent companies. A scheme of arrangement is therefore not strictly an insolvency procedure, although it is frequently used in this context.

- **Objective.** The aim of a scheme of arrangement is for a company to make a binding compromise or arrangement with its creditors and/or shareholders.
- **Companies.** As a scheme of arrangement is not specifically recognised as an insolvency procedure, the provisions of the Insolvency Regulation do not apply. A scheme is generally only available to companies registered in the UK. However, the court can approve a scheme involving a foreign-registered company if it has sufficient connection with the UK. There are examples of the court approving schemes by companies incorporated in Australia, Bermuda and Singapore.

- **How, when and by whom.** A scheme of arrangement can be initiated by:
  - a company itself (through its directors);
  - a creditor; or
  - an insolvency practitioner (administrator or liquidator) appointed to the company.

On receiving an application, the court orders meetings of the various classes of creditors and shareholders whose rights are affected by the scheme proposals.

- **Substantive tests.** It is not necessary to show that the company is insolvent.
- **How long.** The duration of a scheme of arrangement depends on the complexity of the company's affairs.
- **Consents and approvals.** The scheme proposals must be approved by a majority in number (representing 75% in value) of each class of creditors and shareholders present and voting. The court must then approve the proposals and the scheme must be registered with Companies House.
- **Effect.** Once approved by the court and lodged at Companies House, a scheme is binding on the company itself. It is also binding on all creditors and shareholders of the company, regardless of whether they voted on it or were aware of the scheme proposals. There is no automatic stay on creditor action, so a scheme of arrangement is often coupled with an administration order.
- **Conclusion.** Once a scheme of arrangement has been implemented, the company - whether solvent or in an insolvency procedure - reverts to its former status as amended by the terms of the scheme (for example, following a debt-for-equity restructuring).

## Liquidation

There are two types of liquidation: compulsory (at the initiative of a company's creditors) and voluntary (at the initiative of either the shareholders or creditors). There are two sub-categories of voluntary liquidation:

- A solvent company can be wound up under the control of its shareholders in a members' voluntary liquidation (MVL).
- An insolvent company can be wound up under the control of its creditors in a creditors' voluntary liquidation (CVL).
- **Objective.** Both types of liquidation involve winding up a company. The aim of compulsory liquidation is to realise and distribute assets to creditors. A CVL has the same aim, while the specific purpose of an MVL is to repay shareholders in circumstances where the company is solvent, but generally defunct.

- **Companies.** Any company whose COMI is in the UK can be put into compulsory liquidation as main proceedings under the Insolvency Regulation. If a company has an establishment in the UK and its COMI is in the EU, it can be put into compulsory liquidation as secondary proceedings under the Insolvency Regulation. The same is true of a CVL. However, an MVL does not fall within the scope of the Insolvency Regulation and, as a result, can only apply to a company incorporated in the UK.

- **How, when and by whom.** There is no positive obligation to file for insolvency, although the possibility of being found liable for wrongful trading often compels directors to make such a filing (*see above, Administration and Question 6*).

A company, its directors or creditors can file a petition for compulsory liquidation at court. An MVL and CVL are each initiated by the directors, although the input of the shareholders and creditors is essential to pursue these proceedings. The shareholders ultimately control a MVL, while the creditors have control of a CVL.

- **Substantive tests.** Those filing for a compulsory liquidation or a CVL must show that the company is, or is likely to become, unable to pay its debts when due. This test can be satisfied on a cash flow or balance sheet basis, or by an unpaid debt (evidenced by a court judgment or a statutory demand for payment). A court can also put a company into liquidation if it can be shown that it is just and equitable to do so.

When applying for an MVL, the directors must swear a statutory declaration that the company is solvent and will be able to pay its debts in full within 12 months.

- **How long.** The length of a liquidation depends on the complexity of the company's affairs.
- **Consents and approvals.** The court must approve a petition for compulsory liquidation. A voluntary liquidation (whether an MVL or a CVL) requires a 75% majority vote in favour by the shareholders. In a CVL, a creditors' meeting must then be held within 14 days of the shareholders' resolution. At this meeting, a majority by value of the creditors present and voting appoint a liquidator, and fix his remuneration.

Once in office, a liquidator can sell the company's assets without having to seek the prior approval of the court or the company's creditors.

- **Effect.** Both types of liquidation involve a liquidator taking over the management of the company. In compulsory liquidation, a moratorium prohibits creditor action, although secured creditors can still enforce their security. There is no automatic moratorium in a voluntary liquidation. However, the court is generally willing to grant a stay of creditor action from the date of the shareholders' resolution, which is when the MVL or CVL is deemed to commence.
- **Conclusion.** Once the liquidator has realised all the company's assets and made one or more distributions to credi-



tors, he must comply with certain formalities. In a compulsory liquidation, the liquidator must notify Companies House that a final creditors' meeting has been held and that he has vacated office. In a voluntary liquidation, the liquidator must send a final set of filings to Companies House. The company is dissolved three months after these formalities have been completed and then ceases to exist.

## LIABILITY AND TRANSACTIONS

### 6. Are there any circumstances in which a director, parent company (domestic or foreign) or other party could be held liable for the debts of an insolvent company?

Directors, shareholders and other persons involved in the management of a company risk liability under various provisions in the Insolvency Act. Many of these provisions not only apply to actual directors, but also to former directors and to shadow directors (persons whose instructions the directors usually follow, such as a vocal and influential shareholder).

The main grounds for liability are:

- **Breach of fiduciary duty or misfeasance.** A creditor can bring an action for breach of duty or misfeasance against an officer of a company or anyone involved in the promotion, formation or management of the company (*section 212, Insolvency Act*).
- **Fraudulent trading.** Persons who are knowingly party to the carrying on of the company's business with the intent to defraud creditors can be declared liable to contribute to the company's assets (*section 213, Insolvency Act*).
- **Wrongful trading.** Section 214 of the Insolvency Act punishes a director who continues to trade after a time when he knew, or ought to have concluded, that the company had no reasonable prospect of avoiding liquidation. At this point, the directors of a company are under a positive obligation to take every step to minimise the potential losses suffered by creditors.
- **Transactions at an undervalue or preferences.** Directors knowingly party to these forms of transaction (*see Question 7*) can be held liable to contribute to the company's assets.
- **Miscellaneous offences.** Various other offences exist, such as the falsification of company records (*sections 206 to 211, Insolvency Act*).

The penalties for the above include:

- Disqualification from acting as a director for two to 15 years.
- Fines.
- Imprisonment.

- Personal liability to contribute to the insolvent company's estate.

In certain circumstances, a parent company or other related company can be held liable to contribute to under-funded occupational pension schemes (*Pensions Act 2004*). A financial support direction can be made if a company is associated with another company sponsoring an under-funded pension scheme. If the related company does not comply with this direction, or if it is complicit in a deliberate under-funding, the Pensions Regulator can issue a contribution notice requiring it to pay a specified amount into the pension scheme.

In addition, if a director has given a personal guarantee for the company's debts, a creditor can enforce its security against the director's personal assets.

### 7. Can transactions that are effected by a company that subsequently becomes insolvent be set aside?

An insolvency practitioner (administrator or liquidator) appointed to a company can seek to claw back the proceeds of certain past transactions. If the court decides to set aside a transaction of this type, it attempts by way of compensation to restore the company's position to that before the transaction.

An application can be made to set aside:

- **Transactions at an undervalue.** A transaction is at an undervalue if (*section 238, Insolvency Act*):
  - it is entered into by a company for no consideration or for consideration significantly less than market value; and
  - it is entered into within two years before the onset of insolvency (the "relevant time") (*section 240(1)(a), Insolvency Act*).

There is a defence to a claim to set aside a transaction at an undervalue if it can be shown that:

- the company entered into the transaction in good faith for the purpose of carrying on its business; and
- at the time it did so, there were reasonable grounds for believing that the transaction would benefit the company.
- **Preferences.** A transaction can be characterised as a preference if it puts a creditor, surety or guarantor in a better position on insolvency than it would otherwise have held (*section 239, Insolvency Act*). It must also be shown that the company was influenced by a desire to prefer the party to the transaction. The preference must occur within a "relevant time". This is six months prior to the onset of insolvency, or two years prior if the preference is given to someone connected with the company. A person is connected with a company if that person is a director or shadow director of the

company, or is otherwise associated with it or one of its directors (*sections 249 and 435, Insolvency Act*).

- **Transactions defrauding creditors.** Transactions at an undervalue entered into for the purpose of putting assets beyond creditors' reach or otherwise prejudicing their interests can be set aside on the application of any person who is a victim of such transaction (*section 423, Insolvency Act*). There is no need to show that the transaction took place in a set time period before the onset of insolvency or that the company was insolvent at the time of the transaction.
- **Unlawful floating charges.** A floating charge created for no consideration up to 12 months before insolvency proceedings is invalid and can be set aside (*section 245, Insolvency Act*). The period is extended to two years if the floating charge holder is connected to the company.

The above transactions are only set aside if the company is insolvent at the "relevant time" or becomes insolvent as a result of the transaction in question.

In addition, a liquidator appointed to an insolvent company can disclaim onerous or unprofitable contracts.

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#### 8. Please set out any conditions under which a company can continue to carry on business during insolvency or rescue proceedings? In particular:

- **Who has the authority to supervise or carry on the company's business?**
- **What restrictions apply?**

- **Authority.** Upon the onset of insolvency, it is standard practice for an independent licensed insolvency practitioner to take over management of the company's business. This is the case in both an administration and a liquidation (whether compulsory or voluntary).

In an administration, the administrator has wide statutory powers to do anything "necessary or expedient for the management of the affairs, business and property" of the insolvent company (*paragraph 59, Schedule B1, Insolvency Act*). As well as carrying on the company's business, the administrator can sell its assets, and trade with suppliers and customers. A creditors' committee is usually appointed, which consults with the administrator on the conduct of the administration.

In a liquidation, the insolvency practitioner can sell the company's property by public or private means and raise finance using the company's assets as security.

In the context of a CVA and a scheme of arrangement (both of which can be implemented for solvent as well as insolvent companies), the directors can carry on the company's business provided that the creditors consent. A supervisor oversees a CVA to ensure that the directors are implementing the

agreed terms, while the court ensures that a scheme of arrangement is properly administered.

- **Restrictions.** There are some practical restrictions on the conduct of the company's business. Notably, parties to transactions must be informed that the company with which they are dealing is in insolvency proceedings. For example, a company in administration or liquidation must make this clear on all correspondence.

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#### INTERNATIONAL CASES

##### 9. Please state whether:

- **Courts in your jurisdiction recognise insolvency and rescue procedures in other jurisdictions.**
- **Courts co-operate where there are concurrent proceedings in other jurisdictions.**
- **There are any international treaties relating to insolvency to which your jurisdiction is a signatory.**
- **There are any special procedures that apply to foreign creditors.**

- **Recognition.** The English court must automatically recognise certain types of proceedings brought in other European jurisdictions (*Insolvency Regulation*). (These proceedings are set out in Annex A to the *Insolvency Regulation*.)

Proceedings initiated in certain other jurisdictions (generally former Commonwealth countries) benefit from an independent recognition procedure (*section 426, Insolvency Act*).

Under this procedure, a letter of request can be submitted to the English court for foreign insolvency proceedings to be granted recognition in the UK.

The English court also has a wide discretion to recognise foreign proceedings provided that there are no overriding public policy reasons not to do so.

- **Concurrent proceedings.** The *Insolvency Regulation* contains specific provisions on the interrelationship between main and secondary proceedings. If both types of proceedings have begun, the respective insolvency practitioners are required to co-operate with one another (*Article 31*).

If there are concurrent insolvency proceedings in the UK and abroad, the English court usually grants assistance to the foreign court upon request.

The use of cross-border protocols has been developing to regulate concurrent insolvency proceedings. The first known use was in the Maxwell Communications case (*Re Maxwell Communications Corporation plc (1992) BCC 75*). Recently, cross-border protocols have also been used to regulate concurrent English administration and US Chapter 11 proceedings in the Collins & Aikman and Cenargo cases (*Collins &*

*Aikman Corporation Group (2005) EWHC 1754 (Ch)* and *Re Cenargo (not reported, 14 February 2003)*).

- **International treaties.** The Insolvency Regulation has applied since 30 May 2002 and the UK is shortly expected to incorporate the UNCITRAL Model Law on Cross-Border Insolvency 1997 (UNCITRAL Model Law) into domestic law (see *Question 10*).
- **Special procedures for foreign creditors.** Foreign creditors can make a claim in UK proceedings for debts owed to them. Debts in a foreign currency are converted into sterling. Any distribution that creditors have received in foreign proceedings is taken into account and offset against their claim in the UK.

Foreign creditors seeking to enforce their debts in the English court can be required to provide security for costs. This means that they may have to make a payment into court representing security for the company's legal costs which is recoverable by the company should it successfully defend the claim.

## PROPOSED REFORMS

### 10. Are there any proposals for reform to insolvency law in your jurisdiction?

A recent decision has held that contingent tort claimants (in this case individuals exposed to asbestos) fall within the definition of "creditors" in the Insolvency Act. These claimants would

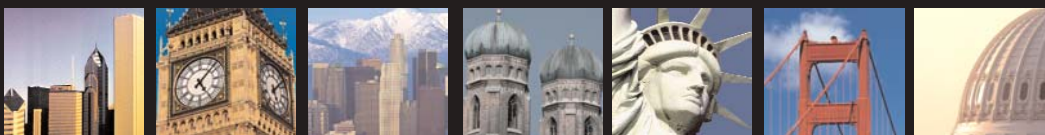
therefore be bound by the terms of a CVA or scheme of arrangement, but would nevertheless be unable to claim their contingent sum in a liquidation of the relevant company (*Re T&N Limited - Simon Vincent Freakley v Centre Reinsurance International Company (not yet reported, 2004)*.) The government has signalled its intention to amend the rules on liquidation so that this anomaly is remedied.

The UNCITRAL Model Law, which has recently been adopted by the US and Canada, is due to be implemented in the UK on 6 April 2006. It represents an attempt to promote certainty and fairness in cross-border insolvencies. To this end, it seeks to facilitate access to the English courts and insolvency procedures by foreign insolvency practitioners and creditors. Under the UNCITRAL Model Law, a foreign representative can apply directly to the English court to commence or participate in insolvency proceedings and to seek recognition of foreign proceedings.

In addition, new "TUPE" (*Transfer of Undertaking (Protection of Employment) Regulations*) provisions are due to be implemented on 6 April 2006. These introduce a possible exception to the standard rule that employees' existing rights are safeguarded where there is a transfer of their employer's business. In an insolvency context, pre-existing debts owed to employees will not automatically pass in full to the new business, but will first be met from the National Insurance Fund (up to the statutory maximum amount). The aim of this change is to promote the sale of insolvent businesses as going concerns and encourage a rescue culture. If a transfer takes place, changes can also be made in certain exceptional circumstances to an employee's terms and conditions of employment, in order to ensure the survival of the business and preserve jobs.



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## Restructuring and Insolvency Practice Group

Kirkland & Ellis' Restructuring Group provides a full range of specialist legal, business advisory and crisis management skills with extensive experience in UK, EU, US and international insolvency matters to help navigate debtors, creditors, officeholders and other stakeholders through the challenges facing troubled businesses. In addition, we add value by drawing upon the firm's internationally recognised pre-eminent expertise in the fields of private equity, litigation, banking & finance, corporate, intellectual property and tax. This comprehensive approach to solving problems that arise in dealing with troubled businesses allows us to address the wide range of issues arising from any restructuring and help our clients achieve their goals.

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